GLOBAL CORRUPTION

Law, Theory & Practice

GERRY FERGUSON

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LAW, THEORY & PRACTICE

Legal Regulation of Global Corruption under
International Conventions, US, UK and Canadian Law

Third Edition

GERRY FERGUSON

University
of Victoria

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Third Edition

Published in Canada by the University of Victoria
Victoria, BC V8P 5C2
press@uvic.ca

Book design by Yenny Lim, Copyright & Digital Publication Services Assistant, University of Victoria Libraries

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> Ferguson, Gerry. (2018). *Global corruption: Law, theory & practice*. Victoria, BC: University of Victoria.

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Library and Archives Canada Cataloguing in Publication

Ferguson, Gerry, author
Global corruption : law, theory & practice / Gerry Ferguson.

Issued in print and electronic formats.
ISBN 978-1-55058-574-2 (softcover).--ISBN 978-1-55058-575-9 (PDF)

1. Corruption--Law and legislation. I. University of Victoria (B.C.), issuing body II. Title.

K5261.F47 2018 364.1'323 C2017-907410-5
C2017-907411-3

ePUBLISHING SERVICES
University of Victoria Libraries

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To the women in my life
for all their love and support

Sharon, Debbie and Lori
and
Alexa, Jessica and Kailyn

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AAA	American Arbitration Association
ABA	American Bar Association
ABMS	ISO 37001 Anti-bribery Management System standard for organizations
ACA	Anti-corruption agency
ACC	Association of Corporate Counsel
ACC	Bangladesh, Anti-Corruption Commission
ACoBA	UK, Advisory Committee on Business Appointments
AECA	*Arms Export Control Act*
AFAR	Arab Forum on Asset Recovery
AFMLS	Asset Forfeiture and Money Laundering Section
AIT	Agreement on Internal Trade
ALACs	Transparency International, Advocacy and Legal Advice Centres
AMF	Quebec, Canada, Autorité des marchés financiers
AML	Anti-Money Laundering
APEC	Asia-Pacific Economic Cooperation
APPC	UK, Association of Professional Political Consultants
ASEM	Asia-Europe Meeting
ASMLS	Asset Forfeiture and Money Laundering Section
AU	African Union
AU Convention	African Union Convention on Preventing and Combating Corruption
BITs	bilateral investment treaties
BSA	US, *Bank Secrecy Act*
BOTA	BOTA Foundation
BOO	build-own-operate
BPI	Bribe Payers Index
CBA	Canadian Bar Association
CBA Code	Canadian Bar Association Code of Professional Conduct
CCIR	EC, Code of Conduct for Interest Representatives
CDA	US, *Contract Disputes Act of 1978*
CED	Committee for Economic Development
CETA	Canada-European Union, Comprehensive Economic and Trade Agreement
CFT	combating the financing of terrorism

CFPOA	Canada, *Corruption of Foreign Public Officials Act*
CICA	US, *Competition in Contracting Act*
CICIG	International Commission against Impunity in Guatemala
CIPR	UK, Chartered Institute of Public Relations
COC	UK, Code of Conduct (for Members of Parliament)
COE	Council of Europe
COIA	Canada, *Conflict of Interest Act*
COIC	Canada, Conflict of Interest Code (for Members of the House of Commons)
CPI	Corruption Perceptions Index
CPS	UK, Crown Prosecution Service
CSC	UK, Civil Service Commission
CSP	corporate social performance
CSPL	UK, Committee on Standards in Public Life
CSR	corporate social responsibility
CTRs	currency transaction reports
CUSAGP	Canada-US Agreement on Government Procurement
DAEO	US, designated agency ethics official
DFAIT	Canada, Department of Foreign Affairs and International Trade
DFID	UK, Department for International Development
DNA	Romanian Anti-Corruption Authority
Dodd-Frank Act	US, *Dodd-Frank Wall Street Reform and Consumer Protection Act*
DOJ	US, Department of Justice
DOJ-AFF	US, Department of Justice Asset Forfeiture Funds
DPAs	US, UK, Deferred Prosecution Agreements
DPOHs	Canada, designated public office holders
DPP	Canada, Director of Public Prosecutions
DTR5	UK, Transparency Directive Review
EA	Canada, *Evidence Act*
EBOs	US, Executive Branch Officials
EBRD	European Bank for Reconstruction and Development
EC	European Commission
ECHR	European Court of Human Rights
ECNEC	Bangladesh, Executive Committee of National Economic Council
ECT	Energy Charter Treaty
EFCC	Nigeria, Economic and Financial Crimes Commission
EGA	US, *Ethics in Government Act*
EITI	Extractive Industries Transparency Initiative
EP	European Parliament

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ESTMA	Canada, *Extractive Sector Transparency Measures Act*
EU Convention	The Convention of the European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States
EU Directive	EU Directive on Public Procurement
FACFOA	Canada, *Freezing Assets of Corrupt Foreign Officials Act*
FAIR	Canada, Federal Accountability Initiative for Reform
FAR	US, Federal Acquisition Regulation
FATF	US, Financial Action Task Force
FCA	US, *False Claims Act*
FCPA	US, *Foreign Corrupt Practices Act*
FDI	Foreign Direct Investment
FAA	Canada, *Federal Accountability Act*
FIFA	Fédération Internationale de Football Association
FinCEN	US, Financial Crimes Enforcement Network
FINTRAC	Financial Transactions and Reports Analysis Centre of Canada
FIU	Financial Intelligence Unit
FLSC	Federation of Law Societies of Canada
FLS Model Code	Canada, Federation of Law Society's Model Code of Professional Conduct
FIPPA	Ontario, Canada, *Freedom of Information and Protection of Privacy Act*
FRO	UK, Financial Reporting Order
FTC	US, Federal Trade Commission
GAO	US, Government Accountability Office
GCB	Global Corruption Barometer
GDP	Gross Domestic Product
GOPAC	Global Organization of Parliamentarians Against Corruption
GPSA	Gas Purchase and Sales Agreement
GRECO	Group of States against Corruption
HCE	US, House Committee on Ethics
HKIAC	Hong Kong International Arbitration Centre
HLOGA	US, *Honest Leadership and Open Government Act*
IACU	International Anti-Corruption Unit
IBRD	International Bank for Reconstruction and Development
ICAC	Hong Kong, Independent Commission Against Corruption
ICAR	International Centre for Asset Recovery
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes

IDA	International Development Association
IFBTF	International Foreign Bribery Task Force
IFC	International Finance Corporation
IG	US, Inspector General
IIA	*Interinstitutional Agreement on the Transparency Register*
IIAs	international investment agreements
ISO	International Organization for Standardization
ITAR	*International Traffic in Arms Regulations*
ITO	Information to Obtain
ITT	Invitation to Tender
JITs	UK, Joint Investigation Teams
JVA	Joint venture agreement
KLRCA	Kuala Lumpur Regional Centre for Arbitration
LA	Canada, *Lobbying Act*
LBOs	US, Legislative Branch Officials
LCC	Canada, *Lobbyists' Code of Conduct*
LCIA	London Court of International Arbitration
LDA	US, *Lobbying Disclosure Act*
LRA	Canada, *Lobbyists Registration Act* (renamed the *Lobbying Act*)
M&A	Mergers and Acquisitions
MACCIH	Support Mission Against Corruption and Impunity in Honduras
MASH	Municipalities, Academic Institutions, Schools and Hospitals
MDBs	Multilateral Development Banks
MIGA	Multilateral Investment Guarantee Agency
MLA	Mutual Legal Assistance
MLACMA	Canada, *Mutual Legal Assistance in Criminal Matters Act*
MLAT	Mutual Legal Agreement
MLPP	Model Law on Public Procurement (UNCITRAL)
MOJ	UK, Ministry of Justice
MOUs	memoranda of understanding
MPs	Members of Parliament
MSG	UK, Multi Stakeholder Group
NAFTA	North American Free Trade Agreement
NCA	UK, National Crime Agency
NCB	Non-Conviction Based (forfeiture)
NGO	Non-Governmental Organization
NILE	US, National Institute for Lobbying and Ethics
NORAD	Norwegian Agency for Development Cooperation
NPA	US, Non-Prosecution Agreements

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OAG	Attorney General of Switzerland
OAS	Organization of American States
OCDETF	Organized Crime Drug Enforcement Task Force
OCE	US, Office of Congressional Ethics
OCHRO	Canada, Office of the Chief Human Resources Officer
OPCS	UK, Office of the Parliamentary Commissioner for Standards
OECD	Organisation for Economic Co-operation and Development
OGE	US, Office of Government Ethics
OM	operate and maintain arrangement
OSC	US, Office of the Special Counsel
OSC	Ontario Securities Commission
P3s	Public-Private Partnership
PACI	World Economic Forum Partnering Against Corruption Initiative
PATT	Proactive Asset Targeting Team
PCA	Permanent Court of Arbitration
PCR	UK, Public Contracts Regulations
PEPs	Politically exposed persons
PIDA	UK, *Public Interest Disclosure Act*
PIM System	Public investment management system
POCA	UK, *Proceeds of Crime Act 2002*
POs	US, Public Officials
POHs	Canada, public office holders
PPP Canada	Public Private Partnership Canada
PPSC	Public Prosecution Service of Canada
PQ	Canada, Parti Québécois
PRCA	UK, Public Relations Consultants Association
PRII	Public Relations Institute of Ireland
PSA	UK, *Public Services (Social Value) Act 2012*
PSCs	People who have significant control over the company
PSDPA	Canada, *Public Servants Disclosure Protection Act*
PWGSC	Public Works and Government Services Canada
RCMP	Royal Canadian Mounted Police
RFP	Request for Proposal
RFQ	Request for Quotation
RFQu	Request for Qualifications
RFSO	Request for Standing Officer
RICO	US, *Racketeering Influenced and Corrupt Organizations Act*
SARs	Suspicious Activity Reports
SBEE	UK, *Small Business Enterprise & Employment Act 2015*

SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SCE	US, Senate Committee on Ethics
SCPO	UK, Serious Crime Prevention Order
SEC	US, Securities and Exchange Commission
SEMA	*Special Economic Measure Act*
SFO	UK, Serious Fraud Office
SIAC	Singapore International Arbitration Center
SMEs	Small and Medium Sized Enterprises
SOCA	UK, Serious Organised Crime Agency
SOCPA	UK, *Serious Organised Crime and Police Act*
SOX	US, *Sarbanes-Oxley Act of 2002*
SPV	Special Purpose Vehicle
SRA Code	UK, Solicitor Regulations Authority Code of Conduct
STRs	suspicious transaction reports
StAR	Stolen Asset Recovery Initiative (WB/UNODC)
TFF	US, Treasury Forfeiture Fund
TI	Transparency International
TI Canada	Transparency International Canada
TI UK	Transparency International United Kingdom
TIPs	treaties with investment provisions
TLA	UK, *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014*
TR	EC/EP, Transparency Register
TRO	Temporary restraining order
UEFA	Union of European Football Associations
UKFIU	UK, Financial Intelligence Unit
UKLR	UK Lobbying Register
UNCAC	United Nations Convention against Corruption
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime
UPAC	Quebec, the Unité permanente anticorruption / Permanent Anticorruption Unit
USC	United States Code
US DOJ	United States Department of Justice
UKFIU	UK, Financial Intelligence Unit
VIAC	Vienna International Arbitration Centre

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WB	World Bank
WDF	World Duty Free
WGB	OECD'S Working Group on Bribery
WGI	Worldwide Governance Indicators
WJP	US, World Justice Project
WPA	US, *Whistleblower Protection Act*
WPEA	US, *Whistleblower Protection Enhancement Act*
WTO-AGP	World Trade Organization Agreement on Government Procurement

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Gerry Ferguson is a University of Victoria Distinguished Professor of Law who specializes in criminal law. He is also a senior associate with the International Centre for Criminal Law Reform and Criminal Justice Policy in Vancouver. Professor Ferguson is a member of the United Nations Office on Drugs and Crime Anti-Corruption Academic Development Initiative (ACAD) devoted to the creation of anti-corruption academic materials and the teaching of university courses on global corruption. He is co-editor and co-author (with Douglas Johnston) of *Asia-Pacific Legal Development* (UBC Press, 1998), was a co-leader of the CIDA-funded Canada-Vietnamese Legislative Drafting and Management Program, 1994-95, and a team member of the CIDA-funded Canada-China Procuratoracy Project, 2003-2008, under the direction of the ICCLR. He is the co-author, with Justice Dambrot, of the annually updated two-volume book, *Canadian Criminal Jury Instructions* and co-author of the *Annual Review of Criminal Law*. Professor Ferguson has taught criminal law as a Visiting Professor at the University of Hong Kong, the University of Auckland, Monash University, the University of Malaya and the University of Airlangga in Indonesia. He has given guest lectures at various law schools in South Africa, China, Vietnam, Thailand, Singapore, Australia, New Zealand, Ireland and Europe. Professor Ferguson is a former member of the National Advisory Council of the Law Commission of Canada and an active participant in the Canadian Bar Association, Law Society, and Continuing Legal Education Society activities. His teaching and scholarly interests include transnational and comparative criminal law and procedure, sentencing and mental health law. Professor Ferguson may be contacted at gferguso@uvic.ca.

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PREFACE TO THE THIRD EDITION

I am most grateful to Inba Kehoe, Copyright Officer & Scholarly Communication Librarian at the University of Victoria Libraries, for suggesting that I produce an open-access print version of my 2017 electronic version of *Global Corruption: Law, Theory and Practice*. This edition includes a number of significant anti-corruption developments that have occurred in the past year, but not all changes and developments. Thus this edition is comprehensively updated to January 2017 and selectively updated to February 2018. This edition also adds a new Chapter 13 entitled "Campaign Finance Laws: Controlling the Risks of Corruption and Public Cynicism" and a Table of Acronyms.

Gerry Ferguson
February 2018

ACKNOWLEDGMENTS

I am deeply indebted to Mary Wallace for her dedication and diligence in helping to transform the electronic version to this print version and to Leyla Salmi for her research assistance on various topics in the early stages of producing this edition. Likewise, I am equally indebted to Inba Kehoe, Stephanie Boulogne and Yenny Lim for the care and attention that they have put into the editorial production and the design, including cover, of this version.

PREFACE TO THE SECOND EDITION

It has only been 18 months since the first edition of this book was published. But the frequency of corruption and the social, legal, economic and political responses to corruption continue to increase at a dizzying pace.

While organized on the same model as the first edition, the second edition includes references to up-to-date anti-corruption laws, policies, best practices and excellent research resources such as books, articles and reports by NGOs, government bodies, academics and practitioners. In addition, several topics have been either introduced or significantly expanded in each chapter. The detailed Table of Contents following the Preface to the first edition indicates the scope of the topics covered in this book.

Gerry Ferguson
January 2017

ACKNOWLEDGMENTS

As with the first edition, this book would not have seen the light of day without the contributions of a dedicated team of legal research assistants. This is especially true in the case of the chief editor, Mary Wallace, who painstakingly reviewed and edited the entire book. I am deeply indebted to the following students who researched and updated various chapters: Connor Bildfell, Sarah Chaster, Dmytro Galagan, David Gill, Laura Ashley MacDonald, Madeline Reid and Matthew Spencer. I am also very grateful to Dmytro Galagan and Jeremy Henderson who added new sections to Chapters 7 and 12 and to Victoria Luxford, Joseph Mooney and Jeremy Sapers who updated their Chapters (9, 10 and 12). Finally I am very grateful to the CBA Law for the Future Fund, the Law Foundation of British Columbia and the Foundation for Legal Research who generously funded my research assistants for this book.

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PREFACE TO THE FIRST EDITION

In the beginning there was no corruption but Adam got greedy, abused his position of privilege by going for the apple and things have gone downhill ever since. Corruption is now an inescapable reality of modern life.

Purpose of this Book

No Canadian law school (prior to UVic Law in September, 2015) had a course on global corruption, and relatively few law schools around the world have such a course. This book has been specifically created to make it easier for professors to offer a law school course on global corruption. This book is issued under a creative commons license and can be used for free in whole or in part for non-commercial purposes. The first chapter sets out the general context of global corruption: its nature and extent, and some views on its historical, social, economic and political dimensions. Each subsequent chapter sets out international standards and requirements in respect to combating corruption – mainly in the UN Convention Against Corruption (UNCAC) and the OECD Bribery of Foreign Officials Convention (OECD Convention). The laws of the United States and United Kingdom are then set out as examples of how those Convention standards and requirements are met in two influential jurisdictions. Finally, the law of Canada is set out. Thus, a professor from Africa, Australia, New Zealand or English speaking countries in Asia and Europe has a nearly complete coursebook – for example, that professor can delete the Canadian sections of this book and insert the law and practices of his or her home country in their place.

While primarily directed to a law school course on global corruption, I expect that this coursebook, or parts of it, will be of interest and use to professors teaching courses on corruption from other academic disciplines and to lawyers and other anti-corruption practitioners.

Genesis of this Book

The United Nations Office on Drugs and Crime (UNODC) is responsible for promoting the adoption of and compliance with UNCAC. Chapter II of UNCAC is focused on Prevention of Corruption. Educating the lawyers, public officials and business persons of tomorrow on anti-corruption laws and strategies is one preventative strategy. Recognizing this, the UNODC set up an Anti-Corruption Academic Initiative (ACAD) to promote the teaching of corruption in academic institutions by collecting and distributing materials on corruption. As a member of the ACAD team, this coursebook is my contribution to that worthy goal.

Where to Next

As a first edition, there is room for improvement in this book. I hope to update and repost this book annually. In future editions, I would like, for example,

- to provide an index

- to expand chapter 8 on the "Role of Lawyers in Advising Business Clients on Corruption and Anti-Corruption Issues"
- to include a chapter on corruption and political parties and campaign financing
- and perhaps to add a few chapters on corruption in specific business sectors such as extractive industries, infra-structure projects etc.

I would be very pleased to hear from users of this book especially in regard to the inevitable errors and omissions that I have made in trying to describe and comment on the vast field of global corruption under UNCAC and the OECD Anti-Bribery Convention, and the laws of United States, United Kingdom and Canada.

Finally, I would like to thank the many NGOs and government agencies that have produced an incredible volume of excellent studies and reports on corruption/anti-corruption issues and for making those studies and reports, many of which are used in this book, publicly available.

Gerry Ferguson
September 2015

ACKNOWLEDGMENTS

This book would not have been completed without a host of angels and archangels and a few generous funders to keep them fed. All these angels provided excellent, high quality research and writing assistance and I am most grateful to all of them. Some of the angels became archangels due to the extent of their research and writing contributions to this book. The archangels include Katie Duke for her work on chapters 1 to 3, Ashley Caron and Martin Hoffman for their work on chapters 4 and 5, James Parker for his work on chapters 1 and 6 and Madeline Reid for her editing contributions to the whole book. Chapters 9 to 12 would not have been possible without the excellent research and writing of Joseph Mooney, Jeremy Sapers, Mollie Deyong, Erin Halma and Victoria Luxford. Other indispensable angels included Laura MacDonald, Courtney Barnes, Lauryn Kerr and Ryan Solcz. I would like to sincerely thank the following organizations for helping to fund the research students: Law Foundation of British Columbia, University of Victoria Learning and Teaching Centre, Canadian Bar Association Law for the Future Fund, the Foundation for Legal Research and Dentons LLP.

I am also grateful to the following lawyers, professors and anti-corruption practitioners who have made valuable comments on parts of this book: Noah Arshinoff, Sean Burke, Roy Cullen, Alan Franklin, Dr. Noemi Gal-Or, Professor Mark Gillen, Steven Johnston, Selvan Lehmann, Richard Lane, Professor Andrew Newcombe, John Ritchie, and Graham Steele.

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CHAPTER 1

CORRUPTION IN CONTEXT: SOCIAL, ECONOMIC AND POLITICAL DIMENSIONS

CONTENTS

1. WHY CORRUPTION MATTERS: THE ADVERSE EFFECTS OF CORRUPTION

2. THE MANY FACES OF CORRUPTION

3. DRIVERS OF CORRUPTION

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5. MORE ISSUES ON MEASURING AND UNDERSTANDING CORRUPTION

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1. WHY CORRUPTION MATTERS: THE ADVERSE EFFECTS OF CORRUPTION

1.1 A Case Illustration of the Impact of Corruption

The TV report noted below investigates the cancellation of World Bank funding ($1.2 billion loan) for a major bridge proposal (worth nearly $3 billion) in Bangladesh. The bridge is critical to both the economic growth of the country and the safety of hundreds of thousands of poor Bangladesh citizens who cross the Padma River daily in crowded, unsafe boats.[1] The World Bank cancelled funding for the bridge project because very senior politicians and officials in the Bangladesh government allegedly solicited bribes from bidding companies. SNC-Lavalin allegedly agreed to pay those bribes in order to get the engineering contract (worth $50 million) to supervise the bridge construction. SNC-Lavalin is one of the five

[1] "SNC and a Bridge for Bangladesh" CBC, the National, Investigative Report (15 minutes), aired May 15, 2013, online: <http://www.cbc.ca/player/News/TV+Shows/The+National/ID/2385492220/>.

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largest international engineering firms in the world. It is based in Canada and operates in over 100 other countries.

Background on the Padma Bridge Corruption Scandal

When allegations of bribery concerning the awarding of the engineering contract to SNC-Lavalin arose, the World Bank (WB) instituted an investigation by an external evaluation panel in the Fall of 2012. According to the report of the WB Panel, there was evidence that in late March of 2011 two members of the Bangladesh Bridge Project Evaluation Committee (BPEC) unlawfully informed senior SNC-Lavalin officers in Bangladesh that SNC-Lavalin was currently second behind another firm, Halcrow, in the bidding process, but that no final recommendation had been made. In addition to BPEC's recommendation, the awarding of the engineering contract would also have to be approved by Minister Syed Abul Hossain of the Bangladesh government. SNC-Lavalin officers allegedly took several steps to improve the company's ranking on BPEC's list. Mohammad Ismail, Director of an SNC-Lavalin subsidiary in Bangladesh was the main representative in the bidding process, along with SNC-Lavalin local consultant Md Mostafa. Ismail and Mostafa dealt directly with Zulfiquar Bhuiyan, the Secretary of the Bridge Authority and also a member of BPEC, and Minister Hossain. Bhuiyan indicated that he and the Minister expected to have a face-to-face meeting with a top SNC-Lavalin executive to "seal the project." Ramesh Shah was Vice-President of SNC-Lavalin International Inc. (SLII) and reported to Kevin Wallace who was Senior Vice-President of SLII and the senior SNC-Lavalin executive assigned to the Padma Bridge project. SLII was a relatively small subsidiary or division of the SNC-Lavalin Group of companies. Its head office was located in Oakville, Ontario.

In May 2011, Ramesh Shah and Kevin Wallace flew to Bangladesh for a face-to-face meeting with Buiyan and Minister Hossain. The meeting was facilitated by an influential government Minister, Abul Hasan Chowdhury, whom the prosecution alleges was also an agent of SNC-Lavalin. After the meeting, Ramesh Shah wrote in his notebook, "PADMA PCC…4% Min…1% Secretary." "PCC" was SNC-Lavalin's internal notation for "project consultancy or commercial costs" which apparently was used in SLII's accounts to refer to bribery payments. "Min" presumably referred to Minister Hossain and "Secretary" presumably referred to Secretary Buiyan. Two weeks later, SNC-Lavalin International Inc. was awarded the contract.

As noted, the World Bank "suspended" its funding for Padma Bridge in 2012 pending an external evaluation of alleged corruption by a WB Investigative Panel. After completing its initial evaluation, the WB panel recommended corruption charges be laid against several persons, including Minister Hossain. Bangladesh's Anti-Corruption Commission (ACC) laid conspiracy to bribe charges against seven persons, but they adamantly refused to include Minister Hossain. The World Bank threatened to cancel the Padma Bridge loan agreement due to this refusal to conduct a "full and fair" corruption inquiry of all suspects. In January 2013, before a formal cancellation occurred, Bangladesh "withdrew" its formal request to the World Bank for funding of the bridge.

The bridge was scheduled for completion in 2014. According to Bangladesh news sources, work on the bridge began in 2015 using domestic financing and apparently a $2 billion investment from China. The government of Bangladesh initially claimed the bridge would be complete by 2018. In January of 2016, the Executive Committee of National Economic Council (ECNEC) approved a third revision to the Padma Bridge project raising the total project cost to more than Tk 80 billion (roughly US $1.02 billion) over budget. The Bangladesh Bridge Authority claimed that the increased budget is due to delayed implementation and associated factors including rising costs for construction materials, consultancy services, and land, as well as recruiting more people to speed up the process.[2] Independent sources have suggested that the climbing costs were also at least in part due to further bribery and corruption, and that in order to fund the project the Bangladeshi government had to divert resources from essential services like health care.[3] Meanwhile, a hundred or more citizens continue to die yearly crossing the river on overcrowded and unsafe boats.[4]

The World Bank alerted the RCMP to evidence of possible corruption it had uncovered. After investigating, the RCMP initially laid bribery charges against two top SLII executives, Mohammed Ismail and Ramesh Shah. They are both Canadian citizens. Then, in September 2013, the RCMP laid bribery charges against three more persons: Wallace and Bhuiyan, both Canadian citizens, and former Minister Abul Hassan Chowdhury, who is a Bangladeshi national. A preferred indictment was filed on October 28, 2013, alleging one count of bribery by all five men committed between December 1, 2009 and September 1, 2011, contrary to s. 3(1)(b) of the *Corruption of Foreign Public Officials Act*. Chowdhury brought an action to stay the proceedings against him on the grounds that there was no jurisdiction to prosecute him, a Bangladeshi citizen who had never been in Canada, and whose alleged unlawful conduct occurred in Bangladesh. Canada has no extradition treaty with Bangladesh and had not attempted to have Bangladesh surrender Chowdhury for prosecution in Canada. Chowdhury was successful in his court challenge and the charges against him were stayed: *Chowdhury v The Queen*.[5] Charges against Mohammed Ismail were subsequently dropped, and the remaining three continued to await trial on the bribery charge.

In an important pre-trial issue in *World Bank Group v Wallace*, the Supreme Court of Canada unanimously ruled that the World Bank does not have to disclose its investigative reports

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[2] "Tk 8,286cr Rise in Padma Bridge Cost Okayed", *The Independent* (6 January 2016), online: <http://www.theindependentbd.com/printversion/details/29269>.

[3] Daniel Binette, "When Should Corruption Be Tolerated? The Case of the Padma Bridge", *The Global Anticorruption Blog* (6 November 2016), online: <https://globalanticorruptionblog.com/2015/11/06/when-should-corruption-be-tolerated-the-case-of-the-padma-bridge/>.

[4] See e.g., "Bangladesh Ferry Disaster Death Toll Reaches 70", *Daily Mail Online* (23 February 2015) and *US Today* (23 February 2015).

[5] *Chowdhury v The Queen*, 2014 ONSC 2635.

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and similar matters to the four accused.[6] Any other result would have hampered the investigation and would have been a significant blow to future cooperation from agencies such as the World Bank.

Based on the evidence of alleged corruption collected by the World Bank, SNC-Lavalin Group Inc. and the World Bank signed a Negotiated Resolution Agreement in which SNC-Lavalin International Inc. (SLII) and over 100 SNC-Lavalin Group Inc. affiliates have been debarred from bidding on World Bank funded projects for 10 years. The remainder of SNC-Lavalin Group Inc. will also be debarred if SNC-Lavalin does not comply with the terms of the settlement in regard to improving their internal compliance program. It is hard to determine what portion of total SNC-Lavalin work is likely to be affected by the World Bank debarment, although by some estimates it is thought to be less than two percent.

Meanwhile the Bangladesh ACC continued to investigate the charge of conspiracy to bribe by seven persons: three Bangladesh officials (including the Prime Minister's nephew, Ferdous, Zaber and Bhuiyan), three SNC officials (Wallace, Shah and Mohammed Ismail), and SNC's local agent Mostafa. Remarkably, the ACC, in its final report in September 2014, concluded that there was not sufficient evidence to proceed with a charge of conspiracy to bribe against any of these men. The ACC also reported that Ministers Hossain and Chowdhury had no involvement in the alleged bribery scheme [See Chapter 6 at Section 3.2 for further discussion of the Bangladesh ACC]. The ACC report was then filed with the Bangladesh court and on October 30, 2014, the Court acquitted all seven persons of conspiracy to bribe.

[6] *World Bank Group v Wallace*, 2016 SCC 15. The World Bank received emails from tipsters suggesting that there had been corruption in regard to the bridge supervision contract. The World Bank did its investigation and found evidence of corruption. After debarring SNC-Lavalin Group Inc. from bidding on World Bank-sponsored projects for 10 years, the World Bank shared the tipsters' emails, its own investigative reports and other documents with the RCMP. The RCMP used that information to obtain a warrant to intercept private communication (a wiretap warrant) and a search warrant to obtain certain documents from SNC-Lavalin offices. After the conspiracy to corrupt charge was laid, the accused person brought an application before an Ontario Superior Court trial judge to quash the wiretap authorization and thereby exclude from trial the evidence collected by wiretap. As part of the wiretap challenge, the accused sought an order requiring production to them of certain World Bank investigative documents. The trial judge concluded that certain World Bank documents were "likely relevant" to the accused's right to a fair trial and therefore ordered those documents be produced for *review before the court*. The SCC quashed the production order on two grounds. First, the World Bank was granted immunity from such disclosure under the Articles of Agreement setting up the World Bank, Articles which Canada and some 185 countries have agreed to. Second, even if the World Bank did not have immunity, the documents sought did not pass the "likely relevant" test, and therefore a court could not lawfully order their disclosure.

Criticism of the World Bank

It should be noted that some commentators are highly critical of the World Bank's lending practices. For example, Paul Sarlo[7] argues that the World Bank facilitates large scale corruption by making huge development loans to notoriously corrupt governments without imposing a regime of due diligence to ensure the loan is used for the intended project.[8] This lack of due diligence opens the door to theft of 20-40% of loans by corrupt leaders or through the companies they hire to complete the project. Ultimately it is the citizens of the corrupt borrowing country who pay, since they are responsible for full repayment of the loan with interest even if part of the loan is stolen.

A Shocking Conclusion

On January 6, 2017 the trial judge, Justice Nordheimer, threw out all the wiretap evidence in the case on the basis, amongst others, that the information provided in the Information to Obtain (ITO) was nothing more than "speculation, gossip and rumour".[9] If that was true, what does that say about the experience and competence of the senior RCMP officers who sought the wiretap, and of any prosecutor who may have assisted in obtaining it?[10] If the trial judge's overall characterization of the ITO was incorrect, why didn't the Public Prosecution Service of Canada (PPSC) appeal that decision? Barely one month later, on February 10, 2017, the Crown elected to call no witnesses at the trial on the grounds that "we

[7] Paul Sarlo, "The Global Financial Crisis and the Transnational Anti-Corruption Regime: A Call for Regulation of the World Bank's Lending Practices" (2014) 45 Geo J Intl L 1293.

[8] For example, the World Bank lent Indonesia $30 billion during the thirty-year rule of notoriously corrupt General Suharto. The International Monetary Fund has been subject to similar criticism related to irresponsible lending. For example, a portion of an IMF loan to Russia was used by Boris Yeltsin for his re-election campaign in 1996: Clare Fletcher and Daniela Herrmann, *The Internationalisation of Corruption* (Burlington, VT: Ashgate, 2012) at 68.

[9] "The fact that a particular investigation may be difficult, does not lower the standard that must be met in order to obtain a Part VI authorization. Reduced to its essentials, the information provided in the ITO was nothing more than speculation, gossip, and rumour. Nothing that could fairly be referred to as direct factual evidence, to support the rumour and speculation, was provided or investigated. The information provided by the tipsters was hearsay (or worse) added to other hearsay." (*R v Wallace*, 2017 ONSC 132 at para 71).

[10] For more details concerning allegations of SNC-Lavalin's involvement in corruption of Bangladeshi public officials, World Bank's investigation and subsequent withdrawal from funding the project, and RCMP investigation into this matter, see World Bank, "World Bank Statement on Padma Bridge" (29 June 2012), online: <http://www.worldbank.org/en/news/press-release/2012/06/29/world-bank-statement-padma-bridge, and World Bank> and *World Bank Group v Wallace*, [2016] 1 SCR 207, 2016 SCC 15.

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had no reasonable prospect of conviction based on the evidence".[11] If the wiretap evidence was as legally suspect as Justice Nordheimer found, why didn't the PPSC pursue the other available evidence before the trial began that would have supported the continuation of the prosecution, including the possibility of a plea agreement or a non-prosecution agreement with one of the original conspirators in exchange for their cooperation and testimony? It is in the public interest to ask whether the RCMP officers and prosecutors were up to the task of investigating and prosecuting this foreign bribery case? An inquiry and subsequent public explanation of why this important *CFPOA* case fell apart will be helpful for future investigations and prosecutions and may help reduce the damage done to Canada's reputation.

> Corruption is "public enemy no. 1" in the developing world, according to World Bank President Jim Yong Kim, and "every dollar that a corrupt official or corrupt business person puts in his or her pockets is a dollar stolen from a pregnant woman who needs healthcare, or from a girl or boy who deserves an education, or from communities that need water, roads and schools." Recently, it has been estimated that as much as $1 trillion annually is siphoned off from developing countries by corruption, tax evasion and other large financial crimes. The World Bank has estimated that as much as $40 billion in foreign aid to the world's poorest countries has been lost to corruption in recent years. And 3.6 million people die from inadequate health care and living conditions each year in part because corruption has stolen away development aid. UN Development Programme Administrator Helen Clark stated that "corruption can stand in the way of people getting basic services," while UK Prime Minister David Cameron said "don't let anyone keep corruption out of how we tackle poverty." In 2008, the US Assistant Attorney General warned that "corruption is not a gentleman's agreement where no one gets hurt. People do get hurt. And the people who are hurt the most are often residents of the poorest countries on earth."

The remainder of Section 1 will look at the nature, causes and consequences of corruption that have motivated such strong condemnation of corruption by world leaders.

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[11] Jacques Gallant, "Judge acquits SNC-Lavalin execs, says RCMP relied on 'gossip'", *Toronto Star* (10 February 2017), online: <https://www.thestar.com/news/gta/2017/02/10/judge-acquits-snc-lavalin-execs-says-rcmp-relied-on-gossip.html>, and Janet McFarland, "Former SNC executives, businessman acquitted in corruption case", *The Globe and Mail* (10 February 2017), online: <http://www.theglobeandmail.com/report-onbusiness/former-snc-lavalin-executives-businessman-acquitted-in-corruption-case/article33979762/>.

1.2 Four Concerns about Corruption

The Organization for Economic and Cooperative Development (OECD) prepared a Background Brief in 2013 entitled "The Rationale for Fighting Corruption" as part of the organization's CleanGovBiz: Integrity in Practice Initiative.[12] The initiative seeks to involve civil society and the private sector in anti-corruption strategies. The brief provides an overview of the reasons why everyone should be concerned about corruption. The text of this brief is set out below:

BEGINNING OF EXCERPT

The Rationale for Fighting Corruption

The costs of corruption for economic, political and social development are becoming increasingly evident. But many of the most convincing arguments in support of the fight against corruption are little known to the public and remain unused in political debates. This brief provides evidence that reveals the true cost and to explain why governments and business must prioritise the fight against corruption.

What is Corruption?

Corruption is the abuse of public or private office for personal gain. It includes acts of bribery, embezzlement, nepotism or state capture. It is often associated with and reinforced by other illegal practices, such as bid rigging, fraud or money laundering. [Transparency International describes corruption as "the abuse of entrusted power for private gain."]

What does Corruption Look Like?

It could be a multinational company that pays a bribe to win the public contract to build the local highway, despite proposing a sub-standard offer. It could be the politician redirecting public investments to his hometown rather than to the region most in need. It could be the public official embezzling funds for school renovations to build his private villa. It could be the manager recruiting an ill-suited friend for a high-level position. Or, it could be the local official demanding bribes from ordinary citizens to get access to a new water pipe. At the end of the day, those hurt most by corruption are the world's weakest and most vulnerable.

[12] "The Rationale for Fighting Corruption" (OECD, 2013), online: <http://www.oecd.org/cleangovbiz/49693613.pdf>.

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Why Fight Corruption?

Corruption is one of the main obstacles to sustainable economic, political and social development, for developing, emerging and developed economies alike.

Overall, corruption reduces efficiency and increases inequality. Estimates show that the cost of corruption equals more than 5% of global GDP (US$ 2.6 trillion, World Economic Forum) with over US$ 1 trillion paid in bribes each year (World Bank). It is not only a question of ethics; we simply cannot afford such waste.

1. Corruption increases the cost of doing business

First, bribes and drawn-out negotiations to bargain them add additional costs to a transaction. Second, corruption brings with it the risk of prosecution, important penalties, blacklisting and reputational damage. Third, engaging in bribery creates business uncertainty, as such behaviour does not necessarily guarantee business to a company; there can always be another competing company willing to offer a higher bribe to tilt the business in its favour.

On the macro level, corruption distorts market mechanisms, like fair competition and deters domestic and foreign investments, thus stifling growth and future business opportunities for all stakeholders. IMF research has shown that investment in corrupt countries is almost 5% less than in countries that are relatively corruption-free. The World Economic Forum estimates that corruption increases the cost of doing business by up to 10% on average. Siemens, the German engineering giant, had to pay penalties of US$ 1.6 billion in 2008 to settle charges that it routinely engaged in bribery around the world. A significant negative impact of corruption on a country's capital productivity has been proven.

2. Corruption leads to waste or the inefficient use of public resources

As a result of corruption, investments are not allocated to sectors and programmes which present the best value for money or where needs are highest, but to those which offer the best prospects for personal enrichment of corrupt politicians. Thus resources go into big infrastructure projects or military procurement where kickbacks are high, to the detriment of sectors like education and health care. Moreover, public tenders are assigned to the highest bribe payer, neglecting better qualified companies not willing to bribe, which undermines the quality of the projects carried out. In some instances public funds are simply diverted from their intended use, embezzled and exploited for private enrichment. Corruption also slows down bureaucratic processes, as inefficient bureaucracies offer more leverage for corrupt public officials: the longer the queue for a service, the higher the incentive for citizens to bribe to get what they

want. Finally, nepotism - in both private and public organisations - brings incompetent people into power, weakening performance and governance.

Several studies provide evidence of the negative correlation between corruption and the quality of government investments, services and regulations. For example, child mortality rates in countries with high levels of corruption are about one third higher than in countries with low corruption, infant mortality rates are almost twice as high and student dropout rates are five times as high (Gupta et al. 2011). Numbers on the monetary loss due to corruption vary, but are alarming. The African Union (2002) estimates that 25% of the GDP of African states, amounting to US$148 billion, is lost to corruption every year. The US health care programmes Medicare and Medicaid estimate that 5% to 10% of their annual budget is wasted as a result of corruption.

3. Corruption excludes poor people from public services and perpetuates poverty

The poor generally lack privileged access to decision makers, which is necessary in corrupt societies to obtain certain goods and services. Resources and benefits are thus exchanged among the rich and well connected, excluding the less privileged. Moreover, the poor bear the largest burden [proportionate to their income] of higher tariffs in public services imposed by the costs of corruption… They might also be completely excluded from basic services like health care or education, if they cannot afford to pay bribes which are requested illegally. The embezzlement or diversion of public funds further reduces the government's resources available for development and poverty reduction spending.

The significant impact of corruption on income inequality and the negative effect of corruption on income growth for the poorest 20% of a country have been proven empirically (Gupta et al. 2002). The World Bank (Baker 2005) estimates that each year US$ 20 to US$ 40 billion, corresponding to 20% to 40% of official development assistance, is stolen through high-level corruption from public budgets in developing countries and hidden overseas. Transparency International (Global Corruption Report 2006) found that about 35% of births in rural areas in Azerbaijan take place at home, because poor people cannot afford to pay the high charges for care in facilities where care was supposed to be free.

4. Corruption corrodes public trust, undermines the rule of law and ultimately delegitimizes the state

Rules and regulations are circumvented by bribes, public budget control is undermined by illicit money flows and political critics and the media are silenced through bribes levering out democratic systems of checks and balances. Corruption in political processes like elections or party financing undermines the rule of the people

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and thus the very foundation of democracy. If basic public services are not delivered to citizens due to corruption, the state eventually loses its credibility and legitimacy.

As a result, disappointed citizens might turn away from the state, retreat from political processes, migrate – or – stand up against what they perceive to be the corrupt political and economic elites. The global uprisings from the Arab world to India, Brazil and occupy Wall Street are proving that business as usual can no longer be an option for a number of countries. [footnotes omitted]

END OF EXCERPT

1.3 Four Other Related Concerns about Corruption

In addition to the four concerns described above, several other concerns are worthy of specific note, namely corruption's impact on (i) human rights, (ii) gender equality, (iii) global security and (iv) climate change and environmental degradation.

1.3.1 Human Rights and Corruption

In *Corruption: Economic Analysis and International Law*, Arnone and Borlini elaborate on the impact of corruption on the rule of law and human rights:

> Massive corrupt dynamics, indeed, weaken the basic foundations both of the representative mechanisms underlying the separation of powers and of human rights. ... Since corruption generates discrimination and inequality, this relationship [between human rights and government corruption] ... bears on civil and political rights. For instance, it strengthens the misappropriation of property in violation of legal rights ... it likely leads to the rise of monopolies which either wipe out or gravely vitiate freedom to trade. Corruption strikes at economic and social rights as well: the commissioning by a public entity of useless or overpriced goods or services, and the choice of poorly performing undertakings through perverted public procurement mechanisms are mere examples of how corruption can endanger the second generation of human rights.
>
> The relationship between fundamental HR and corruption could not be expressed more vividly than in the words of the UN High Commissioner for Human Rights, Navy Pillay: "Let us be clear. Corruption kills. The money stolen is enough to feed the world's hungry every night, many of them children; corruption denies them their right to food, and in some cases, their right to life" ... The departure point and organizational principle of the 2004 [UN Development Program's] analyst study is that "Corruption affects the poor disproportionately, due to their powerlessness to change the status

> quo and inability to pay bribes, creating inequalities that violate their human rights."[13]

In their article "The International Legal Framework Against Corruption: Achievements and Challenges," Jan Wouters et al. note the increasing tendency to frame corruption as a human rights issue.[14] To help understand the link between corruption and human rights, the International Council on Human Rights Policy divides corruption-based human rights violations into direct, indirect and remote violations. For example, bribing a judge directly violates the right to a fair trial, while embezzling public funds needed for social programs indirectly violates economic and social rights. Many commentators hope this focus on human rights will create new human rights-based remedies and assist in anti-corruption efforts.

The coupling of corruption and human rights remains an increasingly popular trend. In April 2015 in Doha, at the 13th United Nations Congress on Crime Prevention and International Justice, Dean and Executive Secretary of the International Anti-Corruption Academy, Martin Kreutner, stated, "All the universal goals run the risk of being severely undermined by corruption. … Corruption is the antithesis vis-à-vis human rights, the venom vis-à-vis the rule of law, the poison for prosperity and development and the reverse of equity and equality."[15] While recognizing the important connection between corruption and human rights, recently some authors have further analyzed the potential dangers and limitations of confining discussions of corruption to the language of human rights.[16]

Recent publications have also taken a closer look at the connection between corruption and human rights in particular geographic areas.[17] In particular, Anne Peters in her Working

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[13] Marco Arnone & Leonardo S Borlini, *Corruption: Economic Analysis and International Law* (Edward Elgar, 2014) at 170–171.

[14] Jan Wouters, Cedric Ryngaert & Ann Sophie Cloots, "The International Legal Framework Against Corruption: Achievements and Challenges" (June 2013) 14:1 Melbourne J Intl L 205 at 271–273.

[15] United Nations Office on Drugs and Crime, Press Release, "Sustainable Development, Human Rights, Freedoms Hinge on Anti-Corruption Strategies, Speakers Say as Crime Congress Concludes High-Level Segment" (14 April 2015), online: <http://www.unodc.org/unodc/en/press/releases/2015/April/sustainable-development--human-rights--freedoms-hinge-on-anti-corruption-strategies--speakers-say-as-crime-congress-concludes-high-level-segment.html>.

[16] Cecily Rose, "The Limitations of a Human Rights Approach to Corruption" (2016) 65:2 ICLQ 450.

[17] See for example Kolawole Olaniyan, *Corruption and Human Rights Law in Africa* (Hart, 2014); Midori Matsushima and Hiroyuki Yamada, "Impacts of Bribery in Healthcare in Vietnam" (2016) 52:10 J of Development Studies 1479; and C Raj Kumar, "Corruption in India: A Violation of Human Rights Promoting Transparency and the Right to Good Governance" (2015) 49:2 UC Davis L Rev 741. For more on the connection between human rights and corruption, and the implications for anti-corruption efforts and remedies, see Lucy Koechlin & Magdalena Sepulveda Carmona, "Corruption and Human Rights: Exploring the Connection" in Robert I Rotberg, ed, *Corruption, Global Security, and World Order* (Cambridge, Massachusetts: Brookings Institution Press, World Peace Foundation & American Academy of Arts and Sciences, 2009) at 310–340 and International Council on Human

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Paper 20 "Corruption and Human Rights" examines the various ways corruption can be conceptualized as a human rights violation and the advantages and disadvantages of doing so. She also examines whether it is a good idea to conceptualize corruption as a human rights violation and concludes, with some limitations, that it is. In regard to this latter point, she states:[18]

BEGINNING OF EXCERPT

An entirely different set of questions concerns the proceedings in which such a human rights violation might be claimed and whether the change in perspective – away from a primarily criminal law approach to anti-corruption toward human rights – is practical in terms of legal policy and valuable in terms of legal ethics.

Opportunity for moral and practical strengthening of the anti-corruption agenda

Proponents of endowing the anti-corruption instruments with a human rights approach believe that this will upgrade these instruments in political and moral terms and thus ensure improved implementation of anti-corruption measures. The classical argument is "empowerment". The human rights approach can elucidate the rights of persons affected by corruption, such as the rights to safe drinking water and free primary education, and show them how, for instance, the misappropriation of public funds in those areas interferes with their enjoyment of the goods to which they are entitled. In that way, affected persons would be empowered to denounce corruption to which they otherwise would be helplessly exposed.

The UN Human Rights Council believes that the greatest advantages consist, firstly, in shifting the existing criminal law focus of the anti-corruption instrument away from individual perpetrators toward the systemic responsibility of the State and, secondly, in an improvement of the status of victims.

A weakness of the purely criminal law approach to anti-corruption is becoming apparent especially in China, where the broad and indeterminate criminal offences can easily be abused to eliminate or at least discredit political opponents. The human rights perspective shifts the focus away from repression toward prevention and thus also away from the abusive initiation of criminal proceedings.

Rights Policy, *Corruption and Human Rights: Making the Connection* (Versoix, Switzerland: ICHRP, 2009).

[18] Anne Peters, "Corruption and Human Rights" (2015) Basel Institute on Governance Working Paper No 20, online: <https://www.baselgovernance.org/sites/collective.localhost/files/publications/corruption_and_human_rights.pdf>.

Finally, the shift from criminal law to human rights changes the intensity and burden of proof. While a public servant accused of bribery or criminal breach of trust enjoys the presumption of innocence, the human rights approach requires States to exonerate themselves before the treaty bodies when accused of deficient anti-corruption measures. For instance, a State must demonstrate that while it is willing to allot sufficient means to an authority, it is unable to do so due to a lack of resources. The follow-up question would be whether statistical evidence or the mere observation of the luxurious lifestyle of high-ranking politicians would be sufficient to corroborate the misappropriation of public funds that is presumed by the practice of the CESCR and also by the UN Convention against Corruption. Article 20 UNCAC calls upon States parties to "consider" establishing "illicit enrichment" as a criminal offence. Under such a criminal law provision, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income could be punished. Such an implicit presumption of guilt is problematic in terms of the rule of law.

Practical recommendations

The practical strategy implied by this change in perspective would be mutual mainstreaming. Human rights mainstreaming of anti-corruption efforts would mean that the realization of human rights would be one of the anti-corruption goals from the outset. In legal practice, this would imply an interpretation of all criminal offences relating to corruption in a way that takes into account human rights. On a complementary basis, anti-corruption mainstreaming of all human rights procedures should be implemented.

The implementation of this recommendation would include the following: In the work of the human rights treaty bodies, the guidelines for all country reports and for all country-specific concluding observations of the committees as well as the mandates of the human rights special rapporteurs should include corruption as a checkpoint that must be addressed. Not only human rights NGOs, but also specialized anti-corruption NGOs should be allowed to participate in the Universal Periodic Review as well as in treaty-specific monitoring. One might also conceive of a "General Comment on Corruption and Human Rights" that would apply to all treaties. Finally, an anti-corruption mandate could be included in the international standards for the national human rights institutions.

The practical benefit of the change in perspective is diminished, however, in that the international mechanisms are themselves weak when it comes to enforcing human rights. The options for individual complaints at the international level are limited − but some openings do exist, for example individual communications to various Human Rights Treaty Bodies. Of course, it should not be forgotten that the domestic institutions are the primary enforcers of international human rights. If a domestic

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court were to condemn organs of the State for a violation of human rights through corruption, this would be a comparatively strong sanction. In many States, however, this is not to be expected, due to corruption in the justice system. This means that "empowerment" through human rights remains more symbolic than practical.

Risk of moral weakening

The strength of taking a human rights approach to anti-corruption instruments is simultaneously its weakness, however. This is because of the ambivalent attitude of the Global South toward "Western" human rights. Their critique of the idea of human rights overlaps with fundamental objections to the international anti-corruption agenda.

This fundamental critique is clothed in the language of cultural relativism, ideology, or economics. According to the critique, the anti-corruption strategy is merely the imposition of a particular "Western" model of the State in numerous respects: A liberal State governed by the rule of law is required as a regulatory framework for a free market. This demand is based on a neoliberal agenda that wants to push back an interventionist, heavily bureaucratized model of the State.

The critique accuses the "rule of law" of serving primarily the economic interests of property owners and of capital.

Secondly, according to this critique, the conception of corruption as an evil is based on the picture of a State that performs public duties by way of public officials who are hired on the basis of merit and who act according to legal rules that formally apply to all. But this disqualifies communities based on family and clan relationships, which are sustained by exchanging gifts and providing group members with official posts. The values of reciprocity and loyalty underlying these communities are not acknowledged, but rather are replaced with Western meritocratic thinking and formal equal treatment. The allegation of legal and cultural imperialism and of the dictate of Western capital is further nourished by the human rights approach to anti-corruption strategies. According to that view, both sets of international instruments are merely two variants of imperialism.

However, economic and anthropological research relativizes this fundamental critique of anti-corruption strategies and thus the danger that they might be weakened by imbuing them with a human rights approach. The allegation that both anti-corruption and human rights are hegemonic or US-dominated strategies and/or strategies driven by global capital sounds more like an attempt to justify the behaviour of elites whose power and sinecures are threatened by anti-corruption and by the demand for respect of human rights. Individuals affected in many different regions of the world and cultures have demonstrated on Tahrir Square or the Maidan, in Caracas

or Mexico City, for freedom and fair prices of bread and against the corruption of the elites.

Conclusion and outlook

Shift in the prerogative of interpretation

In terms of communication theory, the change in perspective proposed here is a kind of "framing", i.e., a new framework for interpretation associated with a new prerogative of interpretation. It is important in this regard that this prerogative of interpretation shifts in institutional terms as well: away from the World Bank and toward the UN Human Rights Council. Potentially, this new discursive power also entails a new power to act.

In legal terms, the connection between anti-corruption law and human rights protection proposed here can be construed as a systemic integration of two subareas of international law. Or, the human rights approach to anti-corruption instruments can be seen as their constitutionalization. Some international lawyers complain that the latter smacks of "human rightism", or of a "hubris" of international human rights protection. But this alleged hubris can also be seen in more positive terms as the legitimate reinstitution of the human being as the normative reference point for all law, including international law.

Devaluation of the Global South?

We have seen that the determination of a concrete violation of human rights by a concrete corrupt act is easier in the domain of petty corruption. In the domain of grand corruption, such as bribery of government ministers by foreign investors or the diversion of funds from the public budget, the connection between corrupt conduct and human rights violations of concrete victims is much harder to make. Now Western democracies suffer less from petty corruption than from grand corruption, including what is provocatively termed "legal corruption" in the form of non-transparent election financing and the resulting vested interests of politics, or in the form of a toleration of the smooth transition of public officials to lucrative jobs in the private sector, in which the insider knowledge gained in office can be put to use in the new company ("revolving door" phenomenon).

Because the reconceptualization in terms of human rights focuses primarily on petty corruption, it casts a spotlight on the Global South. But it would be exaggerated to say that this spotlight constitutes a devaluation of non-Western societies and thus represents a paternalistic, civilizing mission of the West against the rest of the world. The change in perspective does not downplay or excuse grand corruption, including

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"legal" corruption in the Western world. It is merely less able to capture it, because grand corruption has a different, less individualized structure of wrongfulness.

The State, public office, and universalizability

Until well into the 19th century, patronage and the purchase of public offices were largely considered legal and legitimate components of governance even in Europe. The awareness that these forms of exercising and influencing political power and administration were illegitimate and to be combated could only emerge with the development of the modern State – a State in which an impartial bureaucracy is called upon to apply the law equally and in which all public officials are required to act in the public interest, not in the interest of their family or ethnic group.

In a patrimonial State in which the political and administrative positions are primarily intended to generate income ("rent seeking"), the idea of corruption has no place. In that sense – as already indicated at the outset – the modern State governed by the rule of law and the concept of corruption are inextricably linked. This also explains why anti-corruption is difficult in regions of the world where this understanding of the State and the associated institutional safeguards are weak.

But – to use an example – is it really the same from the perspective of a motorist whether the sum of money he or she has to pay at a road block in order to pursue his or her course represents a bribe to a corrupt traffic police officer – as in many African States – or a motorway toll − as in France for example?

In both cases, the motorist's freedom of movement is limited by him being forced to pay. The difference is that the motorway toll is based on a law that serves the public interest, namely maintenance of the motorway network, and at the same time applies equally to everyone (with reasonable differences based on type of vehicle, number of persons, or other relevant criteria). In contrast, the bribe is not based on a fee schedule defined in a political or at least orderly administrative procedure – but it may under certain circumstances help feed the police officer's family. The difference between a bribe and a State fee is thus based solely on the legitimacy and legality of the institutions and procedures in which they are defined, collected, and used.

Augustine's insight that States not governed by law and justice are nothing but large bands of thieves has lost none of its validity after more than 1,000 years. Only if this insight proves to be universally applicable can a global anti-corruption strategy be successful. And the "individualized" conception of corruption – namely the insight that corruption interferes with the rights of each individual citizen – can make a greater contribution to this universalization than the invocation of an anonymous general interest and an abstract conception of public office. [footnotes omitted]

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1.3.2 Gender Equality and Corruption

Corruption affects women differently than men and carries implications for gender equality. According to the UNDP report *Corruption, Accountability and Gender: Understanding the Connections*, corruption "exacerbates gender-based asymmetries in empowerment, access to resources and enjoyment of rights."[19] Reasons for corruption's disproportionate effects include the fact that women make up most of the global poor, who suffer most from corruption, and the fact that women have lower levels of literacy and education, which can adversely affect their knowledge of their rights. The report summarizes the effects of corruption on women as follows:

> The data suggests that 'petty' or 'retail' corruption (when basic public services are sold instead of provided by right) affects poor women in particular and that the currency of corruption is frequently sexualized – women and girls are often asked to pay bribes in the form of sexual favours. Women's disempowerment and their dependence on public service delivery mechanisms for access to essential services (e.g., health, water and education) increases their vulnerability to the consequences of corruption-related service delivery deficits. In addition, women's limited access to public officials and low income levels diminishes their ability to pay bribes, further restricting their access to basic services. Therefore, corruption disproportionately affects poor women because their low levels of economic and political empowerment constrain their ability to change the status quo or to hold states accountable to deliver services that are their right.[20]

The report provides more specific examples of the ways women and girls experience corruption in various countries and settings. For example, in many countries, women and girls bear water-gathering responsibilities—corruption prevents the construction of more convenient water infrastructure. In the arena of education, women and girls might face sexual extortion in order to be graded fairly or pay for school, as illustrated in Botswana.[21] The report also describes the disproportionate impact of corruption on women entrepreneurs, who often lack the resources to make bribe payments for licenses and permits to start a business. Other corruption-related issues for women include increased vulnerability to sexual violence in the context of police and judicial corruption and blocked access to maternity hospitals when staff members demand bribes.

1.3.3 Global Security and Corruption

In her book *Thieves of State*, Sarah Chayes argues that corruption fuels threats to international security. She ties endemic corruption by elites to national and international revolution and

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[19] Naomi Hossain, Celestine Nyamu Musembi & Jessica Hughes, *Corruption, Accountability and Gender: Understanding the Connections* (UNDP & UNIFEM, 2010) at 7.
[20] *Ibid* at 5.
[21] *Ibid* at 12.

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violence in the Arab world, Nigeria, Ukraine and various historical settings.[22] Chayes draws attention to Al-Qaeda's assertions that the main rationale behind the 9/11 attacks was George W. Bush's cozy relationship with kleptocratic Arab heads of state. To demonstrate a pattern of association between corruption and destructive, terroristic acts, she compares the example of contemporary jihadists to Dutch Protestants who ransacked property of the corrupt Catholic Church during the Reformation. Similar to these early Protestants, the jihadists "articulate their struggle, at least in part, as a reaction to the kleptocratic practices of local rulers."[23] Chayes also cites other threats to global security fueled by corruption, such as uprisings leading to government collapse in countries like Syria, the ease of trafficking in conflict minerals and other illegal goods in corrupt countries like Zimbabwe, and unreliable military regimes.[24]

Although Chayes' first-hand experience leads to the conclusion that terrorism is, in part, a reaction to corrupt regimes in certain countries, other empirical research undermines the idea that corruption is a motivating factor for terrorism in general. Research by Teets and Chenoweth suggests that "[c]orruption does not motivate terrorism because of grievances against corrupt states, but rather it facilitates terrorism...corruption lowers the barriers to terrorist attacks, probably because obtaining illicit materials to conduct attacks is more difficult in less corrupt or transparent countries."[25] Matthew Simpson's research, described in an article titled "Terrorism and Corruption: Alternatives for Goal Attainment Within Political Opportunity Structures," also "cast[s] doubt on the notion that terrorist violence is the expression of grievances developed in response to perceived corruption within the political process."[26] Rather, Simpon's research indicates that organizations turn to terrorism when other extralegal avenues, like corruption, are blocked; "[i]n instances where the particular path of corruption could not be employed to gain political influence, these organizations used alternative strategies – terrorism being high on the list – to fill the gap."[27] However, Simpson recognizes that more research is required to determine when the relationship between corruption control and terrorism might vary due to other factors like inequality and development.

In *Corruption: Global Security and World Order*, Rotberg and Greenhill further explore the connection between corruption, trafficking and global security:

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[22] Sarah Chayes, *Thieves of State: Why Corruption Threatens Global Security* (WW Norton & Company, Inc., 2015).
[23] *Ibid* at 181.
[24] *Ibid* at 181–186.
[25] Jessica C Teets & Erica Chenoweth, "To Bribe or to Bomb: Do Corruption and Terrorism Go Together?" in Robert I Rotberg, ed, *Corruption, Global Security, and World Order* (Brookings Institution Press, World Peace Foundation & American Academy of Arts and Sciences, 2009) at 180.
[26] Matthew Simpson, "Terrorism and Corruption: Alternatives for Goal Attainment within Political Opportunity Structures" (Summer 2014) 44:2 100 Intl J of Sociology 87 at 100.
[27] *Ibid* at 100.

> The durable ties between corrupt regimes and transnational crime and transnational trafficking pose major global security problems because of the ability of criminal organizations to subvert stability and growth in poor countries, by their skill at sapping such impoverished places of revenue and legitimate modernization, by their undermining the fabric of weak and fragile societies, and by their negative reinforcement of the least favorable kinds of leadership in developing countries. ... these unholy partnerships ... by facilitating the spread of small arms and light weapons make civil wars possible and lethal.[28]

Adding to the issue of global security, Matthew Bunn describes the link between corruption and nuclear proliferation, pointing out that "[c]orruption has been a critical enabling element of the nuclear weapons programs in Pakistan, Iraq, Libya, and Iran."[29] Bunn explains that countries aspiring to a nuclear program are limited in their choice of means to obtain materials, and if these means are insufficient, "illicit contributions from foreign sources motivated by cash will be central to a nuclear program's success."[30]

For an exploration of the need for anti-corruption measures and good governance to promote sustainable peace in post-conflict nations, see Bertram Spector, *Negotiating Peace and Confronting Corruption: Challenges for Post-Conflict Societies* (US Institute of Peace Press, 2011). Spector argues that negotiated cease-fires and other short-term measures are not enough to establish long-lasting peace; rather, good governance is needed to end the corruption that fuels conflict in the first place.

1.3.4 Climate Change, Environmental Degradation and Corruption

Corruption in the area of climate change holds the potential to cause wide-ranging effects. Corrupt avoidance of climate change standards can sap projects of their effectiveness in mitigating climate change, leading to adverse consequences for future generations. The resultant failure or reduced success of mechanisms designed to mitigate the impacts of climate change will also disproportionately affect vulnerable, poor populations, who are expected to bear the brunt of the effects of climate change.

Enforcement of heightened climate change standards will require good governance at both international and national levels. As stated by Transparency International (TI) in *Global Corruption Report: Climate Change*, "[a] robust system of climate governance – meaning the processes and relationships at the international, national, corporate and local levels to address the causes and effects of climate change – will be essential for ensuring that the enormous political, social and financial investments by both the public sector and the private

[28] Robert I Rotberg, "How Corruption Compromises World Peace and Stability" in Rotberg (2009) at 9.
[29] Matthew Bunn, "Corruption and Nuclear Proliferation" in Rotberg (2009) at 156.
[30] *Ibid* at 124.

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sector made in climate change mitigation and adaptation are properly and equitably managed, so that responses to climate change are successful."[31]

TI explains why climate change initiatives are uniquely vulnerable to corruption. Responses to climate change will involve massive amounts of money (investment in mitigation efforts is expected to reach almost US$700 billion by 2020), which will "flow through new and untested financial markets and mechanisms," creating fertile ground for corruption.[32] Many climate issues are complex, new and uncertain, yet require speedy solutions, which also increases the risk of corruption, for example by leaving "regulatory grey zones and loopholes."[33]

In TI's book, Patrick Alley points out that rife corruption in the forestry sector has already subverted efforts to use reforestation and forest management to slow climate change.[34] According to the World Bank, timber worth an estimated US$10-23 billion is illegally logged or produced from suspicious sources every year. This illegal harvesting of timber is facilitated by "deeply engrained corruption schemes" in the industry.[35] The forestry sector is particularly prone to corruption because most tropical forests are on public land and therefore susceptible to control by a small group of politicians or public servants. Timber operations are also generally located in remote areas, far from scrutiny. Further, because no countries ban the importation of illegally sourced timber aside from the US, illegal timber is easy to launder on the international market.

Corruption threatens climate change action in many other ways. For example, undue influence and policy capture are current and future risks to effective climate change policy, as demonstrated by powerful energy sector lobby groups in the US. According to TI, carbon markets are also vulnerable to undue influence, which might have contributed to over-allocation of carbon permits and huge windfall profits for European power producers in 2005-2007. Carbon markets also suffer from a lack of measuring, reporting and verification of emissions. Other problems include the current lack of transparency and accountability in climate policy both internationally and nationally. For example, Shahanaz Mueller points out that, in Austria, the lack of transparency in implementation of aspirational policies has led to disappointing performance and slow progress.[36] Corruption in the construction sector also poses a huge risk to future adaptation projects; "[a]daptation without oversight presents

[31] Gareth Sweeney et al, eds., *Global Corruption Report: Climate Change* (Transparency International, 2011) at xxv.
[32] *Ibid* at xxvi.
[33] *Ibid*.
[34] Patrick Alley, "Corruption: A Root Cause of Deforestation and Forest Degradation" in Sweeny et al, (2011) at 299.
[35] Sweeny et al (2011) at xxxii.
[36] Shahanaz Mueller, "Climate Policies in Austria: Poor Accountability Breeds Slow Progress" in Sweeny et al, (2011) at 71.

a two-fold risk of diverted funds *and* substandard work ... which may put populations at even more risk of climate extremes."[37]

TI points out that the corruption spawned by climate change is not limited to familiar forms of corruption, such as misappropriation of funds and bribery, but rather "transcends the established typologies of corruption."[38] TI argues that its definition of corruption, the abuse of entrusted power for private gain, must be expanded in the context of climate change to include "the power that future generations have vested in all of us, in our stewardship role for the planet," and abuses of power such as "distortion of scientific facts, the breach of principles of fair representation and false claims about the green credentials of consumer products."[39]

1.4 Empirical Evidence on the Relationship between Corruption, Reduced Economic Growth and Poverty

In a report entitled *Corruption and Poverty: A Review of Recent Literature*, Chetwynd et al. summarize the different theories and research connecting corruption with poverty.[40] While Chetwynd's summary is now dated (2003), I believe it still accurately reflects the basic relationship between corruption and poverty. Their research reveals an indirect relationship between poverty and corruption explained by two main theories. Persons who attach themselves to the "economic model" argue that corruption negatively impacts indicia of economic growth, which exacerbates poverty. Chetwynd et al. refer to the second theory as the "governance model." Proponents of this theory argue that there is evidence that corruption negatively affects governance and poor governance negatively affects levels of poverty.

In the excerpt below, Chetwynd et al. use the terms "rent seeking" and "rent taking." "Rent-seeking" is a term used by economists to refer to instances where an individual or entity seeks to increase his/her portion of existing wealth by demanding a form of rent that generally is of no benefit to the larger society. The distinction between rent seeking and corruption is explained by Coolidge and Rose-Ackerman in "High-Level Rent Seeking and Corruption in African Regimes: Theory and Cases":

> "Rent seeking" is often used interchangeably with "corruption," and there is a large area of overlap. While corruption involves the misuse of public power for private gain, rent seeking derives from the economic concept of "rent" -- earnings in excess of all relevant costs (including a market rate of

[37] Sweeny et al (2011) at xxxi.
[38] *Ibid* at xxv.
[39] *Ibid* at xxv–xxvi.
[40] E Chetwynd, F Chetwynd & B Spector, *Corruption and Poverty: A Review of Recent Literature* (Management Systems International, 2003) at 2–3, online: <http://www.u4.no/recommended-reading/corruption-and-poverty-a-review-of-recent-literature/>.

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> return on invested assets). Rent is equivalent to what most non-economists think of as monopoly profits. Rent seeking is then the effort to acquire access to or control over opportunities for earning rents. These efforts are not necessarily illegal, or even immoral. They include much lobbying and some forms of advertising. Some can be efficient, such as an auction of scarce and valuable assets. However, economists and public sector management specialists are concerned with what Jagdish Bhagwati termed "directly unproductive" rent seeking activities, because they waste resources and can contribute to economic inefficiency.[41]

For example, a customs official who demands that a bribe be paid before allowing imports into the country may become preoccupied with seeking to maximize his/her ability to extract these bribes (a form of rent) from the public. This is both an instance of corruption and rent seeking as the customs official seeks to maximize his/her own wealth at the expense of work productivity and the public interest.

Excerpts from Chetwynd et al.'s report, *Corruption and Poverty*, are set out below:[42]

BEGINNING OF EXCERPT

Introduction

Popular belief suggests that corruption and poverty are closely related in developing countries. Corruption in the public sector is often viewed as exacerbating conditions of poverty in countries already struggling with the strains of economic growth and democratic transition. Alternatively, countries experiencing chronic poverty are seen as natural breeding grounds for systemic corruption due to social and income inequalities and perverse economic incentives. This report summarizes recent research on the relationship between poverty and corruption to clarify the ways in which these phenomena interact. This understanding can inform USAID planning and programming in democracy and governance, as well as in poverty reduction strategies.

The development literature is rich with theoretical insights on this relationship, many of them founded on practical experience and careful observation. The World Bank's *World Development Report for 2000/01: Attacking Poverty* summarized current thinking on the corruption-poverty linkage as follows:

[41] Jacqueline Coolidge & Susan Rose-Ackerman, "High-Level Rent Seeking and Corruption in African Regimes: Theory and Cases" (1999) World Bank Working Paper No 10, online: <http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-1780>.

[42] Chetwynd et al (2003), at 5–16.

> The burden of petty corruption falls disproportionately on poor people …For those without money and connections, petty corruption in public health or police services can have debilitating consequences. Corruption affects the lives of poor people through many other channels as well. It biases government spending away from socially valuable goods, such as education. It diverts public resources from infrastructure investments that could benefit poor people, such as health clinics, and tends to increase public spending on capital-intensive investments that offer more opportunities for kickbacks, such as defense contracts. It lowers the quality of infrastructure, since kickbacks are more lucrative on equipment purchases. Corruption also undermines public service delivery (World Bank, 2001: 201).

Many of these relationships have been examined using empirical research methods.[43] Much of this literature is recent -- from the mid-1990s -- when major international donor institutions began to focus attention on corruption issues and researchers initiated cross-country measurement of the corruption phenomenon. This report integrates this literature to present the major themes that are hypothesized and tested.

This report is divided into three sections. The first section describes briefly how poverty and corruption are defined and measured in the literature. The second section presents the prominent themes that emerged from our review of the literature on corruption and poverty. Within this section, theoretical propositions are discussed, empirical research studies that support or refute them are described, and implications are drawn. The third section summarizes the major themes uncovered in our review.

…

2 Examining the Relationship Between Corruption and Poverty

This review found that few studies examine or establish a direct relationship between corruption and poverty.[44] Corruption, by itself, does not produce poverty. Rather, corruption has direct consequences on economic and governance factors, intermediaries that in turn produce poverty. Thus, the relationship examined by researchers is an indirect one.

Two models emerge from the research literature. The "economic model" postulates that corruption affects poverty by first impacting economic growth factors, which, in

[43] [1] Many studies address the issue indirectly; few address it directly. See Annex 1, Bibliographic Table.

[44] [4] One group of researchers, Gupta et al (1998), found a statistically significant positive association directly between corruption and poverty. Tests for directionality showed that it appears to be corruption that increases poverty.

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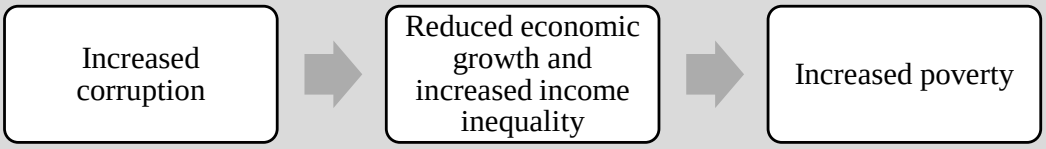
turn, impact poverty levels. In other words, increased corruption reduces economic investment, distorts markets, hinders competition, creates inefficiencies by increasing the costs of doing business, and increases income inequalities. By undermining these key economic factors, poverty is exacerbated.



The "governance model" asserts that corruption affects poverty by first influencing governance factors, which, in turn, impact poverty levels. So, for example, corruption erodes the institutional capacity of government to deliver quality public services, diverts public investment away from major public needs into capital projects (where bribes can be sought), lowers compliance with safety and health regulations, and increases budgetary pressures on government. Through these serious challenges to governance practices and outcomes, poverty is affected.

The following review of the literature is organized in relation to these models.

2.1 Economic Model

The literature shows an inverse correlation between aggregate economic growth and corruption; in general, countries with higher corruption experience less economic growth. Many of the studies reviewed for this paper address the channels through which corruption affects economic growth, for instance, through impacting investment and entrepreneurship, distorting markets, and undermining productivity. Furthermore, there is empirical evidence that corruption aggravates income inequality and is associated with slower economic growth. Finally, studies present evidence that as the rate of economic growth increases, the number of people above the poverty line tends to rise as well.

Corruption Impedes Economic Growth

The relationship between corruption and economic growth is complex. Economic theory supports the notion that corruption hinders economic growth in the following ways:

- *Corruption discourages foreign and domestic investment*: rent taking increases costs and creates uncertainty, reducing incentives to both foreign and domestic investors.
- *Corruption taxes entrepreneurship*: entrepreneurs and innovators require licenses and permits and paying bribes for these goods cuts into profit margins.
- *Corruption lowers the quality of public infrastructure:* public resources are diverted to private uses, standards are waived; funds for operations and maintenance are diverted in favor of more rent seeking activity.
- *Corruption decreases tax revenue:* firms and activities are driven into the informal or gray sector by excessive rent taking and taxes are reduced in exchange for payoffs to tax officials.
- *Corruption diverts talent into rent seeking:* officials who otherwise would be engaged in productive activity become pre-occupied with rent taking, in which increasing returns encourage more rent taking.
- *Corruption distorts the composition of public expenditure*: rent seekers will pursue those projects for which rent seeking is easiest and best disguised, diverting funding from other sectors such as education and health.[45]

These theoretical propositions are supported by a number of empirical studies. They demonstrate that high levels of corruption are associated with low levels of investment and low levels of aggregate economic growth. For example, the results of several World Bank corruption surveys illustrate this inverse relationship between corruption and economic growth.

- *Corruption discourages domestic investment.* In Bulgaria, about one in four businesses in the entrepreneur sample had planned to expand (mostly through acquiring new equipment) but failed to do so, and corruption was an important factor in their change of plans. The Latvia study surveyed enterprises that had dropped planned investments. It found that the high cost of complying with regulations and the uncertainty surrounding them, including uncertainty regarding unofficial payments, were important factors for 28% of businesses foregoing new investments.
- *Corruption hurts entrepreneurship especially among small businesses.* Several studies reported that small businesses tend to pay the most bribes as a percentage of total revenue (especially in Bosnia, Ghana, and Slovakia). In

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Poland, businesses have to deal with a large number of economic activities that are licensed, making them more prone to extortion.

- *Corruption decreases revenue from taxes and fees.* In Bangladesh, more than 30% of urban household respondents reduced electric and/or water bills by bribing the meter reader. In several studies, respondents were so frustrated that they indicated a willingness to pay more taxes if corruption could be controlled (Cambodia, Indonesia, Romania).[46]

In a cross-national analysis of corruption and growth for the IMF, Tanzi and Davodi (1997) tested four hypotheses designed to explain four channels through which corruption reduces growth. Using regression analysis, results established that higher levels of corruption were associated with: (1) increasing public sector investment (but decreased productivity); (2) reduced government revenues (reducing resources for productive expenditures); (3) lower expenditures on operations and maintenance (where other studies show that high government consumption is robustly associated with lower economic growth, e.g., see Barro 1996); and (4) reduced quality of public infrastructure (as shown by indicators for road conditions, power and water losses, telecom faults and proportion of railway diesels in use). All of these findings are consistent with the observation that corruption is inversely correlated with growth in GNP.

A seminal study by Mauro (2002) used a composite of two corruption indices and multiple regression analyses with a sample of 106 countries to show that high levels of corruption are associated with lower levels of investment as a share of Gross Domestic Product (GDP) and with lower GDP growth per capita. Extrapolation of these results by the researcher suggested that if a country were to improve its corruption index from a score of six to eight on a ten-point scale, it would increase the investment rate more than 4% and annual per capita GDP growth would increase by nearly one-half percent.

Recent work by Lambsdorff (forthcoming) casts additional light on how corruption affects investment, specifically, the relationship of investment to GDP. The study categorized investment into domestic savings and net capital inflows. Regression results provided evidence that corruption negatively impacts on capital accumulation by deterring capital imports. To explore causation, Lambsdorff decomposed the

[45] [5] For a summary discussion of these points, see Mauro 1999. For further discussion of the theoretical reasoning, see Heidenheimer and Johnston (2002), specifically Chapter 19, Corruption and Development: A Review of the Issues, pp. 329-338 (Pranab Bardhan); Chapter 20, The Effects of Corruption on Growth and Public Expenditure, pp. 339-352 (Paolo Mauro); Chapter 21, When is Corruption Harmful? pp. 353-371 (Susan Rose-Ackerman).

[46] [6] For clarity, abbreviated references to the diagnostic studies are by country name rather than by name of author. References to the diagnostic studies are grouped at the end of the bibliography.

corruption index into several sub-indicators that look at corruption through the lens of bureaucratic quality, civil liberty, government stability, and law and order. Only the law and order sub-indicator turned out to be important for attracting capital flows.

Another World Bank study (2000a) suggests that higher levels of corruption reduce growth through decreased investment and output. This comprehensive study looked at 22 transition countries and examined two forms of corruption – state capture and administrative corruption – and their impact on selected economic and social indicators. Data for the study were derived from the Business Environment and Enterprise Performance Survey (BEEPS).

[Note: The empirical data cited by Chetwynd et al. above is from the 1990s and early 2000s. Subsequent empirical research has cast doubt on the claim that high levels of corruption adversely affect economic growth in terms of GDP. In fact, corruption might increase economic growth in the short run under certain circumstances (for example, by allowing corporations to avoid meeting expensive environmental requirements). However, Toke S. Aidt argues that corruption still impedes sustainable economic growth in the long run in his article "Corruption and Sustainable Development," discussed below at page 27-28 of this book.]

Corruption Exacerbates Income Inequality

Several studies have demonstrated a relationship between corruption and income inequality. The theoretical foundations for this relationship are derived from rent theory and draw on the ideas of Rose-Ackerman (1978) and Krueger (1974), among others. Propositions include:

- Corruption may create permanent distortions from which some groups or individuals can benefit more than others.
- The distributional consequences of corruption are likely to be more severe the more persistent the corruption.
- The impact of corruption on income distribution is in part a function of government involvement in allocating and financing scarce goods and services (Gupta, Davoodi, and Alonso-Terme, 1998).

A World Bank study (2000c) of poverty following the transition to a market economy in Eastern Europe and Central Asia (ECA) produced important findings concerning income distribution and corruption. The study analyzes data on firms' perceptions of corruption and notes that more firms in ECA report that corruption is a problem than

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in most other geographic regions.[47] The authors analyzed whether there "is any apparent link, within ECA, between corruption and measures of income inequality" (World Bank, 2000c: 169). When Gini coefficients for income per capita (measures of income inequality) were graphed against the Transparency International (TI) Corruption Perceptions Index (CPI), lower levels of corruption were seen to be statistically associated with lower levels of income inequality (simple correlation was +0.72). Similar results were obtained using different measures of corruption. The authors add that closer examination of the links between corruption and inequality show that the costs of corruption fall particularly heavily on smaller firms.[48]

This report also examined the relationship between a particular type of corruption, state capture, and income inequality. State capture describes the situation where businesses have undue influence over the decisions of public officials. The report notes that differences in income inequality in the ECA countries are greatest in those countries where the transition has been least successful and where state capture is at its highest. In these countries, state capture has allowed large economic interests to distort the legal framework and the policy-making process in a way that defeats the development of a market economy.[49] The report explores the relationship between state capture and income inequality through regressions of the Gini coefficient on measures of state capture and other variables and finds that a higher degree of state capture is correlated with higher inequality. The relationship holds even when controlling for political freedoms, location, and years under state planning (World Bank, 2000c: 172).

Gupta et al. (1998) conducted cross-national regression analysis of up to 56 countries to examine the ways that corruption could negatively impact income distribution and poverty. The study looked at the following relationships:

- *Growth* : Income inequality has been shown to be harmful to growth, so if corruption increases income inequality, it will also reduce growth and thereby exacerbate poverty.
- *Bias in tax systems* : Evasion, poor administration, and exemptions favoring the well-connected can reduce the tax base and progressivity of the tax system, increasing income inequality.

[47] [8] Data is taken from the World Bank's Business Environment and Enterprise Performance Survey (BEEPS), and shows that 70% of firms in the CIS [Commonwealth of Independent States] report that corruption is a problem, compared to 50% in Central and Eastern Europe, 40% in Latin America and 15% in OECD. World Bank 2000c at 168-69.

[48] [9] World Bank 2000c at 170, citing EBRD Transition Report (1999).

[49] [10] See generally World Bank 2000c at Chapter 4, A Look at Income Inequality, pp 139-170. The transit ion economies have been particularly vulnerable to state capture because of the socialist legacy of fused economic and political power.

- *Poor targeting of social programs*: Extending benefits to well-to-do income groups or siphoning from poverty alleviation programs will diminish their impact on poverty and inequality (and will tend to act as a regressive tax on the poor, enhancing income inequality).

The Gupta et al. study examined these propositions through an inequality model using a Gini coefficient to measure inequality. ... The statistically significant results include:

- Higher corruption is associated with higher income inequality such that a worsening of a country's corruption index by 2.5 points on a scale of 10 corresponds to an increase in the Gini coefficient (worsening inequality) of about 4 points. Tests showed the same results for an average decrease in secondary schooling by 2.3 years, as an example of the significance of corruption.
- Even controlling for stage of economic development, corruption appears to be harmful to income inequality. Moreover, a test of directionality suggests that it is corruption that increases inequality and not the reverse.[50]
- Corruption tends to increase the inequality of factor ownership [i.e. the ownership of the means of production].
- Corruption increases income inequality by reducing progressivity of the tax system, that is, the impact of corruption on income inequality was shown to be higher after taxes.

In another study of 35 countries (mostly OECD countries), Karstedt hypothesized that corruption supports, stabilizes and deepens inequality. Her measures of corruption (Transparency International's CPI and Bribery Propensity Index) were tested against measures of income distribution (as well as measures of power distance between elites and other ranks, and general trust). Results showed that *societies with high income inequality have high levels of corruption, while those with high levels of secondary education and a high proportion of women in government positions have decreasing levels of corruption*. The relation between measures of corruption and the Gini index of income inequality was nonlinear, indicating that after countries attain a specific level of income equality, corruption tends to decrease exponentially.

How does corruption exacerbate income inequality? Evidence from diagnostic surveys of corruption in several countries suggests that corruption aggravates income

[50] [11] In a review of empirical studies, Lambsdorff (1999) cites other studies that agree with Gupta on this relationship. Lambsdorff questions whether inequality may also contribute to corruption. We have not found direct empirical support for reverse causality, though there is some indirect support in Kaufmann and Kraay, 2002, discussed below.

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inequality because lower income households pay a higher proportion of their income in bribes.

In conclusion, the literature establishes clearly that corruption impedes economic growth and augments income inequalities. How does reduced economic growth, in turn, increase poverty?

Reduced Economic Growth Rates Increase Poverty

There is evidence that the absence of economic growth (or negative growth) increases poverty. Quibria's study (2002) suggests that the burden of rapid economic retrenchment, such as seen recently in Thailand and Indonesia, hurts the poor most heavily. Similarly, in the transition countries of the former Soviet Union (FSU), the changeover to a market system was associated with a sharp initial drop in output and significantly higher levels of poverty. The expansion of poverty was initiated by the collapse of GDP, which fell by 50 percent in the FSU countries and 15 percent in Central and Eastern Europe. Poverty was found to be highly correlated with administrative corruption and corruption was empirically associated with lower economic growth rates (World Bank, 2000a).

Using a poverty model, the Gupta et al. (1998) study conducted a cross-national analysis of up to 56 countries to examine the relationship between growth and poverty. ... The authors found that higher growth is associated with poverty alleviation.

Dollar and Kraay (2002) of the World Bank Development Research Group studied a sample of 80 countries over four decades and showed that income of the lowest 20% of the population rises one for one with increases in per capita GDP. Moreover, using tests for directionality, they concluded that a 1% increase in GDP actually causes a 1% increase in the incomes of the poor.[51]

In his comprehensive study of the so-called Asian Tigers, Quibria (2002) gives a good example of rapid economic growth (during the 1980s and 1990s) leading to a

[51] [12] Dollar and Kraay (2002). The question of the direction of causality is debated in several of the sources reviewed for this report. There is some empirical evidence of causality running from corruption to poverty. Dollar and Kraay (2002); Gupta, (1998). Although intuitively it would seem that there might also be reverse causality (i.e., running from poverty to corruption), we have not found empirical studies supporting this point. There is some evidence, however, of reverse causality running from per capita incomes to governance. See Kaufmann and Kraay (2002), discussed below.

substantial decrease in those living below a poverty line of $1.25 per day.[52] Further, in those countries with a more equitable distribution of income at the outset, the decrease in poverty tended to be more robust. However, even in this special case of multiple country rapid growth in a particular region, income distribution remained more or less constant over the period of growth. Similarly, Ravallion and Chen (in Easterly, 2001: 13-14) examined 65 developing countries between 1981 and 1999. They found that the number of people below the poverty line of $1 per day was reduced in countries with positive economic growth. However, they concluded that "measures of inequality show no tendency to get either better or worse with economic growth."[53]

In conclusion, these studies show conclusively that income rises with economic growth and vice versa. It should be noted that economic growth does not necessarily lead to more equal income distribution; an increase in income may benefit the better-off rather than bringing the poor out of poverty. Income distribution seems to be an important moderating factor in the relationship between economic growth and poverty reduction.

2.1 Governance Model

The governance model postulates that increased corruption reduces governance capacity, which, in turn, increases poverty conditions. Kaufmann et al. (1999) define governance as,

> "the traditions and institutions by which authority in a country is exercised. This includes (1) the process by which governments are selected, monitored and replaced, (2) the capacity of the government to effectively formulate and implement sound policies, and (3) the respect of citizens and the state for the institutions that govern economic and social interactions among them."

Corruption disrupts governance practices, destabilizes governance institutions, reduces the provision of services by government, reduces respect for the rule of law, and reduces public trust in government and its institutions. Impaired governance, in turn, reduces social capital and public trust in governance institutions; this reduces

[52] [13] Quibria (2002). Quibria suggests that a factor in this growth was the containment of corruption to the centralized type which he considers less costly to growth than more generalized or chaotic corruption.

[53] [14] Easterly (2001) at 13-14. In severe economic retraction, the poor suffer appreciably greater loss in income than the population's average. Easterly quotes from Martin Ravillion and Shaohua Chen, Distribution and Poverty in Developing and Transition Economies (World Bank Economic Review No.11 May 1997).

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the public funds available to support effective economic growth programs and reduces the capability of government to help its citizens and the poor, in particular.

Corruption Degrades Governance

Johnston (2000) suggests that serious corruption threatens democracy and governance by weakening political institutions and mass participation, and by delaying and distorting the economic development needed to sustain democracy. In a study of 83 countries, Johnston compares Transparency International's CPI with an index of political competitiveness and finds that well-institutionalized and decisive political competition is correlated with lower levels of corruption. These results were confirmed, even when controlling for GDP and examining the relationship over time.

Diagnostic surveys of corruption in Bosnia-Herzegovina, Ghana, Honduras, Indonesia and Latvia report that government institutions with the highest levels of corruption tend to provide lower quality services. The converse is also true: in Romania, the survey shows that state sector entities with better systems of public administration tend to have lower levels of corruption.

The literature shows that corruption impacts the quality of government services and infrastructure and that through these channels it has an impact on the poor. This is particularly the case in the health and education sectors. Enhanced education and healthcare services and population longevity are usually associated with higher economic growth. But under conditions of extensive corruption, when public services, such as health and basic education expenditures that especially benefit the poor, are given lower priority in favor of capital intensive programs that offer more opportunities for high-level rent taking, lower income groups lose services on which they depend. As government revenues decline through leakage brought on by corruption, public funds for poverty programs and programs to stimulate growth also become more scarce.

Gupta, Davoodi and Tiongson (2000) used regression analysis across a large sample of countries to assess an aggregate measure of education outcome and health status in a model that includes several corruption indices, per capita income, public spending on health care and education, and average years of education completed. The results supported the proposition that better health care and education outcomes are positively correlated with lower corruption. In particular, corruption is consistently correlated with higher school dropout rates and corruption is

significantly correlated with higher levels of infant mortality and lower-birth weights of babies.[54]

Mauro looked at the relationship between corruption and the composition of government spending. He found evidence that corrupt governments may display predatory behaviour in deciding how to distribute government expenditures. Specifically, his data showed corruption negatively related to education and health expenditures. ...

Gupta et al. (1998) also found that corruption can lead to reduced social spending on health and education. Countries with higher corruption tend to have lower levels of social spending, regardless of level of development. Corruption lowers tax revenues, increases government operating costs, increases government spending for wages and reduces spending on operations and maintenance, and often biases government toward spending on higher education and tertiary health care (rather than basic education and primary health care).

Impaired Governance Increases Poverty

Pioneering research on the relationship among corruption, governance and poverty has been conducted at the World Bank by the team of Kaufmann, Kraay and Zoido-Lobaton. Their studies suggest an association between good governance (with control of corruption as an important component) and poverty alleviation.

Kaufmann et al. (1999) studied the effect of governance on per capita income in 173 countries, treating "control of corruption" as one of the components of good governance. ... Analysis showed a strong positive causal relationship running from improved governance to better development outcomes as measured by per capita income.[55] A one standard deviation improvement in governance raised per capita

[54] [15] There was a problem of multicolinearity between corruption and public spending which for all practical purposes invalidated the other education indicators. Gupta, Davoodi and Tiongson (2000) at 17.

[55] [16] Kaufmann, Kraay and Zoido-Lobaton (1999) at 15. Although the relationship held for most of the aggregate indicators, the test of the relationship between the aggregate indicator for corruption and increase in per capita income did not hold up. Specification tests reported the p -value associated with the null hypothesis that the instruments affect income only through their effects on governance. For five out of the six aggregate indicators, the null hypothesis was not rejected, which was evidence in favor of the identifying assumptions. Corruption was the aggregate indicator for which the null hypothesis was rejected. This suggested that the aggregate indicator was not an adequate independent measure of corruption. "This is not to say that graft is unimportant for economic outcomes. Rather, in this set of countries, we have found it difficult to find exogenous variations in the causes of graft which make it possible to identify the effects of graft on per capita incomes." P.16 n. 15.

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incomes 2.5 to 4 times. Analysis of updated indicators for 2000-2001 did not change these conclusions.[56]

Kaufmann and Kraay (2002) used updated governance indicators to gain a more nuanced understanding of the role of good governance in the relationship between corruption and growth in per capita incomes.[57] Using governance data for 2000/01, the authors establish empirically that for Latin American and Caribbean countries (i) better governance tends to yield higher per capita incomes, but (ii) higher per capita incomes tend to produce reduced governance capacity. The authors attribute this second finding to state capture. In short, the authors suggest that corruption (in the form of state capture) may interfere with the expected relationship between economic growth (higher per capita incomes) and better governance. The authors note that an empirical in-depth examination of the phenomenon of state capture in the Latin American and The Caribbean (LAC) region is part of the upcoming research agenda.[58]

The effect of governance on corruption and poverty is illuminated by another World Bank study (2000a). The deterioration in governance discussed in this study was accompanied by an increase in both corruption and poverty. Thus, as seen earlier, increases in corruption tend to deteriorate governance practices, but the reverse holds true as well – reduction in governance capacity increases the opportunities for corruption.

Reduced Public Trust in Government Increases Vulnerability of the Poor

Corruption that reduces governance capacity also may inflict critical collateral damage: reduced public trust in government institutions. As trust -- an important element of social capital --declines, research has shown that vulnerability of the poor

[56] [17] Kaufmann, Kraay and Zoido-Lobaton (2002). In an April, 2002, presentation at the US Department of State, Dr. Kaufmann summarized this work on governance and the demonstrated link to better development outcomes such as higher per capita income, lower infant mortality and higher literacy. He expects that donors will pay much more attention to governance, and that the link between good governance and poverty alleviation is now a mainstream concept. Kaufmann (2002), slide 44. New data will be released shortly and will be available at http://info.worldbank.org/beeps.kkz/.

[57] [18] Kaufmann and Kraay (2002). In a forthcoming study that draws on a survey of public officials in Bolivia, Kaufmann, Mehrez and Gurgur conclude (using a theoretical model for econometric analysis) that external voice and transparency have a larger effect on corruption (and quality of service) than conventional public sector management variables (such as civil servant wages, internal enforcement of rules, etc.).

[58] [19] This study would be similar to the Business Environment and Enterprise Performance Survey (BEEPS), developed jointly by the World Bank and the EBRD, which generated comparative measurements on corruption and state capture in the transition economies of the CIS and CEE. See http://info.worldbank.org/governance/beeps/.

increases as their economic productivity is affected. The concept of social capital refers to social structures that enable people to work collectively for the good of the group.[59] One of the most important and widely discussed elements of social capital is trust, both interpersonal trust and trust in institutions of government.[60] …

One of the effects of widespread corruption in government services is that it appears to contribute to disaffection and distrust, and this appears to impact particularly heavily on the poor.[61] This is not surprising, because low income people are the ones who are most likely to be dependent on government services for assistance with basic needs, such as education and healthcare, and least likely to be able to pay bribes to cut through complex and unresponsive bureaucracies. Lack of trust has economic consequences: when people perceive that the social system is untrustworthy and inequitable, this can affect incentives to engage in productive activities.[62]

Knack and Keefer (1997) tested the relationship between social capital and economic performance in 29 market economies using indicators from the World Values Surveys (WVS) on interpersonal trust. They added the WVS trust measure to investment and growth regressions and found that trust correlated highly with economic growth. Each 12 percentage point rise in trust was associated with an increase in annual income growth of about 1 percentage point. They also found that the impact of trust on growth is significantly higher for poorer countries, suggesting that interpersonal trust is more essential where legal systems and financial markets are less well developed.

In a later study, Zak and Knack (1998) found that trust is higher in nations with stronger formal institutions for enforcing contracts and reducing corruption, and in nations with less polarized populations (as measured by income or land inequality, ethnic heterogeneity, and a subjective measure of the intensity of economic discrimination). They also showed that formal institutions and polarization appear to influence growth rates in part through their impacts on trust. For example, income inequality, land inequality, discrimination and corruption are associated with significantly lower growth rates, but the association of these variables with growth dramatically weakens when trust is controlled for.

[59] [20] For a discussion of various definitions of social capital and their evolution, see Feldman and Assaf (1999).
[60] [21] See Rose-Ackerman (2001). Rose-Ackerman discusses the complex nature of the relationship between trust, the functioning of the state and the functioning of the market. The study stresses the mutual interaction between trust and democracy and the impact of corruption.
[61] [22] Rose-Ackerman (2001) at 26, noting that this is especially the case in the FSU.
[62] [23] Buscaglia (2000), discussing corruption and its long term impact on efficiency and equity, especially corruption in the judiciary.

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Knack (1999) also looked at the effect of social capital on income inequality. His study regressed various indicators of social capital and trust against income data by quintile and found that higher scores on property rights measures were associated with declines in income inequality. Using the WVS trust indicator, he also found that inequality declined in higher trust societies. ... Knack concludes that "social capital reduces poverty rates and improves—or at a minimum does not exacerbate—income inequality."

3 Conclusion

Overall, the literature reviewed in this paper demonstrates that corruption does exacerbate and promote poverty, but this pattern is complex and moderated by economic and governance factors. Table 1 summarizes the major findings of this report.

Table 1. Major Propositions Linking Corruption and Poverty

- Economic growth is associated with poverty reduction
- The burden of rapid retrenchment falls most heavily on the poor.
- Corruption is associated with low economic growth
- Corruption reduces domestic investment and foreign direct investment
- Corruption reduces public sector productivity
- Corruption distorts the composition of government expenditure, away from services directly beneficial to the poor and the growth process, e.g., education, health, and operation and maintenance
- Better health and education indicators are positively associated with lower corruption
- Corruption reduces government revenues
- Corruption lowers the quality of public infrastructure
- Corruption lowers spending on social sectors
- Corruption increases income inequality
- Corruption increases inequality of factor ownership
- Inequality slows growth
- Corruption decreases progressivity of the tax system
- Corruption acts as a regressive tax
- Low income households pay more in bribes as percent of income
- Better governance, including lower graft level, effects economic growth dramatically
- Better governance is associated with lower corruption and lower poverty levels.
- High state capture makes it difficult to reduce inequality
- Extensive, organized, well institutionalized and decisive political competition is associated with lower corruption
- Trust is a component of social capital. Higher social capital is associated with lower poverty. Corruption undermines trust (in government and other institutions) and thereby undermines social capital.

[footnotes omitted]

END OF EXCERPT

The 2015 OECD report, *Consequences of Corruption at the Sector Level and Implications for Economic Growth and Development*, explores the correlation between corruption and economic growth by focusing on four sectors that are key in promoting economic growth and

development but also vulnerable to corruption: extractive industries, utilities and infrastructure, health, and education.[63] The report investigates how corruption "distorts sector performance" and the consequences for economic growth and development.[64] For example, in extractive industries, the report finds that corruption can siphon funds away from populations and render dependence on natural resources counterproductive for the economy. The analysis concludes that corruption in these four sectors directly affects the cost of public and private sector projects, while indirectly damaging public institutions, eroding public trust in government and increasing inequality.

In his article "Corruption and Sustainable Development," Aidt takes a new approach to analyzing the relationship between growth and corruption.[65] He points out that "[m]ost of the empirical research on the consequences of corruption at the economy-wide level uses real GDP per capita," which has led to ambiguous and contradictory results regarding causal directions.[66] Aidt argues that research focused on GDP is "barking up the wrong tree."[67] Since "development is concerned with sustainable improvements in human welfare," Aidt instead focuses his research on the relationship between corruption and *sustainable* development.[68] He defines sustainable development as "present economic paths that do not compromise the well-being of future generations."[69] Aidt's research indicates that "corruption is a major obstacle to sustainable development."[70] The following excerpt summarizes Aidt's findings on the relationship between corruption and sustainable development: [71]

> Corruption has the potential to undermine sustainable development in many ways. ... sustainable development requires suitable investment in the economy's capital assets. A vast empirical literature strongly suggests that corruption is one reason why many societies do not make sufficient investments in their productive base. Take, for example, education, that is, investment in the stock of human capital. Since education is associated with positive externalities, the social value of these investments exceeds the private return, and public funding is justified from a social point of view, in particular for primary education. But do the funds committed always reach the schools? Expenditure tracking surveys undertaken by the World Bank

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[63] OECD, *Consequences of Corruption at the Sector Level and Implications for Economic Growth and Development* (OECD, 2015), online: <http://www.oecd.org/publications/consequences-of-corruption-at-the-sector-level-and-implications-for-economic-growth-and-development-9789264230781-en.htm>.

[64] *Ibid* at 9.

[65] Toke S Aidt, "Corruption and Sustainable Development" in Susan Rose-Ackerman & Tina Soreide, eds, *International Handbook on the Economics of Corruption,* vol 2 (Edward Elgar, 2011) at 3–50.

[66] *Ibid* at 6.

[67] *Ibid* at 3.

[68] *Ibid.*

[69] *Ibid* at 6.

[70] *Ibid* at 37.

[71] *Ibid* at 9–11.

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in Africa suggest that the answer is no: corrupt officials manage to divert the flow of funds to other purposes, most likely to private consumption or political patronage...the macroeconomic evidence presented by Mauro (1998), Tanzi (1998) and many others shows how corruption distorts the portfolio of public spending by shifting resources away from education and towards public [sic] consumption. In short, there are good reasons to believe that corruption undermines the accumulation of human capital and may thus be a cause of unsustainable development.

Another example is investment in manufactured capital. A large theoretical literature highlights different reasons why corruption reduces the incentive to invest. The basic point is that corruption, through the sale of investment licenses or simply through creation of red tape and rent-seeking, serves as a tax on investment. The macroeconomic evidence strongly confirms that investment does not thrive in a corrupt environment. ... Tanzi and Davoodi (1998), for example, show that corruption tends to increase public investment, but that it is associated with low operation and maintenance expenditures and with poor quality of infrastructure, that is, with investments of lower quality. Moreover, Wei (2000) demonstrates that corruption acts like a tax on international investments....Along similar lines, Rose-Ackerman (1999, ch. 3), argues that corrupt politicians favor investment projects with inefficiently high capital intensity ('white elephants') because the stream of bribe income generated by such projects is front-loaded. As a consequence of this bias, too little investment is subsequently made in maintaining the capital.

…

The final example relates to the management of natural capital. Leite and Weidmann (2002) and many others provide macroeconomic evidence on the close association between extraction of natural resources, resource rents, and corruption. Anecdotal evidence linking the exploitation of natural resources to corruption is also abundant, ranging from kickbacks associated with logging concessions in Malaysia and Indonesia to oil concessions in Nigeria. ... The consequence of these distortions is environmental degradation. This is directly related to a vast literature on the so-called 'resource curse'. Economic logic suggests that abundance of natural resources should be beneficial for economic development. ... Yet, as first demonstrated by Sachs and Warner (1997), despite this apparent advantage, resource-rich countries tend to grow at a slower rate than other countries. One often-cited reason for this curse is that resource abundance fosters a 'rentier' economy with rampant corruption and poorly developed institutions. ... Such an environment not only encourages overuse of the natural resource base; it also crowds out investment in manufactured and human capital (Gylfason, 2001; Papyrakis and Gerlagh, 2006), misallocates talent away from innovative activities to rent-seeking (Acemoglu and Verdier, 1998) and encourages growth-harming increases in government

> consumption (Atkinson and Hamilton, 2003) ... the general message from this literature is that resource rents induce corruption where institutions are weak, and that corruption and weak institutions encourage overuse of natural capital. The implied net result is a significant fall in genuine investment.
>
> These examples show that corruption can be a threat to sustainable development through the effect it has on investment in an economy's productive base. However, they also demonstrate another basic point. The effect of corruption on economic growth, defined in terms of GDP per capita, is likely to be smaller than the corresponding effect of corruption on genuine investment and sustainability, at least over the medium term. [footnotes omitted]

For a detailed analysis of the effects of corruption on markets, national economies, the public sector, institutions and other aspects of economies and governance, see Marco Arnone and Leonardo S. Borlini, *Corruption: Economic Analysis and International Law* (Cheltenham, UK; Northampton, US: Edward Elgar Publishing, 2014).

1.5 Poverty and Corruption: A Growing Concern

Figure 1.1 Scenes from the Kibera in Nairobi. Photo by Karl Mueller. CC BY 2.0 Generic license.

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The excerpts below are from Roy Cullen's readable and informative book *The Poverty of Corrupt Nations*.[72] Mr. Cullen, a former member of the Parliament of Canada, is also a founding member of the Global Organization of Parliamentarians Against Corruption (http://gopacnetwork.org/). In his book, he finds a strong correlation between low GDP per capita and corruption (based on TI's Corruption Perceptions Index). The following excerpts illustrate some connections between corruption and poverty:[73]

BEGINNING OF EXCERPT

Nations where corruption is rampant also tend to have a large proportion of the population living in poverty – such as the people in this shanty town – while the countries' leaders may be diverting millions from national wealth to Swiss bank accounts for their personal benefit.

[Note: The picture of the shanty town is not reproduced because permission could not be obtained. An alternative picture has been substituted. See Figure 1.1.]

…

What I will attempt to demonstrate in this book is that while bribery and corruption may have cultural connotations and roots, they are morally and economically indefensible. This book places its focus on the relationship between corruption and poverty. It has two major themes.

First, there is the need for world leaders to address the growing disparities between the rich and poor nations. How big is this gap and what are the trends? As David Landes highlights in *The Wealth and Poverty of Nations*, "The difference in income per head between the richest industrial nation, say Switzerland, and the poorest non-industrial country, Mozambique, is about 400 to 1. Two hundred and fifty years ago, this gap between richest and poorest was perhaps 5 to 1…It is estimated that in today's world, 20,000 people perish every day from extreme poverty (some argue that the figure is 50,000 daily deaths from poverty-related causes).

[Note: The enormous gulf globally between the rich and the poor continues to grow. For a compelling account of this income inequality and of the dangers it creates, see: Joseph Stiglitz, The Great Divide: Unequal Societies and What We Can do About Them (W.W Norton, 2015).]

[72] Roy Cullen, *The Poverty of Corrupt Nations* (Blue Butterfly Books, 2008).
[73] *Ibid* at 1–6, 27–29, 59–61, 71–72.

Second, there is a need to deal with bribery and corruption, a growing activity that is getting completely out of hand, and one of the key factors that is slowing growth and reducing economic opportunities in the developing world.

I then argue that conventional approaches to battling poverty and corruption have not worked and need to be examined. We need to begin thinking and acting creatively to develop a new paradigm. Executing corrupt officials (25 officials have met this fate in China in the past four years) is not the answer for progressive nations with a respect for human rights and the rule of law.

The two themes mentioned above are closely interconnected. The poverty of the world's poor nations is significantly exacerbated through bribery and corruption. Later on I will describe the high degree of correlation between poverty and corruption. Not only do the problems of income distribution amongst the political elites, the working poor, and the poverty-stricken become more exaggerated, but it saps hope. Corruption also leads to political instability, donor fatigue, and the disappearance of much needed investment capital in the affected countries.

…

We know that disparities between the rich and poor nations are not a function of poverty alone. In fact, corruption is not an unknown phenomenon in the so-called developed world…. There are many underlying reasons for the wealth and income disparities. Some of these factors are not controllable, whereas corruption, with political will, can be controlled.

…

Quite clearly, corruption is a disease that affects every functioning aspect of governments. To better understand the correlation between corruption and good governance, researcher Tony Hahn created an Index of Public Governance (IPG). Hahn uses three levels of measurement to compute the index, drawing on data from the Freedom House's 2004 indices of political rights and civil liberties, Transparency International's 2004 Corruptions Perceptions Index, and the Economic Freedom of the World's 2004 annual report [these indices are further discussed in Section 4 of this chapter]. Each set of data represents a democratic and capitalist perspective of government based on the fundamentals that good governance ensures the ability of citizens to vote, encourages free enterprise, improves quality of life, and allows citizens to exercise their civil liberties.

Hahn's Index ranks 114 countries, revealing New Zealand at the top of the list with the highest model of good governance with a ranking of 9.45 out of 10. Following closely behind are Finland, Switzerland, Iceland, and Denmark. Also included in the top 10 are the United Kingdom, with a ranking of 9.2, and Australia and Canada, each

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of which have a perfect *score* in the areas of political rights and civil liberties. Surprisingly the United States missed the top 10 by one, ranking eleventh with a score of only 8.2 on economic freedom.

Most importantly, however, are the results for Africa. The first of the African countries to make the list is Botswana, which ranks 29th with a score of 7.52, with Mauritius and South Africa following closely behind. What is interesting about this, as Hahn points out, is that unemployment in Botswana is over 20 per cent and a third of the population is living with HIV/AIDS. Comparing the Index rankings with indicators of development such as life expectancy and literacy, Botswana is gravely behind South Africa and Mauritius, with a life expectancy at 33.38 years—less than half the expected age of Mauritians. Another African nation worth noting is war-torn Sierra Leone, which ranks 74th on the Index of Public Governance, ahead of both Russia (91st place) and China (99th place). Yet in comparison to indicators of development, China and Russia also greatly surpass Sierra Leone.

Hahn points to history and culture to explain why a country can have a positive ranking in the Index of Public Governance and a low incidence of development. He argues that if countries that have the foundations of good governance continue with their efforts, development will follow. This means if countries like Sierra Leone stick to the path of comparatively good governance, while countries like Russia do not, then the indicator of development should rise for Sierra Leone in comparison with Russia.

In fact, Hahn's hypothesis on the relationship between corruption and poverty appears to be supported in a correlation analysis between Hahn's IPG and GDP per capita.

…

However, good governance is not the only indicator of corruption—poverty plays a role as well. *Governance, Corruption, and Economic Performance* recently published by the IMF, includes studies on the impact of corruption on economic performance. Amongst the findings are the following:

- social indicators (e.g. child mortality rate, school drop-out rates) are worse where corruption is high;
- countries with higher corruption tend to have lower per capita income, a higher incidence of poverty and greater income inequality;
- tax revenue is lower in more corrupt countries;
- transition economies that have made more progress on structural reform tend to be less corrupt; and
- decentralization of taxation and spending improves governance.

…

Corruption and Society

In a December 2005 document, "Controlling Corruption: A Handbook for Arab Politicians," a number of negative impacts of corruption on society were identified...

- Substitutes personal gain for public good;
- Prevents or makes it more difficult for governments to implement laws and policies;
- Changes the image of politicians and encourages people to go into politics for the wrong reasons;
- Undermines public trust in politicians and in political institutions and processes;
- Erodes international confidence in the government;
- Encourages cynicism and discourages political participation;
- Can contribute to political instability, provoke coups d'état, and lead to civil wars;
- Perverts the conduct and results of elections, where they exist;
- Keeps the poor politically marginalized;
- Consolidates political power and reduces political competition;
- Delays and distorts political development and sustains political activity based on patronage, clienteles and money;
- Limits political access to the advantage of the rich;
- Reduces the transparency of political decision-making.

…

For politicians in Mexico, when it comes to dealing with the drug lords, the choices are very clear—take the money and run and turn a blind eye; or have you and your family face the consequences of violence turned against you. It becomes even more difficult for a politician attempting to fight the drug lords when the police themselves are corrupt, and when judges are also bribed. It takes a brave politician to buck this trend.

Corruption is not only related to regular crime, however; the downing of a Russian passenger airliner in August 2004 by terrorists highlights how corruption and terrorism can be linked. It is alleged that the terrorist who blew up one of the planes was initially denied boarding the aircraft because of some irregularities with her

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documentation. However, a bribe approximating US $50 was paid—allowing her to board the aircraft and eventually blow it up, causing the death of 46 people.

In conclusion, corruption has enormous implications for developing countries. It undermines democratic processes, carries with it a huge economic cost, and corruption can lead to political unrest. But corruption also impacts countries with more developed economies and it is this to aspect that we now turn our attention.

…

Developed countries are not immune from corruption—it is more a question of order of magnitude, and the level of damage that corruption can cause in the respective jurisdictions. Many or all the negative consequences associated with corruption for developing countries apply to the more developed economies. There are, however, some additional and unique considerations for the industrialized world. There is an economic cost of bribery that is reflected in a higher cost of doing business in corrupt countries. This limits levels of foreign direct investment by developed countries in developing and emerging economies. Corruption in developing countries has undoubtedly changed world migration patterns as people flee their home countries out of disgust and/or the desire to improve the quality of their lives. They may flee their country of birth if they are being persecuted for exposing corrupt practices, or when bribery has caused greater health, safety, and environmental risks. [footnotes omitted]

END OF EXCERPT

2. THE MANY FACES OF CORRUPTION

2.1 No Universal Definition of Corruption

Corruption is not a singular concept; it comes in many forms and occurs in both hidden and open places. It is truly a global phenomenon; no country is corruption free. Although global in its nature, there is no global consensus on a universal definition of corruption. The definition and public perception of what behaviour constitutes corruption will vary to some extent depending on the social, political and economic structure of each society. For example, the line between lawful gift-giving and unlawful bribery can be difficult to pinpoint. Some countries have more prevalent social, political and economic customs of gift-giving. In many Asian countries, for example, gift-giving is, or until recently has been, part of a complex

socio-economic custom. In China, that custom is called *guanxi*.[74] The line between gifts and bribes can also change over time within a country. Indeed, over the past 50-75 years, this has taken place rapidly in many countries with the unrelenting march of the market economy into so-called "developing countries."[75] Graycar and Jancsics in "Gift Giving and Corruption" provide a very useful four-part typology to distinguish between gifts and bribes in the public administration context.[76]

Although cultural difference may affect the nature, extent and kinds of "corruption" in different states, this absence of universal agreement does not mean there is no consensus at all on the meaning of corruption. The UN *Convention Against Corruption* does not define the word corruption. Instead, it adopts the pragmatic approach of describing a number of specific behaviours that parties to the Convention must criminalize as corrupt, and other specific behaviours that state parties should at least *consider* criminalizing. Thus, in a legal sense, corruption is the type of behaviour that a state has defined as corrupt. Chapter 2 of this book is devoted to an examination of the forms of conduct that have been defined as crimes of bribery or corruption.

"Corruption" is best seen as a broad, generic concept. Transparency International's definition of corruption best captures this generic flavour: "corruption is the abuse of entrusted power for private gain." The essence of corruption is the combination of three elements: abuse, entrusted power and private gain. The abuse of entrusted power must be more than accidental or negligent; it must be intentional or knowing. TI's definition includes

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[74] A Smart, "Gifts, Bribes and Guanxi: A Reconsideration of Bourdieu's Social Capital" (1993) 8:3 Cultural Anthropology 388.

[75] For example, P Verhezen, in "Gifts and Alliances in Java" (2002) 9:1 J European Ethics Network 56, argues that the traditional Javanese norms of harmony and respect have been replaced by economic values encouraging individualistic consumption and accumulation rather than sharing of communal wealth. He states that "the [traditional Javanese] logic of the gift and its inherent three-fold structure of obligation [harmony, hierarchy, respect and reciprocity] are [now] used for personal gain, not maintaining a social order. ... The rhetoric and ceremonial forms of a traditional culture are used to camouflage what are in fact business or commercial, and in extreme cases even extortionary relationships." This example is cited by Douglas W Thompson, "A Merry Chase Around the Gift/Bribe Boundary," a 2008 LLM Thesis, Faculty of Law, University of Victoria, at 54-56. Thompson (in Chapter 2) also describes a somewhat similar shift in ancient Athens, whereby some traditionally proper gifting became unethical and illegal as Athens society changed.

[76] Adam Graycar & David Jancsic, "Gift Giving and Corruption" (2017) 40 Intl J of Public Admin 1013-1023. Their four-part typology is divided into social gift, social bribe, bureaucratic gift and bureaucratic bribe. They apply (at page 1020) a series of questions to help distinguish the four different types of exchanges:

> The variables that we would consider for each of these are: what is the primary function of the exchange; what is it that is being transacted; what is expected in return; does the organizational affiliation of the participants matter; are they exchanging their own resources, or somebody else's (the organization's); is there transparency in the transaction; who are the winners and who are the losers; what is the primary means of regulation of the transaction.

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abuse of power by public officials (sometimes called public corruption) as well as abuse of entrusted power by private citizens in business (also called private corruption).[77] Private corruption is often dealt with through offences like theft, embezzlement, or the offering and accepting of secret commissions. When describing corruption, adjectives are often used to indicate the context or form of the corruption in question, such as:

- grand corruption and petty corruption
- public or private corruption
- domestic or local corruption versus foreign corruption
- systemic versus occasional corruption
- supply-side corruption (i.e. offering or giving bribes) versus demand-side corruption (i.e. requesting or receiving bribes), which are also sometimes called active corruption (for the briber) and passive corruption (for the bribed official)
- administrative corruption versus state capture[78]
- political corruption as a species of public corruption, including some forms of financial contributions to political parties and election campaigns, patronage, cronyism and various forms of vote buying
- books and records offences which are accounting offences designed to hide the giving or accepting of bribes

Graycar and Prenzler, in their very readable primer on corruption, *Understanding and Preventing Corruption*, further suggest that corruption should be examined in the context of four components: types, activities, sectors, and places (TASP).[79] They describe the nature and meaning of each of these components. For example, types of corruption include bribery,

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[77] In "The Law and Economics of Bribery and Extortion" (2010) 6:1 Ann Rev L & Soc Sci 217, Susan Rose-Ackerman notes that many jurisdictions do not criminalize private-to-private bribery unless accompanied by some other offence like extortion. In spite of this lack of criminalization, Rose-Ackerman is clear that private-to-private bribery has the potential for broader negative impacts, such as the development of monopolies harmful to consumers and suppliers, diluted product quality and limited entry for new businesses.

[78] Arnone and Borlini (2014) at 2, explain that administrative corruption "concerns all public employees' or public officials' actions for private gain that distort the application and enforcement of existing laws or rules; generally, these actions grant exemptions or tax allowances to specific agents. Alternatively, they are aimed at giving priority access to public services to an elite of agents." State capture, according to Arnone and Borlini, encompasses "all illegal actions aimed at influencing the decision-making process of policy making in the different spheres of the life of a country." Instead of being held accountable through public scrutiny and opinion, authorities in a situation of state capture exploit "illegal and secret channels that aim at favoring the interests of specific groups at the expense of everybody else. These channels are clearly accessible only to a limited group of 'insiders' at the expense of those who are 'outsiders' and do not participate in bribery." State capture is also briefly discussed in Chapter 11, Section 1.1.

[79] Adam Graycar & Tim Prenzler, *Understanding and Preventing Corruption* (Palgrave Macmillan, 2013), ch 1.

abuse of discretion, trading in influence and patronage. Corruption can take place through a variety of activities, including the making of public appointments, the procurement of public goods, the delivery of public services and the regulation and auditing of administrative tasks and obligations. Corruption can occur in any sector of society including construction, extractive industries, municipal governance, immigration, education, health care, sports (especially at the international level), and law enforcement. And finally, corruption can take place internationally, nationally, regionally, and locally, in workplaces, governments, and corporate offices.

Another analytic tool for describing corruption is the 4 W's—who, what, where and why. The "who" describes the various actors (e.g., political leaders, government employees, corporate agents, and executives) involved in corruption events, and the "what" describes the size (petty or grand), the frequency (rare or common) and the type of corruption offences being committed (e.g., bribery of a government official to obtain a government procurement contract or influence peddling in appointments to administrative boards and tribunals). The "where" describes both the place (national or international) and the sector (public works, law enforcement, etc.). Finally, the "why" deals with the purposes or motives for engaging in corruption (including financial need, the need for acceptance and friendship, competition, and the desire to succeed, promotion of perceived efficiency, greed, etc.).

In a more global sense, the 2014 OECD *Foreign Bribery Report* provides a glimpse into the prevalence and characteristics of the corruption of foreign public officials.[80] The Report examines enforcement actions (207 bribery schemes) against 263 individuals and 164 entities for the offence of bribery of foreign public officials in international business transactions. The vast majority of the enforcement actions took place in the US (62%) and Germany (12.5%), with a sprinkling of enforcement actions in Korea (5%), the UK (2.8%), Canada (1.9%) and other countries. The sanctioned offences occurred all over the world. According to the report, the majority of bribes (or at least the majority of bribes targeted by law enforcement officials) came from large companies with more than 250 employees. Senior management were involved in over 50% of cases. 80% of bribes were directed towards officials of state-owned enterprises, followed by heads of state (6.97%), ministers (4%) and defence officials (3%). The values of the bribes were only available in 224 cases, but totaled $3.1 billion in those cases. At least 71% of bribes involved an intermediary such as an agent, corporate vehicle, lawyer or family member. Interestingly, almost half of the cases involved the bribery of officials in countries with high or very high human development scores, casting doubt on the idea that most bribery of public officials occurs in developing countries. In terms of sectors, 57% of cases involved bribes to secure public procurement contracts.

The above description reveals some of the many faces of corruption. Recognition of corruption's many forms and an accurate description of those various forms is essential to finding appropriate responses and mechanisms in fighting corruption. The most effective anti-corruption mechanisms are varied and multi-faceted. They vary with the type of

[80] OECD, *Foreign Bribery Report* (OECD, 2014), online: <http://dx.doi.org/10.1787/9789264226616-en>.

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corruption being targeted and the social, political and economic context in which that corruption occurs. There are no "one size fits all" solutions to corruption. Remedies must be tailor-made and evaluated on an ongoing basis.

2.2 Imposing Western Definitions of Corruption Globally

Some commentators claim that the developed Western countries have imposed their conception of corruption on the rest of the world via international anti-corruption instruments.[81] These instruments are heavily focused on the Western economic priorities of fostering international trade and leveling the playing field for competing businesses. As a result, the international conventions focus on economic corruption of foreign officials rather than more subtle yet venomous forms of political corruption, such as corrupt party and campaign financing, cronyism or vote-buying (see Chapter 13 of this book).

The history of UNCAC and the OECD Convention (outlined in more detail in Section 6 below) explains why those conventions focus primarily on the grand corruption of political leaders in foreign states when securing lucrative contracts as opposed to political corruption. The concern over grand corruption in foreign countries is relatively recent. The history of that concern is recounted in Section 6 of this chapter. In short, the Watergate investigation led to the revelation of large, illegal presidential campaign contributions by prominent corporations through offshore subsidiaries. Further, the investigation revealed a systemic practice of corporate bribery of foreign public officials. Public outrage led to the enactment of the 1977 US *Foreign Corrupt Practices Act*, which made it an offence for US corporations to bribe foreign officials in order to obtain contracts abroad. Surprisingly, bribery of foreign officials was not an offence in any other country. Bribes paid in a foreign country to a foreign official were viewed as a matter for that foreign country. Indeed, bribes to foreign officials were tax deductible as an expense of doing business. Not surprisingly, American companies complained loudly that the *FCPA* put them at a serious competitive disadvantage in obtaining foreign government contracts, since other industrial countries were continuing to bribe foreign officials. Rather than reverse course and decriminalize bribery of foreign public officials, the American government undertook an intense international campaign to bring the major economic countries of the world into line with the American position. The US succeeded with the coming into force of the OECD Anti-Bribery Convention in 1999, followed by the broader UNCAC in 2005.

As this history demonstrates, the international conventions on corruption were born from American concerns about loss of international business and the absence of fair competition.

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[81] See, for example, T Polzer, "Corruption: Deconstructing the World Bank Discourse" (2001) Development Studies Institute, London School of Economics and Political Science Working Paper I. Polzer notes that the word "corruption" has no equivalent in many languages. See also A Gupta, "Blurred Boundaries: The Discourse of Corruption, the Culture of Politics, and the Imagined State" (1990) 22:2 Am Ethnologist 375; E Harrison, "Unpacking the Anti-Corruption Agenda: Dilemmas for Anthropologists" (2006) 34:1 Oxford Development Studies 16.

As discussed in Section 6 of this chapter, during UNCAC's negotiation, Austria, France, and the Netherlands advocated for regulations to increase the transparency of elections and campaign financing, but the US opposed this inclusion. Instead, Article 6 of the Convention merely requires state parties to *consider* implementing measures to increase transparency in elections and campaign financing.

Few commentators argue that grand corruption of foreign public officials should not be criminalized. However, there is merit to the observation that the international conventions focus too exclusively on Western concerns regarding economic trade. One could argue that Western countries display a double standard by roundly denouncing foreign economic bribery while failing to promote global standards regarding political corruption.

2.3 The Prevalence of Corruption

Section 4 of this chapter discusses the different methods for measuring the prevalence of corruption nationally and globally. But one doesn't need sophisticated measuring devices to know that corruption is rampant world-wide. One need only peruse the news over the past year or two to see the variety of people, places and activities involved in corruption. This section sets out briefly some of these corruption scandals. For example, nine US Navy officers were recently charged with accepting cash, hotel expenses and the services of prostitutes in exchange for providing classified US Navy information to a defence contractor in Singapore.[82] In May 2015, 31 executives at a Chinese mobile carrier were punished for creating a "small coffer" by inflating conference expenses and secretly keeping client gifts. The "small coffer" funds were then used for lavish entertainments.[83] In May 2015, BHP Billiton, a mining giant, agreed to pay $25 million to settle charges laid by the US Securities Exchange Commission after BHP paid for government officials from various countries to attend the 2008 Olympics in Beijing. The officials were connected to pending contract negotiations or regulatory issues involving BHP.[84] Malawi's "cashgate" has been unfolding since 2013, when investigations into the siphoning of millions of dollars by civil servants began. In a recent development, two top Malawian army officers were arrested for their involvement in the siphoning of $40 million under the guise of ordering new military uniforms that never materialized.[85] In June 2015, a Beijing traffic police officer stood trial for

[82] Richard L Cassin, "Navy Officer Is Ninth Defendant to Plead Guilty in 'Fat Leonard' Bribe Scandal", *The FCPA Blog* (16 April 2015), online: <http://www.fcpablog.com/blog/2015/4/16/navy-officer-is-ninth-defendant-to-plead-guilty-in-fat-leona.html>.

[83] Hui Zhi, "'Small Coffers' at China Telecom Paid for Feasts and Prostitutes", *The FCPA Blog* (22 May 2015), online: <http://www.fcpablog.com/blog/2015/5/22/small-coffers-at-china-telecom-paid-for-feasts-and-prostitut.html>.

[84] Richard L Cassin, "BHP Billiton Pays $25 Million to Settle Olympics FCPA Offences", *The FCPA Blog* (20 May 2015), online: <http://www.fcpablog.com/blog/2015/5/20/bhp-billiton-pays-25-million-to-settle-olympics-fcpa-offense.html>.

[85] "Two Top Army Officers Arrested in Malawi's Corruption Probe", *The New York Times* (13 May 2015).

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accepting $3.9 million in bribes in exchange for privileged license plates.[86] In the same month, a New Jersey cardiologists' practice agreed to pay $3.6 million to settle allegations that it had falsely billed federal health care programs for medically unnecessary tests.[87]

In March 2016, the South African Supreme Court ruled that President Jacob Zuma had breached the constitution by failing to pay back the $23 million of taxpayers' money he had used to upgrade his private residence. He had used the money to fund additions to his home in Nkandla including a cattle enclosure, an amphitheatre, a swimming pool, a visitor centre and a chicken run. Since then, further allegations of corruption against Zuma have surfaced.[88]

In November 2016, JPMorgan Chase agreed to pay $246 million in fines in a settlement with US officials, for hiring unqualified children of China's ruling elite in exchange for gaining lucrative business.[89] In December 2014, Alstom, a Paris-based company, was ordered to pay $772 million in criminal penalties to settle charges under the US *Foreign Corrupt Practices Act*. The charges related to $75 million in bribes paid by Alstom to public officials in Indonesia, Saudi Arabia, Egypt, and the Bahamas in order to win contracts.[90]

In May 2015, four of the world's largest banks (JPMorgan Chase, Citigroup, Barclays, and the Royal Bank of Scotland) pled guilty to systematic rigging of the currency markets for profit between 2007 and 2013. While paying a total of more than $5 billion in fines, the impact and size of that fine can be put in perspective by noting that JPMorgan Chase earned $4.1 billion from its currency business in the first quarter of 2015.[91]

In June 2015, Chinese state media reported that Zhou Yongkang, former security czar and former member of the Politburo Standing Committee, was sentenced to life imprisonment

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[86] Hui Zhi, "Beijing: Traffic Cop Made $2.9 Million Selling Lucky License Plates", *The FCPA Blog* (4 June 2015), online: <http://www.fcpablog.com/blog/2015/6/4/beijing-traffic-cop-made-39-million-selling-lucky-license-pl.html>.

[87] Richard L Cassin, "New Jersey Cardiologists Pay $3.6 for False Claims Settlement, Whistleblower Awarded $650,000", *The FCPA Blog* (4 June 2015), online: <http://www.fcpablog.com/blog/2015/6/4/new-jersey-cardiologists-pay-36-for-false-claims-settlement.html>.

[88] "Jacob Zuma Corruption Report Blocked in South Africa", *BBC News* (14 October 2016), online: <http://www.bbc.com/news/world-africa-37655939>.

[89] Matt Egan, "JP Morgan Fined for Hiring Kids of China's Elite to Win Business", *CNN Money* (17 November 2016), online: <http://money.cnn.com/2016/11/17/investing/jpmorgan-china-hiring-bribery-settlement/index.html>.

[90] Richard L Cassin, "Alstom Pays $772 Million for FCPA Settlement, SFO Brings New Charges" *The FCPA Blog* (22 December 2014), online: <http://www.fcpablog.com/blog/2014/12/22/alstom-pays-772-million-for-fcpa-settlement-sfo-brings-new-c.html>.

[91] Michael Corkery & Ben Protess, "Rigging of Foreign Exchange Market Makes Felons of Top Banks", *The New York Times* (20 May 2015), online: <http://www.nytimes.com/2015/05/21/business/dealbook/5-big-banks-to-pay-billions-and-plead-guilty-in-currency-and-interest-rate-cases.html>.

in a one-day closed trial. Mr. Zhou admitted to accepting a bribe of $26 million and a similar bribe for his son and daughter. Those bribes only form part of the estimated $16 billion that Mr. Zhou is said to have pilfered. Mr. Zhou was the most senior Chinese official to be convicted of corruption in an ongoing campaign to reduce corruption by making examples of President Xi Jinping's political rivals, such as Bo Xilai in 2013.[92]

In Brazil, a major corruption scandal has been unfolding since 2014 involving Brazil's state-owned oil company, Petrobras. Brazilian prosecutors allege that bribery and kickback schemes at Petrobras involved about $2 billion in bribes and illicit funds. The country's biggest construction companies and many individuals have been charged with corruption-related offences over the past year. For example, Petrobras' former engineering director, Renato Duque, was arrested in November 2014 for allegedly taking $1 million in bribes and $174,000 worth of art in exchange for favouring one company in a bid for an undersea gas pipeline contract. In June 2015, five senior executives of construction companies were arrested in relation to alleged kickbacks and overbilling schemes between contractors and officials at Petrobras. Petrobras is also pursuing civil lawsuits against engineering and construction firms to recover funds tied to corruption. The former CEO of Petrobras, along with five other executives, resigned in February 2015, and two million people protested across Brazil in response to the scandal in March 2015. More protests against corruption at Petrobras took place in August 2015, with many protestors calling for President Dilma Rousseff to step down. In late August 2015, the speaker of the lower house of congress, Eduardo Cunha, was charged with corruption for allegedly accepting $5 million in bribes in connection with the construction of two Petrobras drilling ships. In September 2015, the former presidential chief-of-staff was charged with corruption due to his alleged involvement in kickback schemes at Petrobras. Prosecutors also allege that bribe money connected to the Petrobras scandal has made its way to the ruling party's campaign coffers.[93] As of March 2016, the government of Brazil charged 179 people with criminal offences in relation to the scandal and had secured 93 convictions.[94] In May of 2016, President Rouseff was suspended from her position as President in order to face an impeachment trial. In August 2016, by a 61 to 20 vote of the Senate, Rousseff was convicted of manipulating the federal budget in order to conceal the country's financial problems, impeached, and removed from office.[95]

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[92] Nathan Vanderklippe, "Former Chinese Security Czar Jailed for Life", *The Globe and Mail* (12 June 2015). See also Gerry Ferguson, "China's Deliberate Non-Enforcement of Foreign Corruption: A Practice That Needs to End" (2017) 50:3 Intl Lawyer 503.

[93] "Brazil's Former Presidential Chief of Staff Charged with Corruption", *The Guardian* (4 September 2015), online: <http://www.theguardian.com/world/2015/sep/04/brazils-former-presidential-chief-of-staff-charged-with-corruption>.

[94] Joe Leahy, "What Is the Petrobras Scandal that Is Engulfing Brazil?", *Financial Times* (13 March 2016), online: <https://www.ft.com/content/6e8b0e28-f728-11e5-803c-d27c7117d132>.

[95] Simon Romero, "Dilma Rousseff is Ousted as Brazil's President in Impeachment Vote", *The New York Times* (31 August 2016), online: <http://www.nytimes.com/2016/09/01/world/americas/brazil-dilma-rousseff-impeached-removed-president.html>.

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Since Brazil's new president, Michel Temer, and his conservative government have come into power, another scandal came to light. Brazilian police launched an investigation into fraudulent investments made by large pension funds of state-run companies whose board members were appointed by politicians. The pension funds implicated in the investigation controlled 280 billion reals (approximately US$87 billion) in assets in 2015, and the fraud scheme was valued at approximately 8 billion reals (approximately US$2.5 billion). Many of the politicians under investigation are those who were already under investigation in connection with the Petrobras scandal.[96] Eight of the ten cases upon which the investigation is based involved allegedly fraudulent or reckless investments made by the companies' equity investment divisions.[97] Forty senior financiers and executives were ordered to temporarily step down from their positions, abstain from capital market activity, and forfeit their passports.[98] The most noteworthy of such executives is the chief executive of JBS, the world's largest beef exporter.[99]

And nearly the whole world knows about the corruption charges laid against senior FIFA officials by the US.[100] FIFA officials were indicted based on allegations that they took part in accepting bribes and kickbacks over the course of 24 years. The officials were alleged to have accepted bribes in relation to past bidding processes for hosting rights and in the awarding of broadcasting and marketing rights for various tournaments. The US trial date was tentatively set to begin in February, 2017. Former FIFA President Sepp Blatter, resigned just four days after his re-election in June 2015 because of the allegations of corruption. Blatter, who is not facing charges in the US, said that he will defend FIFA in the US trial.[101] In March 2016, FIFA filed a victim statement and request for restitution. In the restitution claim, FIFA argues that its organization as a whole was not corrupt, but rather only its leaders were. As such, it claims that some of the $290 million seized or frozen by US prosecutors should be used to compensate the victims of the corruption: FIFA and its member associations.[102] In October of 2016, former Costa Rican soccer federation president and member-elect to FIFA's

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[96] Anthony Boadle, "Brazil's New Government Buffeted by Pension Fund Scandal", *Reuters* (6 September 2016), online: <http://www.reuters.com/article/us-brazil-corruption-idUSKCN11C2JK>.
[97] Julia Leite and Gerson Freitas Jr, "Brazil's Biggest Pension Funds Targeted in New Fraud Probe", *Bloomberg* (5 September 2016), online: <https://www.bloomberg.com/news/articles/2016-09-05/police-target-brazil-s-four-biggest-pension-funds-in-fraud-probe>.
[98] Cesar Raizer, "JBS CEO Ordered to Step Aside in Brazil Pension Fund Probe", *Reuters* (7 September 2016), online: <http://www.reuters.com/article/us-brazil-corruption-pensions-idUSKCN11B14G>.
[99] Boadle, (6 September 2016).
[100] For a more detailed account and analysis of the FIFA corruption scandal, see Bruce W Bean, "An Interim Essay on FIFA's World Cup of Corruption: The Desperate Need for International Corporate Governance Standard at FIFA" (2016) 22:2 ILSA J Intl & Comp L 367.
[101] Carl Markam, "Sepp Blatter Will Defend FIFA in Corruption Trial as 39 Executives and Officials Face Charges by American Prosecutors", *Mail Online* (15 April 2016), online: <http://www.dailymail.co.uk/sport/football/article-3542736/Sepp-Blatter-defend-FIFA-corruption-trial-39-executives-officials-face-charges-American-prosecutors.html>.
[102] Alex Johnson, "FIFA Demands Millions in Restitution from U.S. – For its Own Misdeeds", *NBC News* (16 March 2016), online: <http://www.nbcnews.com/storyline/fifa-corruption-scandal/fifa-demands-millions-restitution-u-s-its-own-misdeeds-n540456>.

executive committee, Eduardo Li, plead guilty in a federal court in Brooklyn to charges in connection with the FIFA scandal. He admitted to accepting hundreds of thousands of dollars in bribes for awards of contracts for media, marketing, and sponsorship rights. He also admitted to accepting bribes in connection to friendly matches and admitted to embezzling $90,000 sent by FIFA to the Costa Rican soccer federation for the 2014 Under 17 FIFA Women's World Cup tournament. So far, Li was among 17 people and 2 entities who plead guilty to charges in connection with the FIFA investigation.[103]

In Switzerland, authorities are probing the possibility of corruption in the bidding process for the upcoming World Cups in Qatar (2022) and Russia (2018). According to Domenico Scala, the chairman of FIFA's compliance and audit committee, Qatar and Russia could be denied the opportunity to host the World cup if evidence of bribery in the bidding process comes to light. In June, 2015, Switzerland announced they were investigating 53 "suspicious activity reports" in respect to the possible laundering of bribes in connection to the hosting of the Russia and Qatar World Cups. Sepp Blatter, who is a Swiss citizen, is involved in this investigation. By September 2015, Swiss Attorney General, Michael Lauber, stated that 121 suspicious banking transactions were being investigated. Since then, a spokesman for the Attorney General's office has stated that the number of incidents under investigation had surpassed 200. Swiss officials have estimated that the case will not proceed to trial until at least the end of 2020.[104] Former UEFA President Michel Platini was initially expected to succeed Blatter as President of FIFA, but that was prevented as he is under investigation by Swiss authorities in regard to a $200,000 payment he received from Sepp Blatter in 2011.[105] Gianni Infantino, former General Secretary of UEFA, took over for Blatter as President of FIFA since his election in February 2016.[106]

And elsewhere, the Panama Papers prompted widespread shock and concern about tax evasion, laundering of proceeds of corruption, and other secretive financial dealings facilitated by offshore accounts and shell companies. In 2014, Bastian Obermayer, a journalist with the German newspaper Suddeutsche Zeitung, received an anonymous telephone call. Shortly thereafter, Bastian Obermayer and his colleague Frederik Obermaier received the 11.5 million documents that are now known as the Panama Papers.[107] The leaked documents came from the Panamanian law firm Mossack Fonseca, which specializes in secretive

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[103] Nate Raymond, "Ex-Costa Rican Soccer Chief Li Pleads Guilty in U.S. Bribery Case", *Reuters* (7 October 2016), online: <http://www.reuters.com/article/soccer-fifa-court-idUSL2N1CD1O3>.

[104] Vivek Chaudhary, "FIFA Investigation Could Take Five Years – Swiss Attorney General", *ESPN FC* (2 December 2015), online: <http://www.espnfc.us/blog/fifa/243/post/2736523/fifa-investigation-could-take-five-years-swiss-ag>.

[105] Bruce W Bean, "An Interim Essay on FIFA's World Cup of Corruption: The Desperate Need for International Corporate Governance Standard at FIFA" (2016) 22:2 ILSA J Intl & Comp L 367 at 385.

[106] *Ibid* at 392.

[107] Paul Farhi, "'Hello. This is John Doe': The mysterious message that launched the Panama Papers", *The Washington Post* (6 April 2016), online: <https://www.washingtonpost.com/lifestyle/style/hello-this-is-john-doe-the-mysterious-message-that-launched-the-panama-papers/2016/04/06/59305838-fc0c-11e5-886f-a037dba38301_story.html>

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offshore banking for the wealthy.[108] The International Consortium of Investigative Journalists (ICIJ) managed a team of 370 journalists from roughly 100 media organizations across 70 countries, which finally published the first coverage of the Panama Papers in April of 2016.[109] Of course, not all offshore accounts are used for illegal activities, but because of their secrecy they are often used for money laundering, hiding the proceeds of bribery, and tax evasion.[110] Evidence in the Panama Papers of legal, but perhaps immoral, tax avoidance has prompted backlash against the some of the world's most powerful and wealthy individuals and companies. Internationally, the revelations in the Panama Papers instigated proposals for tax reform and calls for sanctions against countries that operate as tax havens.

The Panama Papers contain information about a multitude of politicians such as Ukrainian President Petro Poroshenko and King Salman of Saudi Arabia. Russian President Vladimir Putin's associates and family members of Chinese President Xi Jinping are also mentioned.[111] On April 5, 2016, Sigmunder David Gunnlaugsson stepped down from his position as Prime Minister of Iceland in response to protests following the release of the Panama Papers. The documents showed that Gunnlaugsson's wife owned an offshore company that held millions of dollars in debt from collapsed Icelandic banks.[112] Shortly after he took over as President of FIFA, Gianni Infantino became the subject of an investigation by the Swiss Federal Police because the Panama Papers included a contract signed years earlier by Infantino when he was at UEFA. The contract suggests that Infantino may have sold broadcast rights below market price only to have them sold later at a far higher price.[113] While serving as Prime Minister of the United Kingdom, David Cameron came under scrutiny because the Panama Papers revealed that his late father owned an offshore investment fund called Blairmore Holdings. While he initially denied having profited from the investments, on April 7, 2016, Cameron admitted that he had sold shares in the company for more than £30,000 shortly before becoming Prime Minister. Although there is no suggestion that the fund facilitated any illegal activity, Cameron's lack of transparency was criticized.[114] The Papers further revealed that three of Pakistani Prime Minister Nawaz Sharif's children owned offshore assets not included on his family's wealth statement.[115] On November 3, 2016, the highest court of Pakistan appointed a commission to investigate Sharif's finances after months of disagreement between Pakistan government and opposition

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[108] Kirk Semple, Azam Ahmed & Eric Lipton, "Leaks Casts Light on Law Firm Built on Secrecy", *The Globe and Mail* (8 April 2016).
[109] Farhi (2016).
[110] Frank Jordans & Raf Casert, "EU Threatens to Sanction Tax Havens", *The Globe and Mail* (8 April 2016).
[111] Farhi (2016).
[112] Ragnhildur Sigurdardottir, "Iceland Appoints New Prime Minister", *The Globe and Mail* (7 April 2016).
[113] Brian Homewood, "Infantino Subject of UEFA Office Raid", *The Globe and Mail* (7 April 2016).
[114] "David Cameron Had Stake in Father's Offshore Fund", *BBC News* (7 April 2016), online: <http://www.bbc.com/news/uk-politics-35992167>.
[115] "Panama Papers: Pakistan PM Nawaz Sharif to face investigators", *BBC News* (20 April 2017), online: <http://www.bbc.com/news/world-asia-36092356>.

party as to the terms of reference for the commission.[116] The Panama Papers also revealed that entrepreneurs and corrupt public officials in several African countries such as Nigeria, Algeria, and Sierra Leone used shell companies to hide profits from the sale of natural resources and to hide bribes paid in order to gain access to the resources.[117]

In other financial news, the US corruption case against Och-Ziff Capital Management, a major hedge fund company, was settled in September 2016. The corruption perpetrated by the hedge fund involved payments of bribes totaling over $100 million to officials in Congo, Libya, Chad, Niger, and Guinea to gain influence and obtain mining assets. In the terms of the settlement, Och-Ziff, which manages $39 billion, agreed to pay $412 million in criminal and civil penalties. This payment was one of the largest that has been approved under the United States' *Foreign Corrupt Practices Act*.[118] And, in January 2017, the SEC filed a civil complaint against two former executives of Och-Zifff in respect to the abovementioned bribery schemes.[119]

Significant controversy has also surrounded the 1MDB affair. 1MDB is a Malaysian state investment firm launched in 2009, the same year that Najib Razak became Prime Minister of Malaysia. The fund was supposed to be used to increase economic development in the country. By 2014, the company was over US$11 billion in debt. In 2015, information surfaced about a suspicious $700 million payment into Najib's bank accounts made in 2013. This information led to investigations into 1MDB in at least six countries. Najib claimed that the transfer was a legal donation from a Saudi benefactor.[120]

On July 20, 2016, the United States Department of Justice filed lawsuits alleging that between 2009 and 2015 over $3.5 billion had been taken from the fund by officials of 1MDB and their associates.[121] The lawsuits outline three separate phases of the theft. The first $1 billion was allegedly obtained fraudulently through a fictitious joint venture between 1MDB and PetroSaudi. The following two phases focus on $2.7 billion in funds that Goldman Sachs

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[116] Will Fitzgibbon, "Pakistan's PM Responds to Supreme Court Hearing on Panama Papers", *ICIJ* (3 November 2016), online: <https://panamapapers.icij.org/20161103-pakistan-supreme-court.html>.
[117] Scott Shane, "Panama Papers Reveal Wide Use of Shell Companies by African Officials", *The New York Times* (25 July 2016), online: <http://www.nytimes.com/2016/07/25/world/americas/panama-papers-reveal-wide-use-of-shell-companies-by-african-officials.html>.
[118] Geoffrey York, "Bribe to Congolese Officials Revealed in U.S. Corruption Case", *The Globe and Mail* (30 September 2016), online: <http://www.theglobeandmail.com/news/world/bribe-to-congolese-officials-revealed-in-us-corruption-case/article32195819/>.
[119] Richard L Cassin, "SEC Charges Two 'Masterminds' behind Och-Ziff Africa Bribe Scheme", *The FCPA Blog* (26 January 2017), online: <http://www.fcpablog.com/blog/2017/1/26/sec-charges-two-masterminds-behind-och-ziff-africa-bribe-sch.html>.
[120] "Thick and Fast: America Applies to Seize Assets Linked to a Malaysian State Investment Firm", *The Economist* (23 July 2016), online: <http://www.economist.com/news/finance-and-economics/21702481-america-applies-seize-assets-linked-malaysian-state-investment-firm-thick>.
[121] *Ibid.*

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raised and diverted into a Swiss offshore company and a Singapore bank account.[122] The proceedings commenced by the US Justice Department sought to seize over $1 billion in assets including luxury properties, art by Van Gogh and Monet, and a jet. The money from 1MDB was also reportedly used to finance production of the film "Wolf of Wall Street." The production company that made the movie was cofounded by Najib Razak's stepson, Riza Aziz. Among the several individuals mentioned in the lawsuit is a high-ranking Malaysian official who is called "Malaysian Official 1" and identified as a relative of Riza Aziz.[123] This individual is presumed to be Prime Minister Najib Razak.[124] The US proceedings that started in July of 2016 only concern seizure of assets. Criminal charges against the individuals involved may follow.[125] As of December 2016, US authorities were investigating Goldman Sachs' role in the scandal. Goldman has maintained that it believed the funds were used to buy legitimate assets for 1MDB.[126]

Authorities in Switzerland and Singapore undertook separate investigations into the 1MDB scandal. On July 21, 2016, Singapore authorities reported having frozen or seized approximately $175 million in its investigations into transactions linked to 1MDB. They also announced forthcoming proceedings against three large Singapore banks for their inadequate attempts to prevent money-laundering.[127] In Switzerland, authorities launched an investigation into whether or not Swiss banks were used to misappropriate funds diverted from 1MDB. In October of 2016, Switzerland's Office of the Attorney General announced that a Ponzi scheme may have concealed the alleged fraud.[128]

Although not strictly a case of corruption, the recent scandal involving Volkswagen's fraudulent avoidance of state emission standards is noteworthy. In September 2015, the US Environmental Protection Agency learned that Volkswagen sold innocent Americans cars equipped with special software that would automatically cheat emissions tests.[129] In June 2016, Volkswagen agreed to spend approximately $14.7 billion in order to resolve federal and state civil allegations. However, the US Department of Justice stated that the settlement would not eliminate the possibility of Volkswagen being held criminally liable for its

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[122] Randeep Ramesh, "1MDB: The Inside Story of World's Biggest Financial Scandal", *The Guardian* (28 July 2016), online: <https://www.theguardian.com/world/2016/jul/28/1mdb-inside-story-worlds-biggest-financial-scandal-malaysia>.
[123] *The Economist* (23 July 2016).
[124] Ramesh (28 July 2016).
[125] *The Economist* (23 July 2016).
[126] Nathaniel Popper & Matthew Goldstein, "1MDB Case Hangs over Goldman Sachs as Investigators Dig for Answers", *The New York Times* (22 December 2016), online: <http://www.nytimes.com/2016/12/22/business/dealbook/1mdb-goldman-sachs.html>.
[127] *The Economist* (23 July 2016).
[128] Joshua Franklin & Saeed Azhar, "Swiss Prosecutors Probe Suspected $800 Million Misappropriation from Malaysia's 1MDB", *Reuters* (5 October 2016), online: <http://in.reuters.com/article/malaysia-scandal-swiss-idINKCN1250R5>.
[129] Russell Hotten, "Volkswagen: The Scandal Explained", *BBC News* (10 December 2015), online: <http://www.bbc.com/news/business-34324772>.

actions.[130] Indeed, on January 11, 2017, Volkswagen AG agreed to plead guilty to three felony counts and agreed to pay a $2.8 billion criminal penalty. In addition, a grand jury indicted six VW executives and employees for their roles in the emission standards fraud.[131]

3. DRIVERS OF CORRUPTION

Sorting out the causes of corruption is a complicated task. In their book *Corruption: Economic Analysis and International Law,* Arnone and Borlini note that "[a]ny attempt to isolate and distinguish causes [of corruption] from effects suffers from the limitations imposed by the presence of multi-directional causal chains."[132] For example, although bad governance has been shown to contribute to corruption, corruption can also contribute to bad governance.

Some factors that enable or drive corruption can, however, be articulated. A good starting point is Arnone and Borlini's observation that discretion and conflict of interest are the breeding grounds for corruption. Bad governance can strengthen the presence of these "preconditions." If lack of accountability is added to the mix, particularly where officials have "monopoly power over discretionary decisions," opportunities for corruption will be rife.[133] Complex and opaque systems of rules tend to foster this lack of accountability, along with insufficient stigma and enforcement surrounding corruption offences.

In a study for the World Bank entitled *Drivers of Corruption*, Soreide enumerates other, more specific drivers of corruption.[134] She begins by describing factors which increase opportunities for "grabbing" by public officials. When officials have the power to control the supply of scarce goods or services, opportunities to create shortages and demand high payments will increase. This is particularly problematic if citizens cannot choose between officials. Soreide maintains that facilitation of financial secrecy and secret ownership also drives corruption, along with information imbalances between principals and agents. For example, principals might not be informed regarding corruption in foreign markets, leaving openings for agents to exploit this ignorance by promoting bribery and pocketing a portion of the proceeds. Soreide also points out that revenues from natural resource exports and

[130] Richard L Cassin, "VW's $14.7 Billion Compliance Failure: Deal Announced to Settle U.S. Civil Emission Claims", *The FCPA Blog* (28 June 2016), online: <http://www.fcpablog.com/blog/2016/6/28/vws-147-billion-compliance-failure-deal-announced-to-settle.html>.

[131] Richard L Cassin, "Volkswagen Pleads Guilty in U.S. Criminal Case, Six VW Employees Indicted", *The FCPA Blog* (11 January 2017), online: <http://www.fcpablog.com/blog/2017/1/11/volkswagen-pleads-guilty-in-us-criminal-case-six-vw-employee.html>.

[132] Arnone & Borlini (2014) at 4.

[133] *Ibid* at 21.

[134] Tina Soreide, *Drivers of Corruption* (World Bank, 2014) at 9–38.

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development aid are vulnerable to grabbing. In the context of aid development, both donor and recipient countries contribute to misuse of aid funds:[135]

> The more urgent the development needs, the more the aid-offering entity pays, and the weaker the recipient government's incentives to perform better, because better performance will eventually cut the level of aid received. The desire to offer financial and other forms of support is particularly strong in emergency situations and in the most-fragile states...Such sets of circumstances are vulnerable to theft and corruption because oversight systems are weak and funds pour in from many sources, continuing as long as the needs are dire.
>
> …
>
> Many authors have pointed at incentive problems of donor agencies, and there are a number of examples where representatives of donor agencies have been involved in illegal transactions or activities that violate their organization's rules and the recipient country's legislation. Although donor agencies are aware of the potentially troubling impact of such cases on the legitimacy of their operations, they, like other bureaucracies, have encountered difficulties eradicating the challenges completely and handling revealed cases of fraud and corruption effectively. ... Jansen [2014] explains a donor-government's disincentive to react partly as a trade-off between the cost of exercising control and the ease of referring to recipient responsibilities. Among the factors is the low propensity among donor representatives to procure independent reviews and audits of aid-financed projects and programs. Sometimes these are driven by the need to seize opportunities for new projects....this tendency is intensified by heavy workloads and "pipeline problems"; that is, when funds have to be allocated within the timeframe of a financial year regardless of the status of preparatory work or controls. [footnotes omitted]

Soreide moves on to consider the factors that encourage people to exploit opportunities for corruption. Included are lack of sanction for individuals or organizations, widespread tolerance, condonement by management, lack of protection for whistleblowers and the failure of political systems and their accountability safeguards.

In his article "Eight Questions about Corruption" (discussed in Section 5), Svensson points out that the countries with the highest levels of corruption according to corruption ranking results are those with low income and developing, and closed and transition economies.[136]

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[135] *Ibid* at 19.

[136] Jakob Svensson "Eight Questions About Corruption" (2005) 19 J Econ Perspectives 19, online: <http://kie.vse.cz/wp-content/uploads/Svensson-2005.pdf>.

In his book *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa,* Hatchard discusses the root causes of widespread corruption in Africa:[137]

> Many writers have sought to explain the bad governance/corruption phenomenon in Africa. Blundo has argued that the colonial legacy was instrumental in creating a climate of corruption: here the new elite simply copied the example from their former colonial masters,[138] although Atyittey argues against this thesis going as far as to accuse Africans of 'carping' about colonial exploitation.[139] Others have linked bad governance with the development of opportunities for corruption. For example, Collier attributes this to four factors: overregulation of private activity; expanded public sector employment; expanded public procurement; and weakened scrutiny.[140] To these may be added issues such as increased access to development aid, privatization programmes, and the ability to launder the proceeds of corruption through the international financial system quickly and efficiently.[141]
>
> Allen has argued that the constitutional models adopted by the Anglophone and Francophone African states at independence concentrated undue political power in the hands of the Executive and that this resulted in weak accountability mechanisms.[142] This power was then enhanced and further entrenched by the establishment of a one-party system in many states and often largely retained despite a return to multi-party democracy and the making of new constitutions.[143] This argument is taken up by Raditlhokwa who blames the spread of corruption almost solely on a crisis of leadership, accusing African leaders of a lack of self-discipline[144] and a resultant 'crisis

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[137] John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Edward Elgar, 2014) at 16–17.

[138] [27] Giorgio Blundo and Jean-Pierre Olivier de Sardan *Everyday Corruption and the State: Citizens and Public Officials in Africa,* ZedPress, London, 2006.

[139] [28] George Ayittey *Africa Betrayed* 1994, Macmillan, London, p. 13.

[140] [29] Paul Collier 'How to Reduce Corruption' (2000) 12(2) *African Development Review,* 191 at 194.

[141] [30] See also an interesting analysis by Wonbin Cho 'What are the origins of corruption in Africa? Culture or Institution?' Paper presented at the 2009 International Studies Association convention.

[142] [31] Chris Allen 'Understanding African Politics' (1995) 22 *Review of African Political Economy*, 301-20.

[143] [32] See further the discussion in Chapter 5, p. 107.

[144] [33] L Raditlhokwa 'Corruption in Africa: A function of the Crisis of Leadership', in K Frimpong and G Jacques (eds) *Corruption, Democracy and Good Governance in Africa* Gaborone, Lightbooks, 1999, 49–55.

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> in leadership'[145] leading to dysfunctional or failed institutions which facilitates the abuse of governmental power.[146]

Hatchard also explains some motives behind the corrupt acts of public officials. First on the list is financial gain, followed by the belief that corruption will not be prosecuted. Next, Hatchard describes the "[p]ressure to carry out or condone the activity" when lower-level officials are threatened or bribed into assisting the corrupt acts of higher level officials.[147] The presence of traditional gift-giving practices can also motivate corrupt practices, along with the standard business practice of "[b]ona fide payments to public officials, such as gifts or hospitality, provided by a company in order to promote its image."[148] The desire to circumvent inefficient bureaucracy, through facilitation payments, for example, also motivates corruption.

4. PERCEPTIONS AND MEASUREMENTS OF CORRUPTION

As pointed out by Graycar and Prenzler, measuring corruption can guide remedial measures and provide "an indicator of how well a society is performing in terms of a government's contract with its citizens."[149] However, measuring corruption is challenging due to the lack of a uniform definition and the covert nature of corruption. A variety of methods deal with these problems in different ways. Measurements might address the level of risk of corruption, or the extent of actual corruption using various indicators, or the cost of corruption. Measurement might require creative techniques; for example, to reveal the amount of aid funding that had been skimmed in road-building projects in Indonesia, Benjamin Olken dug up chunks of road and measured the difference between funding and amounts of materials actually used. Because of the inevitable uncertainty involved in any one measurement method, Graycar and Prenzler recommend that measurements "triangulate as many indicators as possible."[150]

4.1 Commonly-Cited Indexes of Corruption

(i) Transparency International's Indexes

Transparency International is the world's largest anti-corruption NGO. TI has been very influential in raising the profile of the problem of corruption, in part through its research

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[145] [34] Kempe R Hope and Bornwell C Chikulo (eds) *Corruption and Development in Africa: Lessons from Country Case-Studies* Basingstoke, Macmillan, 2000.
[146] [35] See Migai Akech 'Abuse of Power and Corruption in Kenya' (2011) 18 (1) Ind J Global Leg Stud, 341 at 342.
[147] Hatchard (2014) at 18.
[148] *Ibid* at 19.
[149] Graycar & Prenzler (2013) at 34.
[150] *Ibid* at 44.

and surveys regarding the prevalence of corruption-related activities worldwide. The three main indexes and surveys published by TI are the Corruption Perceptions Index (the "CPI"), the Global Corruption Barometer (the "GCB") and the Bribe Payers Index (the "BPI").

(a) The Corruption Perceptions Index[151]

The CPI is the most commonly cited corruption index worldwide. As its title indicates, the CPI measures perceptions rather than actual rates of corruption. The index is an aggregate of a variety of different data sources. It reports on levels of public sector corruption, as perceived by businesspersons and country experts who deal with the country in question. Despite some limitations, it is generally acknowledged as a reliable, though not precise, indicator of public sector corruption levels. The CPI is published annually and its release gets significant media attention. The 2017 edition includes information on 180 countries and territories. Denmark and New Zealand, closely followed by Finland and Norway, topped the list with the lowest levels of perceived corruption, while Somalia, South Sudan, Syria and Afghanistan had the highest perceived corruption levels.

Discussion Question:

(1) Where did the USA, UK and Canada place?

[see 2017 CPI under the heading 'Results' to answer this question]

(b) The Global Corruption Barometer[152]

The GCB measures both lived experiences with corruption and perceptions on corruption amongst the general public. According to TI, it is the world's largest survey on public opinion on corruption. The 2013 edition included responses from citizens in 107 countries. It asked respondents questions regarding both their experiences with corruption in major public services and their perceptions on items such as the effectiveness of government efforts to control corruption and corruption trends and rates. The GCB is published every few years. The survey indicates that more than one in four people worldwide (25%) report having paid a bribe to a major public institution. This increases to more than three out of every four people (75%) in countries such as Sierra Leone and Liberia. In comparison, only one percent of people in countries such as Japan, Denmark and Finland report having done so.

[151] Transparency International, *Corruption Perceptions Index 2017*, online: <http://www.transparency.org/news/feature/corruption_perceptions_index_2017>.

[152] Transparency International, *Global Corruption Barometer 2013*, online: <http://www.transparency.org/gcb2013>.

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Over the course of 2015-2017, Transparency International has been releasing the 2015/2016 edition of the Global Corruption Barometer, which is now being presented in the context of five regional surveys covering Sub-Saharan Africa, the Middle East and North Africa, Asia Pacific, and Americas.[153] The first four regional surveys have already been made available.[154] They show, in particular, that in Europe and Central Asia bribery rates vary considerably between the countries of the region. For instance, while 0% of households in the United Kingdom reported paying a bribe when accessing basic services, this figure was as high as 42% in Moldova and 50% in Tajikistan.[155]

Discussion Questions:

(1) What percentage of people in the USA, UK and Canada reported paying a bribe to the 8 public institutions surveyed (including political parties, the police and the judiciary)?

(2) Does the public perception of bribery (Table 2) appear to be higher or lower than the public report of bribery (Table 1) in the USA, UK, Canada and New Zealand?

(3) Compare and contrast the public perception in the USA, UK, Canada and Denmark of the degree of corruption in each of the 12 public institutions surveyed.

[see 2013 GCB, Appendix C under the heading 'Report' to answer these questions]

(c) The Bribe Payers Index[156]

The BPI is based on a TI survey of business executives in thirty of the countries around the world that are most heavily involved in receiving imports and foreign investment. The index is not published on a regular schedule. The 2011 survey focuses on the supply side of bribery and measures perceptions on how often foreign companies from the largest economies engage in bribery while conducting business abroad versus at home. This edition focused on firms in 28 countries and of the countries surveyed, Chinese and Russian companies were perceived as the most

[153] Transparency International, *Global Corruption Barometer 2015/2016*, online: <http://www.transparency.org/research/gcb/gcb_2015_16/0/>.
[154] Transparency International, *People and Corruption: Africa Survey 2015* (December 2015), online: <https://www.transparency.org/research/gcb/gcb_2015_16>; Transparency International, *People and Corruption: Middle East and North Africa Survey 2016* (May 2016), online: <http://www.transparency.org/whatwedo/publication/people_and_corruption_mena_survey_2016>; Transparency International, *People and Corruption: Europe and Central Asia 2016* (November 2016), online: <http://www.transparency.org/whatwedo/publication/7493>.
[155] Transparency International, *People and Corruption: Europe and Central Asia 2016* (November 2016), at 16-18.
[156] Transparency International, *Bribe Payers Index 2011*, online: <http://www.transparency.org/bpi2011>.

likely to engage in bribery while doing business abroad while firms from the Netherlands and Switzerland were perceived as the least likely to do so. The results are also categorized by sector. The public works construction sector was perceived as the industry sector most likely to involve bribes.

Discussion Questions:

(1) What is the perception of business persons as to the frequency of companies from the USA, UK and Canada engaging in foreign bribery?

(2) Does it appear that companies in the USA, UK, Canada and Singapore engage in more or less bribery at home (based on CPI score) than abroad (based on BPI)?

[see 2011 BPI under the heading 'Results' to answer these questions]

(ii) The World Bank's Worldwide Governance Indicators Project[157]

The Worldwide Governance Indicators project (WGI) reports on six indicators of good governance, one of which is control of corruption. The WGI is an aggregate of data from a large number of surveys conducted between 1996 and 2015, and includes data on more than 200 countries and territories. The WGI may be used to compare data over time or between countries. The Control of Corruption Indicator measures perceptions of the extent to which public power is exercised for private gain.

In August 2013, the Hertie School of Governance released a report titled "Global Comparative Trend Analysis Report."[158] The report, using data from the World Bank's control of corruption indicator, compares control of corruption scores among eight world regions in the period between 1996 and 2011. The regions of North America, Western Europe and Oceania were consistently ranked as the leading regions in controlling corruption. Few countries showed significant change in their control of corruption scores over the fifteen-year period.

Discussion Questions:

(1) Do you think countries with the best scores in the CPI also score best in terms of "control of corruption" in the World Bank's WGI?

[157] World Bank, Governance Indicators Project, online: http://info.worldbank.org/governance/wgi/.
[158] Roberto Martinez, Barranco Kututschka & Bianca Vaz Mondo, "Global Comparative Trend Analysis Report", ed by Alina Mungiu-Pippidi (Hertie School of Governance, 2013), online: <http://anticorrp.eu/publications/global-comparative-trend-analysis-report/>.

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(2) For example, compare the USA, UK, Canada, South Africa and Indonesia on the two different ratings projects (first look up the 2015 or 2017 CPI score for the above countries and then look at the 2015 WGI control of corruption score for each country).

[see WGI under 'Interactive data access' to answer these questions]

(iii) Freedom House Publications

Freedom House is a US-based watchdog organization committed to promoting democracy and political and civil liberties globally. It publishes a number of research reports and publications relating to indicators of good democratic governance. Two major publications which deal specifically with corruption are *Nations in Transit* and *Countries at the Crossroads.*

(a) *Nations in Transit*

Nations in Transit is an annually published report that studies the reforms taking place within 29 of the former communist countries of Europe and Eurasia. The report covers seven categories relating to democratic change, one of which is corruption. Its corruption index reflects "public perceptions of corruption, the business interests of top policymakers, laws on financial disclosure and conflict of interest, and the efficacy of anti-corruption initiatives."[159]

(b) *Countries at the Crossroads*

Countries at the Crossroads, published between 2004 and 2012, was an annual publication examining government performance in 70 countries at a crossroads in determining their political future. Its anticorruption and transparency section included four measurements:

a) environment to protect against corruption (bureaucratic regulations and red tape, state activity in economy, revenue collection, separation of public and private interests, and financial disclosure);

b) anticorruption framework and enforcement (anticorruption framework and processes, anticorruption bodies, prosecution);

c) citizen protections against corruption (media coverage; whistleblower protection; redress for victims, and corruption in education); and

[159] Freedom House, *Nations in Transit 2016: Europe and Eurasia Brace for Impact* (2016), online: <https://freedomhouse.org/sites/default/files/FH_NIT2016_Final_FWeb.pdf> and *Nations in Transit 2017: The False Promise of Populism* (2017), online: <https://freedomhouse.org/sites/default/files/NIT2017_booklet_FINAL_0.pdf>.

d) governmental transparency (general transparency, legal right to information, budget-making process, expenditure accounting, government procurement, and distribution of foreign assistance).[160]

(iv) TRACE Matrix

TRACE International is a non-profit business association, founded in 2001 by in-house anti-bribery compliance experts, that provides its members with anti-bribery compliance support. TRACE Incorporated offers risk-based due diligence, anti-bribery training and advisory services to both members and non-members.[161] In collaboration with the RAND Corporation, TRACE International developed the TRACE Matrix, a global business bribery risk index for compliance professionals, which scores 199 countries in four domains – business interactions with the government, anti-bribery laws and enforcement, government and civil service transparency, and capacity for civil society oversight.[162] Published since 2014, a new edition is released every two years.

(v) The World Justice Project Rule of Law Index[163]

The World Justice Project (WJP) is a US-based independent and multidisciplinary organization that seeks to advance the rule of law globally. Its overall Rule of Law Index assesses performance of governments on the basis of 44 indicators organized in eight categories, including absence of corruption in the executive branch, the judiciary, the military and police, and the legislature.[164] The 2016 edition of the WJP Rule of Law Index, which covers 113 countries and territories, places Denmark, Singapore, Norway, Finland and Sweden on top of the list in the "absence of corruption" category.[165]

4.2 Some Limitations Associated with Corruption Indexes Based on Perceptions

Although the indexes included above are useful in understanding the prevalence of corruption around the globe, most do not include objective measures of corruption. There is little empirical data measuring corruption. The empirical research that does exist is not well-developed and is generally small in scope. This is because quantifying actual rates of corruption on a large scale is difficult. Objective measures, such as the number of bribery prosecutions, are not reliable indicators; a large number of prosecutions may simply reflect

[160] Freedom House, *Countries at the Crossroads 2012 – Methodology*, online: <https://freedomhouse.org/report/countries-crossroads-2012/methodology>.
[161] TRACE, "About TRACE", online: <https://www.traceinternational.org/about-trace>.
[162] TRACE, "TRACE Matrix", online: <https://www.traceinternational.org/trace-matrix>.
[163] World Justice Project, "Who We Are", online: <http://worldjusticeproject.org/who-we-are>.
[164] World Justice Project, "Factors", online: <http://worldjusticeproject.org/factors>.
[165] World Justice Project, *Rule of Law Index 2016*, online: <http://worldjusticeproject.org/sites/default/files/media/wjp_rule_of_law_index_2016.pdf>.

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a well-resourced and effective policing system and judiciary rather than a comparatively high prevalence of bribery. Because of the limitations of objective measurements, TI views perceptions of public sector corruption as the most reliable method of comparing levels of corruption across countries.

Despite the convenience and widespread use of perception measurements, indexes such as TI's CPI have also received significant criticisms. There is no guarantee that perceptions of corruption accurately reflect actual rates, and some commentators suggest that perceptions of corruption are not well-correlated with reality. The CPI in particular has been criticized for being western-centric, as it focuses on the perceptions of western business people rather than local lived experiences with corruption (although TI's Global Corruption Barometer does measure the latter).

Comparing perceptions across countries can also be difficult, as people from different regions may have different understandings about what constitutes corruption. For example, some election financing and lobbying activities in Western countries are designed to influence public officials in subtle, implicit ways—and in that sense, are corrupt—yet these practices are not legally defined as corruption.[166]

Perception measurements raise the issue of how corruption is defined. Definitions of corruption are not universally agreed upon and different definitions may produce differing results. Some definitions include many types of corruption while others focus primarily on bribery. The common focus on corruption in public institutions has also been criticized as being western-centric. Corruption is often portrayed as a trans-cultural disease. However, it is important to consider the different cultural contexts in which it exists.

The authors of the major indexes generally caution that results are not definitive indicators of actual corruption and should not be used to allocate development aid or develop country-specific corruption responses. However, with an understanding of their limitations, these index measurements can provide important information about corruption trends around the globe.

For a detailed, multidisciplinary and cross-sectoral examination of corruption research and practice, see Graycar and Smith's *Handbook of Global Research and Practice in Corruption* (Cheltenham, UK: Edward Elgar Publishing, 2011). Chapter 3 (Heinrich and Hodess, "Measuring Corruption") provides an overview of recent developments and trends in measuring corruption. Chapter 4 (Recanatini, "Assessing Corruption at the Country Level") analyzes an alternative approach to measuring corruption, promoted by practitioners at the World Bank, that assesses a country's governance structures and institutions from various perspectives, which are briefly discussed in Section 4.1(ii) above.

[166] See Garry C Gray, "Insider Accounts of Institutional Corruption: Examining the Social Organization of Unethical Behaviour" (2013) 53 Brit J Crim 533.

For further information, see also Andersson and Heywood, "The Politics of Perception: Use and Abuse of Transparency International's Approach to Measuring Corruption" (2009) 57 Political Studies 746; United Nations Development Programme and Global Integrity, *A User's Guide to Measuring Corruption* (Oslo: UNDP Oslo Governance Centre, 2008) online: <http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/a-users-guide-to-measuring-corruption/users_guide_measuring_corruption.pdf>.

For a collection of data from the burgeoning field of anti-corruption, see TI's GATEway project, online at: <http://gateway.transparency.org/>.

5. MORE ISSUES ON MEASURING AND UNDERSTANDING CORRUPTION

In his article "Eight Questions about Corruption," Jakob Svensson reviews literature and data on eight topics involved in understanding corruption.[167] For non-economists and non-statisticians, the data and analysis in Svensson's article are sometimes dense. What follows is a brief summary of Svensson's review. Although based on available data as of 2005, more recent data does not significantly alter the main observations in the article.

5.1 What is Corruption?

Svensson notes that the most common definition of public corruption is the misuse of public office for private gain. He also notes that no "definition of corruption is completely clear-cut."[168] The data in his article focuses on public corruption.

5.2 Which Countries Are Most Corrupt?

Svensson notes that measuring corruption across countries is challenging because of the secretive nature of corruption and the variety of forms it takes. Svensson then discusses different corruption measurement scales, including:

1. the corruption indicator in the International Country Risk Guide, which measures the likelihood of bribe requests,[169]
2. TI's Corruption Perception Index,[170]

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[167] Svensson (2005).
[168] *Ibid* at 21.
[169] See Political Risk Services for data, online: <http://epub.prsgroup.com/products/international-country-risk-guide-icrg>.
[170] Online: <http://www.transparency.org/cpi2014>.

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3. Kaufmann, Kraay and Mastruzzi's Control of Corruption index (2003),[171]
4. the EBRD-World Bank Business Environment and Enterprise Performance Survey,[172] and
5. the International Crime Victim Surveys, run by UNODC.[173]

Svensson then lists the countries in the bottom ten percent according to each measurement tool.[174]

5.3 What are the Common Characteristics of Countries with High Corruption?

Based on the corruption ranking results, Svensson states:[175]

> All of the countries with the highest levels of corruption are developing or transition countries. Strikingly, many are governed, or have recently been governed, by socialist governments. With few exceptions, the most corrupt countries have low income levels. Of the countries assigned an openness score by Sachs and Warner (1995), all of the most corrupt economies are considered closed economies, except Indonesia. [footnotes omitted]

Svensson's analysis also shows that richer countries generally have lower corruption. However, corruption levels vary widely across countries even controlling for income. For example, he notes that Argentina, Russia and Venezuela are ranked as relatively corrupt given their level of income. On the other hand, rankings of countries in sub-Saharan Africa often match the expected levels of corruption given their GDP. Svensson notes that levels of income are a stronger predictor of levels of corruption when combined with levels of schooling, forms of governance and freedom of the press.

Rose-Ackerman and Bonnie Palifka also argue that states emerging from conflict are especially susceptible to corruption, making reconstruction challenging.[176] Ackerman and Palifka observe that these postconflict states have many of the factors that create incentive to

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[171] See the World Bank website for data, online: <http://info.worldbank.org/governance/wgi/index.aspx - home>.
[172] Online: <http://ebrd-beeps.com/>.
[173] Online: <http://www.unicri.it/services/library_documentation/publications/icvs/>.
[174] See Table 1 in Svensson (2005), at 25.
[175] Svensson (2005), at 24.
[176] Susan Rose-Ackerman & Bonnie J Palifka, *Corruption and Government: Cases, Consequences and Reform*, 2d ed (Cambridge University Press, 2016) at 316.

engage in corruption: widespread destruction, weak controls, lack of trust in law enforcement, poverty, and a poorly functioning judiciary.[177]

5.4 What is the Magnitude of Corruption?

Svensson (2005) points out that subjective rankings of countries as more or less corrupt do not quantify the magnitude of corruption. He outlines some past attempts to measure magnitude at the micro level. For example, to determine the magnitude of corruption involved in public education grants in Uganda, Reinikka and Svensson (2004) compared the value of disbursements to each school district with survey data on actual receipts of money and equipment by schools.[178] Price comparisons can also be used to infer the magnitude of corruption. For example, Hsieh and Moretti (2006) analyzed the difference between the official selling price and estimated market price of Iraqi oil to infer the presence of underpricing and kickbacks for the regime.[179]

5.5 Do Higher Wages for Bureaucrats Reduce Corruption?

Svensson (2005) then reviews empirical research on the impact of certain corruption control measures on actual corruption levels. First, Svensson looks at the relationship between higher wages for public servants and corruption. After summarizing several studies, Svensson concludes:

> Thus, wage incentives can reduce bribery, but only under certain conditions. This strategy requires a well-functioning enforcement apparatus; the bribe being offered (or demanded) must not be a function of the official's wage; and the cost of paying higher wages must not be too high. In many poor developing countries where corruption is institutionalized, these requirements appear unlikely to hold.[180]

5.6 Can Competition Reduce Corruption?

Svensson (2005) also analyzes data related to the relationship between competition and corruption:

> Another common approach to control corruption is to increase competition among firms. One argument is that as firms' profits are driven down by

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[177] *Ibid*. As part of this analysis, Rose-Ackerman and Bonnie Palifka use four case studies: Guatemala, Angola, Mozambique and Burundi. For more, see Chapter 10 of Rose-Ackerman & Palifka (2016).
[178] Reinikka, Ritva and Jakob Svensson, "Local Capture: Evidence from a Central Government Transfer Program in Uganda." (2004) 119:2 Quarterly Journal of Economics. 679.
[179] Hsieh, Chang-Tai and Moretti, Enrico. "Did Iraq Cheat the United Nations? Underpricing, Bribes, and the Oil For Food Program." (2006) 121:4 Quarterly Journal of Economic.1211.
[180] Svensson (2005) at 33.

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> competitive pressure, there are no excess profits from which to pay bribes (Ades and Di Tella, 1999). In reality, however, the connections between competition, profits and corruption are complex and not always analytically clear.[181]

For further discussion of this point, see Taylor's article.[182]

According to Svensson, some evidence shows that deregulation does not reduce corruption by increasing competition, but rather by reducing the discretion and power of public officials. Svensson concludes:

> A variety of evidence suggests that increased competition, due to deregulation and simplification of rules and laws, is negatively correlated with corruption. But it can be a difficult task to strike the right balance between enacting and designing beneficial rules and laws to constrain private misconduct while also limiting the possibilities that such laws open the door for public corruption (Djankov, Glaeser, La Porta, Lopez-de-Silanes and Shleifer, 2003).[183]

5.7 Why Have There Been So Few (Recent) Successful Attempts to Fight Corruption?

Svensson notes that many anti-corruption programs provide resources to existing enforcement institutions. However, these institutions are often corrupt themselves. Svensson states that, "[t]o date, little evidence exists that devoting additional resources to the existing legal and financial government monitoring institutions will reduce corruption."[184] Although Hong Kong and Singapore are considered exceptions, both countries also implemented other wide-ranging reforms in their anti-corruption efforts.

Svensson then lists some alternative approaches to combating corruption, such as turning to private or citizen enforcement, providing citizens with access to information and delegating work to private firms. The issue of designing more effective anti-corruption institutions and practices is further addressed in Section 10 of this chapter.

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[181] *Ibid*.

[182] Alison Taylor argues that a competitive corporate atmosphere encourages corrupt conduct. According to Taylor, the promotion of a "narrative of intense rivalry and urgency" is "an integral part of a corrupt [corporate] culture". Taylor explains that "employees need to be socialized into paying bribes and encouraged to believe that corruption is an inevitable and necessary response to the hard commercial realities." See Alison Taylor, "Does Competition Cause Corruption?", *The FCPA Blog* (22 June 2015), online: <http://www.fcpablog.com/blog/2015/6/22/alison-taylor-does-competition-cause-corruption.html>.

[183] Svensson (2005) at 34.

[184] *Ibid* at 35.

5.8 Does Corruption Adversely Affect Growth?

Finally, Svensson analyzes findings on the link between corruption and economic growth, pointing out that, "in most theories that link corruption to slower economic growth, the corrupt action by itself does not impose the largest social cost. Instead, the primary social loss of corruption comes from propping up of inefficient firms and the allocation of talent, technology and capital away from their socially most productive uses (Murphy, Shleifer and Vishny, 1991, 1993)."[185] Svensson also describes the potentially adverse effects of corruption on firm growth and the allocation of entrepreneurial skills, as well as impacts on social welfare and, by extension, human capital. For more on the relationship between corruption and economic growth, see Section 1.4 of this chapter.

Svensson's Conclusion

Svensson notes that the answers to his eight questions are not clear-cut and he reminds readers of how little we know about many issues concerning corruption. In Svensson's opinion, there are three areas of particular importance requiring more study:

> First and most urgently, scant evidence exists on how to combat corruption. Because traditional approaches to improve governance have produced rather disappointing results, experimentation and evaluation of new tools to enhance accountability should be at the forefront of research on corruption.
>
> Second, the differential effect of corruption is an important area for research. For example, China has been able to grow fast while being ranked among the most corrupt countries. Is corruption less harmful in China? Or would China have grown even faster if corruption was lower? These types of questions have received some attention, but more work along what context and type of corruption matters is likely to be fruitful.
>
> Finally, the link between the macro literature on how institutions provide a more-or-less fertile breeding ground for corruption and the micro literature on how much corruption actually occurs in specific contexts is weak. As more forms of corruption and techniques to quantify them at the micro level are developed, it should be possible to reduce this mismatch between macro and micro evidence on corruption.[186]

For a concise article on the relationship between governance and corruption, and the difficulties of measuring both, see Daniel Kaufmann, "Back to Basics: 10 Myths About Governance and Corruption" (2005) 42:3 Finance and Development. See also Clare Fletcher

[185] *Ibid* at 37.

[186] *Ibid* at 40.

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and Daniela Herrmann, *The Internationalization of Corruption: Scale, Impact and Countermeasures* (Farnham: Gower, 2012), especially Part One.

6. HISTORICAL DEVELOPMENT OF INTERNATIONAL CORRUPTION LAWS

6.1 Early History from Antiquity to the OECD Convention in 1997

In Martin's 1999 article "The Development of International Bribery Law", the author details the development of anti-bribery laws in the west up to the 1997 signing of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Anti-Bribery Convention").[187] The OECD Convention was ratified by Canada in December, 1998 and came into force in February, 1999. The OECD Anti-Bribery Convention paved the way for further international actions to combat corruption, including the more expansive United Nations Convention Against Corruption (UNCAC), which entered into force in 2005.

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BEGINNING OF EXCERPT

Corruption was not a problem at the beginning of history. Rather than use bribes, people made "offerings" to their gods and leaders in the hope of receiving favors. In a sense, such reciprocities provided a social glue that allowed cultures and civilizations to develop. But with civilization came religious and civil institutions that needed rules of fairness and good governance to ensure the loyalty and trust of the populace. Kings and pharaohs had to demonstrate that the rule of law was above the influence of greasy palms. Thus began the distinction between gifts and bribes.

After presenting the Ten Commandments to Moses on Mount Sinai, God instructed the Israelites not to take *shohadh*, which is loosely translated from Hebrew as "offering."

> You shall not take *shohadh*, which makes the clear-eyed blind and the words of the just crooked. (Exodus 23:1-3, 6-8)

[187] A. Timothy Martin, "The Development of International Bribery Law" (1999) 14 Natural Resources & Environment 95, online: <http://timmartin.ca/wp-content/uploads/2016/02/Devpt-of-Int-Bribery-Law-Martin1999.pdf>.

Given that the Old Testament was breaking new ground, it was only natural that this distinction started a bit ambiguously. However, even after several millennia of lawyers trying to define bribery, a certain amount of haze shrouds the issue.

There are records of bribes and bribery laws from ancient times. Archaeologists have recently found an Assyrian archive which is 3400 years old that listed the names of "employees accepting bribes." An Egyptian pharaoh, Horemheb (1342-1314 BC), issued the first recorded law of a secular penalty for bribetaking. The Edict of Horemheb proclaimed that any judge who took a reward from one litigant and failed to hear the adversary was guilty of a "crime against justice" and subject to capital punishment. His threat apparently did not stop the practice of bribing the judiciary from spreading beyond Egypt.

The Greek historian Pausanius relates that before beginning each Olympic Games, all the umpires, athletes, their relatives and trainers swore over boars' flesh that they would uphold Olympic rules intended to prevent corrupt activity. Similar to present times, not everyone played by the rules. Pausanius recorded in his *Description of Greece* (5.21.5) that Calippus of Athens bought off fellow competitors with bribes, as did many other contestants. This practice continued unabated until the Roman Emperor Theodosius eventually abolished the Olympic Games in 394 AD because of rampant corruption and brutality.

As for the Romans' view of bribery, Shakespeare may have captured it best when Brutus said to Cassius in *Julius Caesar:*

> Remember March; the ides of March remember.
> Did not great Julius bleed for justice sake!
> What villain touch'd his body that did stab
> And not for justice? What, shall one of us,
> That struck the foremost man of all this world
> But for supporting robbers – shall we now
> Contaminate our fingers with base bribes
> And sell the mighty space of our large honours
> For so much trash as may be grasped thus?
> I had rather be a dog and bay the moon
> Than such a Roman.
>
> Act 4, Scene 3, lines 19-30

People's view of corruption has evolved and become more negative as the institutions of government have developed. Instead of being ambivalent about the giving of gifts to officials in a position of public trust, modern society has enacted and prosecuted laws that make such payments illegal. Over time, a bribe has come to mean "an inducement improperly influencing the performance of a public function meant to be

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gratuitously exercised." (For an illuminating history of bribes, please refer to J. T. Noonan, BRIBES (1984).) [See also Douglas Thompson's LLM thesis.[188]] Even though it is usually opposed on moral grounds, bribery has become a legal concept analyzed and prosecuted by lawyers. Thus in understanding how the world has grappled with corruption, one must consider the history of bribery laws.

For King and Country (And a little bit for me, too)

Francis Bacon was one of the most brilliant lawyers, judges, and philosophers in English history. He was also one of its most corrupt Lord Chancellors. Bacon was first Solicitor General, then Attorney General, and finally, in 1618, Lord Chancellor. Even though he was an extremely capable jurist who honestly and fairly dispensed justice, he was too detached and philosophical to take notice of the bribes flowing to his servants who used his good office to benefit themselves. Caught up in the byzantine politics of the court of King James I, Bacon was accused of accepting bribes to affect cases in the Court of Chancery. His enemies in Parliament impeached him with twenty-three charges of bribery and corruption. Bacon first replied with a qualified admission of guilt. The House immediately rejected his submission, whereupon Bacon caved in: "I do plainly and ingenuously confess that I am guilty of corruption, and do renounce all defence."

Sir John Trevor was probably the most corrupt Speaker in the history of Parliament. The East India Company was rumored to have bribed him to exert influence over laws affecting it. He also apparently accepted a large payment from the City of London Corporation. Indeed, a House Committee investigation discovered a written record of the City's instructions and an endorsement of the payment to Trevor. The Members of Parliament drew up a resolution in 1694 which convicted the Speaker of a "high crime and misdemeanour." Ironically, it was the responsibility of Sir John, as the Commons Speaker, to put the motion to the House, which he did in a shameless way. The motion was overwhelmingly acclaimed and Sir John slunk out of the House of Parliament. He did not return but rather sent a sicknote to the House who responded by expelling the Speaker. (These and other stories can be found in Matthew Parris, GREAT PARLIAMENTARY SCANDALS (1995).)

[188] [In his University of Victoria LLM thesis, *A Merry Chase Around the Gift/Bribe Boundary* (2008), written under the co-supervision of Professor Ferguson, Douglas Thompson explains how the English word "bribe," which originally had the altruistic meaning of a morsel of bread given as alms to beggars, became associated with the distasteful practice of selling indulgences in medieval England. That practice, carried out by pardoners licensed by the Church, was soon seen as a type of theft or extortion inflicted on those who felt compelled to buy indulgences to reduce the time spent in Purgatory by their deceased loved ones. With the abolition of the selling of indulgences at the time of the Reformation (1538), the word bribe took on its modern meaning.]

The English common law first dealt with foreign bribery in the trial of Warren Hastings who went to India at eighteen as a clerk of the East India Company and quickly rose through the ranks until he was appointed the British Governor of Bengal in 1772. During his tenure as Governor, he amassed a great fortune that could not be accounted for by his salary alone. Edmund Burke, a member of the House of Commons, accused the Company of great abuses in India and gradually those accusations focused on Hastings, who allegedly received large bribes while Governor. As a result of his investigations, Burke and his fellow Parliamentarians drafted Articles of Impeachment against Hastings that asserted various abuses of authority constituting "high crimes and misdemeanours" including "Corruption, Peculation and Extortion." After winning the support of the House of Commons, the impeachment trial of Hastings commenced in the House of Lords in 1787. See Peter J. Marshall, THE IMPEACHMENT OF WARREN HASTINGS (1965).

The leading case of the time (1725) concerned Thomas Earl of Macclesfield, a Lord Chancellor who was accused of selling jobs in Chancery. In that case, the House of Lords held that the sale of an office which related "to the administrations of justice" was not an offense at common law. This was reflected in the definition of bribery provided by Blackstone in his COMMENTARIES ON THE LAWS OF ENGLAND of 1765. A bribe was a crime committed by "a judge or other person concerned in the administration of justice." The definition was thus restricted to acts involving a judicial decree or its execution. By 1769 the law had expanded to make the offering of money for a government office a crime. In this environment, Hastings launched his defence which consisted of showing that he had not offered any money himself as bribes and that any presents he had received were not for himself but for the Company. To be on the safe side, he also launched personal attacks on Burke throughout the trial. Hastings' strategy was successful and resulted in the Lords deciding on April 23, 1795, after seven years of deliberation that he was not guilty. It would take another 180 years before anyone would again try to prosecute an act of foreign bribery. However, the next attempt would be in America rather than England.

New Law in the New World

America has a long tradition of being concerned about corruption. Public offices have been bought, judges were monetarily influenced, and the nation's infrastructure was sometimes built on the back of bribes. But America is a country where government is expected to be for the benefit of the people. Public officials and their decisions were not to be bought and sold by a few wealthy individuals or corporations. Bribes were seen as immoral and against the founding principles of the United States of America. Something had to be done about corruption and lawmakers were more than willing to fill the breach. A multitude of approaches was thus pursued to address the problem.

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The U.S. Founding Fathers clearly had corruption on their minds when they drafted the Constitution. Their first concern was Executive Branch corruption but they expanded the concept to include the Judiciary. The mechanism they built into the Constitution to remedy this problem was impeachment. The Constitutional Convention of 1787 first specified that the grounds for impeachment would be "Treason, Bribery, or Corruption." They later dropped "Corruption" as superfluous but added "other high crimes and misdemeanours" using the language from the Hastings trial in Parliament. This amendment supposedly provided Congress sufficient flexibility in the future to prosecute corrupt judges and Presidents. Unfortunately, the Constitution did not provide that Congressional members were subject to impeachment based upon the argument of James Madison that it was harder to corrupt a multitude than an individual. How wrong he proved to be! Bribing Congressmen became a national pastime. Eventually, Congress passed An Act to Prevent Frauds upon the Treasury of the United States in 1853 which made it illegal to bribe a member of Congress. It was not used much (possibly because of its misleading title). Indeed, during the first 150 years of the American Republic, no high ranking government leader was convicted for bribery. The Teapot Dome Scandal in the 1920s changed this complacency.

Albert Fall, Secretary of the Interior, arranged for the awarding of leases to two oil companies in 1922 in the Navy's oil reserves at Teapot Dome, Wyoming, and Elk Hill, California. After receiving many complaints, the Public Lands Committee of the Senate investigated and thereafter declared that the procurement of the leases had been "essentially corrupt." Apparently, Edward Doheny of Pan-American Petroleum made Secretary Fall a cash loan of $100,000 delivered in "a little black bag" on which neither principal nor interest was collected, and the alibi of Harry Sinclair of Mammoth Oil Company was that he bought an interest in Fall's ranch. The Supreme Court unanimously cancelled the leases as "corruptly secured" and the oil companies were forced to pay back over $47 million. All three were tried for conspiracy to defraud the United States but were acquitted. However, former Secretary Fall was convicted of bribery even though he argued that if the oilmen were innocent of giving a bribe, he could not be guilty of taking one. Fall was eventually sentenced to a fine equal to the bribe and served one year in jail. See Burl Noggle, TEAPOT DOME: OIL AND POLITICS IN THE 1920'S (1962).

American legislators continued putting in place a plethora of laws that comprehensively extended the criminal law of bribery to almost every class and occupation imaginable. There was the Anti-Racketeering Act of 1934 and the Hobbs Act of 1946. This preoccupation with bribery continued unabated until the Nixon administration in 1970 produced the most comprehensive federal statute ever designed against bribery – the Racketeering Influenced and Corrupt Organization Act (or RICO). This statute was enacted in response to the growth of organized crime but

its greatest effect was to make bribery a federal offense and to give broad powers to district attorneys to prosecute anyone engaged in a "pattern" of bribes.

There was also a long history of laws meant to stop the abuses of campaign financing. President Teddy Roosevelt first pushed for the enactment of the Tillman Act of 1907 after the president of Standard Oil claimed that he had given the Republican Party $125,000 in cash which had never been returned. The law prohibited corporate directors from using stockholders' money for political purposes and was meant to be "an effective method of stopping the evils aimed at in corrupt practice acts." This phrase had been popular for some time. The English Parliament had enacted a Corrupt Practices Act in 1883. The U.S. Congress enacted the Federal Corrupt Practices Act of 1910, which required the reporting of all contributions to national elections. This statute was amended several times, but its enforcement was infrequent, resulting in ambivalence about campaign contributions. The situation did not change until 1972 when the Federal Corrupt Practices Act was repealed and the Federal Election Campaign Act was enacted, resulting in taxpayers being permitted to deduct contributions to presidential campaigns. The government in effect had legalized payments to campaigning politicians rather than encourage potential bribes.

Throughout this period, all of the industrialized countries and most of the developing world had their own laws which made the bribery of public officials illegal. England had the Public Bodies Corrupt Act of 1889 and the Prevention of Corruption Acts of 1906 and 1916. Countries such as Canada, Denmark, France, Germany, Italy, the Netherlands, Spain, and Switzerland had prohibited the bribery of public officials under their respective Criminal Codes for many years. Some, such as France, as early as 1810. But similar to the United States, all these laws addressed the bribery of domestic officials, i.e., judges, politicians, and government officials within the country's boundaries. No one ever contemplated looking beyond their own borders. All that changed as a result of some unrelated but extraordinary events investigated by several committees of the U.S. Senate.

A Leap into Foreign Waters

In 1972 the Democratic National Committee headquarters located at the Watergate complex in Washington, D. C., was burglarized. The Senate formed a select committee the next year to investigate the burglary and found that many U.S. corporations had made illegal contributions to Richard Nixon's Committee to Re-Elect the President. The result was that fifteen prominent corporations pleaded guilty to making illegal campaign contributions and were fined. One of the corporations, Gulf Oil, provided an amazing report to the Senate committee that detailed an elaborate overseas network to siphon political bribes back to the States and to other countries. Gulf had

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apparently distributed more than $5 million to influential politicians from overseas bank accounts over the years. See THE GREAT OIL SPILL (1976).

On February 3, 1975, Eli Black, the Chairman of United Brands Corporation, jumped to his death from a New York skyscraper. The Securities and Exchange Commission (SEC) investigated and discovered that his corporation, the largest American banana producer, had paid $2.5 million to senior politicians in the Honduras. The SEC successfully sued the company for securities fraud since the payments were not reported in the financial accounts of United Brands. During the same period, a military coup ousted the President of the Honduras. As a result of the United Brands' investigation and concerns around the Gulf Oil report, the SEC sent a questionnaire to U.S. companies and asked them to reveal any "questionable payments" made by them abroad. Based upon this survey, the SEC published a report showing that over 400 U.S. companies, including 117 of the Fortune 500, had made "questionable payments" totalling more than 300 million dollars.

In June 1975, Senator Frank Church and his Subcommittee on Multinational Corporations were investigating a recent price rise of Arab oil and had called upon Northrop Corporation, a major supplier of aircraft to Saudi Arabia, to provide evidence. Northrop admitted paying bribes through a Saudi agent, Adnan Khashoggi, using the "Lockheed model." After hearing this statement and seeing the questionnaire from the SEC, the auditors of Lockheed Aircraft Corporation decided that they would only certify the company's accounts if Lockheed's corporate officers signed statements that all payments to consultants were in accordance with contracts and properly recorded. As it turned out, Lockheed had been engaged in a massive program of overseas bribes to government officials who bought their planes. Its officers refused to sign the statements. It quickly became public knowledge that Lockheed was going into its stockholders' meeting with unaudited financial statements. This caught the attention of Senator William Proxmire, Chairman of the Senate Banking Committee, who immediately convened an investigation into Lockheed. The day before the Senate Committee began its hearing, the company's treasurer shot himself dead. Undeterred, the Senate Banking Committee opened its investigation on August 25, 1975. The Committee found that Lockheed had paid hundreds of millions of dollars through consultants to government officials in Saudi Arabia, Japan, Italy, and the Netherlands. When asked if he had paid a one million dollar bribe to Prince Bernhard of the Netherlands, the president of Lockheed, A. Carl Kotchian, replied:

> I think, sir, that as my understanding of a bribe is a quid pro quo for a specific item in return. I would characterize this more as a gift. But I don't want to quibble with you, sir.

It appeared that even a sophisticated jet-setting business executive was unable to distinguish a gift from a bribe.

Upon further examination, the Banking Committee found that as many as nine different American laws were criminally violated by a bribe paid abroad, including the Internal Revenue Code, the Foreign Assistance Act, the Bank Secrecy Act, the Travel Act, and RICO. However, these statutes had only been peripherally violated. To the great chagrin of the Committee, no specific law explicitly prohibited an American from paying a bribe overseas. Something had to be done to prevent the abuses perpetrated by Lockheed, Gulf Oil, and others so inclined. Senator Proxmire's Committee thus recommended that a new law be enacted to prevent overseas bribery based on their reasoning that (1) foreign governments friendly to the United States had come under "intense pressure from their own people," (2) the "image of American Democracy" had been "tarnished," (3) confidence in the financial integrity of American corporations had been impaired, and (4) the efficient functioning of capital markets had been hampered.

After very little debate in either the House or Senate, both Houses unanimously approved the Committee's bill on December 7, 1977, and President Carter subsequently signed it into law on December 19, 1977. The Foreign Corrupt Practices Act (FCPA) was thus born. This law was the first of its kind in the world. A new era of global bribery prevention had begun. The United States, like no other country before it, had decided to make the payment of bribes to foreign officials illegal and imposed rigorous record keeping requirements on U.S. companies and their overseas subsidiaries to ensure that bribes could not be hidden. However, when the dust settled and the United States surveyed the global landscape, it found itself standing alone.

All For One and One For All

American companies immediately recognized that they were at a disadvantage to their foreign competitors. They would thereafter constantly claim that they lost overseas contracts because they could not pay the bribes that foreign companies allegedly did. (This view has been reinforced in some recent studies. *See* U.S. Department of Commerce, UNCLASSIFIED SUMMARY OF FOREIGN COMPETITIVE PRACTICES REPORT (Oct. 12, 1995); James R. Hines, Jr., FORBIDDEN PAYMENT: FOREIGN BRIBERY AND AMERICAN BUSINESS AFTER 1977 (Nat'l Bureau of Econ. Res. Working Paper No. 5266, 1995). The American government believed that its companies were competing on an unlevel playing field and therefore began seeking multilateral co-operation on global bribery.

The United States has advocated changes in the bribery laws of other countries in two primary areas. The first is to criminalize the bribery of foreign officials. This reflects the debate held in the U.S. Senate when it approved the FCPA in 1977. At that time,

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Congress chose the stringent approach of criminalization over the option of only requiring public disclosure of foreign payments on the grounds that it was too lenient. The second area is the elimination of the tax deductibility of bribes. The U.S. government was concerned that other governments such as France and Germany allowed their corporations to deduct such payments against their income tax and thus tacitly approved the practice.

The first attempt to change international bribery law on a multilateral basis was at the United Nations (U.N.) and was wholly unsuccessful. The U. N. Economic and Social Council completed a draft agreement known as the International Agreement on Illicit Payments in 1979. This draft document outlawed all bribes to public officials, including the "grease" payments exempted under the FCPA. The Council of the General Assembly took no action to convene a conference to conclude and formalize it, despite strong efforts to do so by the United States.

Having failed at the United Nations, the U.S. moved to another forum, the Organization for Economic Cooperation and Development (OECD). The American government lobbied the OECD in 1981 to implement an illicit payments agreement. However, several countries expressed the view that differences among their legal systems would make such an agreement difficult to implement. Another attempt was made at the insistence of Congress when they amended the FCPA in 1988. Nothing resulted from either of these efforts. *See* U.S. Department of State, ILLICIT PAYMENTS: PAST AND PRESENT U.S. INITIATIVES.

The multilateral approach of the U.S. government was shelved at that point. There were a variety of unilateral attempts to extend the territoriality of the FCPA even farther beyond U.S. borders. Senator Russ Feingold introduced Bill 576 in 1995 which would have prohibited certain U.S. trade assistance agencies from aiding U.S. subsidiaries of foreign corporations, unless the director of the agency certified to Congress that the corporation maintained a company-wide policy prohibiting the bribery of public officials. Senator Hank Brown drafted a more far-reaching bill, the Foreign Business Corruption Act of 1996, to pressure foreign companies and countries. It provided for private rights of action with awards up to three times damages, allowed retaliatory actions against corrupt foreign governments on the basis of unfair trade barriers, and gave any U.S. person the right to bring action in a U.S. court against a foreign concern which violated a law of a foreign country that was substantially similar to U.S. legislation.

Neither of these bills advanced. One of the primary reasons was that the Clinton administration had decided in late 1993 to renew a multilateral effort. Since the Cold War had ended, the U.S. focused its attention on global economics and the problem of foreign bribes was given high priority in this new war. The American government carefully considered the supply and demand sides of the corruption equation in

forging its strategy. It primarily focused on the supply side (or active part of bribery) and the multilateral organization that received most of its attention was the OECD.

The OECD Convention

In May 1994, a majority of the OECD countries agreed upon a suite of recommendations entitled OECD RECOMMENDATIONS ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS. However, it was not binding and was well below the objectives set by the United States. No specific measures were recommended; rather, it offered a broad list of "meaningful steps." Subsequently, after intensive lobbying by the United States and after overcoming the resistance of some European countries (especially France), the OECD Council on April 11, 1996, approved a recommendation to eliminate the tax deductibility of bribes among its member states. At the next OECD meeting in May 1997, the American government pushed for a resolution committing governments to outlaw foreign bribery in their domestic legislation by the end of 1998 and to establish a monitoring system to ensure that it was being enforced. In opposition, France and Germany, with the support of Japan and Spain, maintained that "you need an international convention for criminalizing corruption, because the legal framework in each country is different. The U.S. and its supporters viewed this as a stalling tactic since such treaties take many years to negotiate and ratify.

After much negotiation, a compromise was struck. The ministers endorsed the REVISED REC-OMMENDATION ON COMBATTING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS. They recommended that member countries would submit criminalization proposals to their legislative bodies by April 1, 1998, and seek their enactment by the end of 1998. The ministers also decided to open negotiations promptly on a convention to be completed by the end of 1997, with a view to its entry into force as soon as possible within 1998, and urged the prompt implementation of the 1996 recommendation on the tax deductibility of such bribes.

After six months of intensive discussions, all twenty-nine member countries of the OECD and five non-member countries agreed to sign the CONVENTION ON COMBATTING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (the OECD Convention) in Paris on December 17, 1997, *reprinted at* 37 I.L.M. 1 (1998). This Convention provided the framework under which all the signatory governments undertook to prohibit and act against the bribery of foreign public officials on an equivalent basis without requiring uniformity or changes in the fundamental principles of each government's legal system. The OECD Convention entered into force on the 60th day following the date upon which 5 of the 10 countries with the largest shares of OECD exports, representing at least 60% of the combined total exports of those 10 countries, deposited their instruments of acceptance, approval, or ratification. Such ratification had to occur by December 31, 1998, to be binding upon all signatory countries. Canada's deposit of its instrument on December

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17, 1998, met the pass mark and resulted in the OECD Convention's entering into force on February 15, 1999. At the time of writing, fourteen countries had deposited their instruments of ratification and the remaining signatory countries have publicly stated that they will complete their ratification process during 1999 [as of 2016, 41 countries have adopted the Convention].

The Convention has a clearly defined scope. It provides that each government "shall establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business." The Convention makes it an offence for nationals of signatory countries to give a bribe to a foreign public official. In other words, it is directed against offences committed by the bribegiver and not the public official receiving the bribe.

Signatory countries have undertaken to make the bribery of a foreign public official punishable by effective, proportionate, and dissuasive criminal penalties. A foreign public official includes persons elected or appointed to hold legislative, administrative, or judicial office of a foreign country. It also covers Public Agencies, Public Enterprises, and Public International Organizations. Despite intense lobbying by the U.S., it is not an offence to make payments to political parties or officials of those parties.

The Convention provides that the bribe and its proceeds are subject to seizure and confiscation. Where more than one government has jurisdiction, they are required to consult with a view to determining the most appropriate jurisdiction for prosecution. Bribery of a foreign public official is considered an extraditable offence amongst the signatory governments. All parties to the Convention have undertaken to cooperate in carrying out a program of systematic follow-up to monitor and promote the full implementation of the Convention. The OECD has recently set up a Centre for Anti-Corruption Compliance to provide information and training on anti-corruption laws. This Centre provides one of the most comprehensive websites available on foreign corruption: [updated link: http://www.oecd.org/daf/anti-bribery/]. [See also the UNODC anti-corruption website TRACK at http://www.track.unodc.org/.] The commentaries on the Convention state that it is not an offense if the advantage was permitted or required by the written law or regulation of the foreign public official's country. Also, making small "facilitation" payments is not an offense since they are not payments made "to obtain or retain business or other improper advantage."

Without question, the OECD Convention is the most significant international treaty on foreign bribery up to this time [1999]. However, it is but one piece of the American

strategy. At the urging of the U.S., the G-7 countries supported the recommendations of the OECD when they met in Lyon, France, in July 1996. The United Nations General Assembly also approved a resolution on "Action Against Corruption" in January 1997 and the Council of the European Union adopted a Framework Convention Against Corruption in May 1997. The U.S. has also worked closely with non-governmental organizations such as the International Chamber of Commerce (ICC) and Transparency International (TI).

In March 1996, the ICC approved and published its Rules of Conduct on bribery in international business transactions. These rules prohibit extortion and bribery for any purpose, not just to obtain or retain business, making them more stringent than the previous ICC Code published in 1977. The rules now cover extortion and bribery in judicial proceedings, tax matters, and environmental and other regulatory cases, as well as in legislative proceedings. (The ICC's website on extortion and bribery is [updated link: http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2004/ICC-Rules-of-Conduct-and-Recommendations-to-Combat-Extortion-and-Bribery-(2005-Edition)/]).

Transparency International was founded in May 1993 with its headquarters in Germany. It is a not-for-profit, non-governmental organization that attempts to counter corruption in international business transactions. It does this through international and national coalitions which encourage governments to establish and implement effective law, policies, and anti-corruption programs. Each year, TI publishes a corruption [perception] index which lists [global perceptions on] the most and least corrupt countries in the world. It has also established a program called "Islands of Integrity" which attempts to arrange, in welldefined markets, a pact among competitors to stop corruption simultaneously, by entering into an Anti-Bribery Pact. (For further details on TI, see its homepage at [updated link: http://www.transparency.org]).

The United States has not forgotten the demand side (or passive part) of bribery. It pursued the corruption agenda at both the Organization of American States (OAS) and the Asia-Pacific Economic (APEC) Forum. Its greatest success to date has been at the OAS. In a meeting held in Caracas, Venezuela, in March 1996, the OAS adopted an Inter-American Convention Against Corruption. Once again, the United States led the implementation of this convention, with strong support from several South American countries, including Venezuela. Colombia opposed the treaty's extradition provisions and Uruguay objected to the bank secrecy provisions. However, it was eventually signed by twenty-five OAS members and has been ratified by sixteen member states at this time [as of 2015, 33 OAS members have signed on].

The OAS Convention provides that each country shall prohibit and punish the offering or granting, directly or indirectly, by its nationals, residents, or businesses, to

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a government official of another state, of any article of monetary value or other benefit in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions. Such offenses shall be an extraditable offense in any extradition treaty existing between or among the countries. Countries shall also provide each other the broadest possible measure of assistance in the identification, tracing, freezing, seizure, and forfeiture of property or proceeds obtained, derived from, or used in the commission of any offence established in accordance with the convention. (The OAS website on corruption can be found at [updated link: http://www.oas.org/juridico/english/fightcur.html]).

The U.S. government lobbied the APEC Forums that met in Manila in 1996 and Vancouver in 1997 to approve recommendations similar to those adopted by the OECD. Several Asian members of the APEC Forum publicly stated their misgivings about the U.S. proposal, citing cultural differences amongst the member economies. Nothing happened with this proposal, and it was quietly dropped.

The Clinton administration also pushed the corruption agenda in the multilateral organizations that govern world trade and dispense development funds, in particular, the World Trade Organization (WTO), the World Bank, and the International Monetary Fund (IMF). At the WTO's Singapore conference in December 1996, the United States, with support from Canada, the European Union, Japan, and nine other countries, proposed new public procurement rules that would criminalize bribes and require more transparency in the awarding of government contracts. As expected, resistance to the proposal arose from a variety of developing countries. A group led by Malaysia and including Indonesia, Thailand, Brunei, the Philippines, Bahrain, Zimbabwe, Cuba, Egypt, and Uganda argued that due regard be given to the national policies of each country.

…

In 1996, the World Bank initiated a policy that required it to investigate complaints of corruption and if it found sufficient grounds, allowed it to blacklist companies and governments that participated in bribery. Under this policy, evidence of corruption could result in the cancellation of World Bank financing in a country and in the prevention of a bribing company from participating in contracts financed by the World Bank. The World Bank has made a clear public statement of its position in a report published in September 1997 entitled *Helping Countries Combat Corruption: The Role of the World Bank*. The report states that bribes are one of the primary elements of corruption used to obtain government contracts and services and that poorly regulated financial systems permeated with fraud "can undermine savings and deter foreign investment. They also make a country vulnerable to financial crises and macroeconomic instability."

The World Bank has begun to act against countries where it has found corruption in its projects. The bank stopped funding development projects in Nigeria and Zaire, and it has launched strict reforms to improve the monitoring of its money. The World Bank also suspended a $76 million loan to Kenya for energy development because it could not ensure that contracts would be awarded fairly and openly. Developing countries have to take these actions seriously since the World Bank finances about 40,000 contracts worth $25 billion each year. (Further details on the World Bank's anticorruption program can be found at [updated link: http://www.worldbank.org/en/topic/governance/brief/anti-corruption].)

[In the last five years, the World Bank funded on average $40 billion worth of projects a year; the World Bank has also significantly increased the number of debarments in that same period—from 2009-2013 there have been 492 debarments.[189]]

On a similar basis, the IMF has denounced corruption in developing countries. As part of its monetary policy, it has urged countries wanting to borrow from the IMF to institute anticorruption reforms. The IMF has also acted closely with the World Bank against corrupt regimes. In August 1997, the IMF suspended a $220 million loan to Kenya because of a scandal in the gold and diamond export trade. The next month, the IMF put a $120 million loan to Cambodia on hold "because of problems in governance which concern corruption and logging." As the IMF takes a leading role in resolving the financial crises of several Southeast Asian countries, it is imposing conditions on its loans that directly address corruption and bribery. South Korea has been forced to open its markets, curtail state-owned firms and crony capitalism, and make its financial systems more transparent. Thailand and Malaysia had to accept the same recipe and Indonesia was required to close sixteen loss-making banks, including one owned by former President Suharto's son. (The IMF's position on dealing with corruption is provided at [updated link: http://www.imf.org/external/np/exr/facts/gov.htm].)

[Basically, the IMF maintains that good governance is the key to economic success and that it promotes good governance by engaging in surveillance of its member countries' economic policies].

Despite such pressures, laws dealing with bribery in developing countries themselves haven't changed much. Bribery laws in third world countries are often confusing and

[189] See Freshfields' report on World Bank sanctions, online: <https://consultations.worldbank.org/Data/hub/files/consultation-template/consultation-review-world-bank-group-sanctions-systemopenconsultationtemplate/materials/freshfields_bruckhaus_deringer_llp_world_bank_consultation_submission.pdf>. See also <http://www.freshfields.com/en/news/Freshfields_submits_recommendations_as_part_of_World_Bank_sanctions_system_consultation/>.

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sometimes even contradictory. They tend not to reflect local customs and practice and are often ignored. When they are applied, it is often done arbitrarily and inconsistently. The punishment under such host country laws is usually severe and consists of imprisonment or fines and occasionally death. The punishment tends to apply to individuals only and not to corporations. For an investing company, the individuals most at risk are the company's employees and representatives who work or reside in the host country.

Investing companies often face a dilemma with these laws. Whereas they try to conform to the requirements of the bribery laws of their country of residence, this may not necessarily translate into conformance with host country laws. One example is the defences or exceptions under the FCPA. Facilitating payments or reasonable business expenditures may not strictly be allowed in the host country's law even though much greater sins are publicly practiced. These laws will undoubtedly change if a WTO convention on bribery is enacted, but in a way which is presently unknown.

Don't Blame Uncle Sam!

One gets the impression that the American government has single-handedly changed corruption laws around the world, for which they can be commended (or criticized, depending on one's perspective). However, it is not the complete story. The United States has indeed been the primary catalyst in this tremendous change, but looking beyond its initiative there are a multitude of reasons that have converged to create wide and growing support for the prevention of bribery in foreign countries.

The United States has mounted a massive global campaign in every conceivable multilateral organization in the world. (The primary U.S. Government website on foreign corruption is found at [updated link: http://www.imf.org/external/np/exr/facts/gov.htm]). A lot of this campaign is motivated by self-interest, but there is also a genuine desire to make the world a better place to do business. The U.S. government has relentlessly pursued the simple goal of having other countries' multinationals play by the same rules applicable to U.S. companies. Its strategy is clearly laid out in the 1996 Annual Report to Congress of the Trade Promotion Coordinating Committee. One of the Report's more novel ideas was the establishment of a hotline at the U.S. Department of Commerce for reporting bribery allegations. (This recommendation has not been implemented to the gratitude of scurrilous bribers around the world!)

There is a dawning realization that bribes eliminate competition, create inefficiencies, and ultimately cost countries and their consumers money. One only has to look at a list of the most corrupt countries and see that it is very similar to the list of the least developed countries in the world. It has been demonstrated that countries with high corruption have less investment and lower growth rates in their economy. *See generally*

Paulo Mauro, WHY WORRY ABOUT CORRUPTION? (1997). The result has been growing support in international trade and development organizations for policies aimed directly at eliminating corruption.

END OF EXCERPT

In their book *Handbook of Global Research and Practice in Corruption*, Graycar and Smith note some reasons why corruption has increasingly been seen as a significant global concern:

> International trade has been a feature of human behavior for millennia. But in recent centuries new transport mechanisms and new technologies have made for economic interdependence. Compounded by digital technologies which move money around the world at the speed of light, and global business moguls who seek advantage opportunistically and capriciously, corruption takes on a new dimension. Political instability has also taken on a cross-national dimension, and it is often fuelled by, and in turn fuels corruption.[190]

6.2 International Corruption Instruments Culminating in UNCAC (2005)

Webb in "The United Nations Convention Against Corruption" describes the major international anti-corruption instruments developed between 1997 and the enactment of UNCAC.[191] The brief summaries below of the major international instruments developed between 1996 and 2005 are derived from Webb's article.

6.2.1 The Organization of American States Inter-American Convention Against Corruption (1996)

The Organization of American States Inter-American Convention Against Corruption (OAS Convention) was signed by 22 countries in 1996, including the US. Canada signed the convention in 1999 and 33 countries have now signed on. The OAS Convention was the first binding international instrument on corruption. Venezuela led the group of Latin-American countries that lobbied for its creation. The United States was also a strong supporter of the Convention. The OAS Convention has a broader scope than the OECD Anti-Bribery Convention. Besides criminalizing the bribery of foreign officials, the OAS Convention requires that signatory states also criminalize the acceptance or solicitation of bribes. It

[190] Adam Graycar & Russell Smith, *Handbook of Global Research and Practice in Corruption* (Edward Elgar, 2011) at 3.

[191] Philippa Webb, "The United Nations Convention Against Corruption" (2005) 8 J Intl Econ L 191, online: <http://jiel.oxfordjournals.org/content/8/1/191.short>.

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therefore addresses both active bribery (the giving of a bribe) as well as passive bribery (the receiving of a bribe). Since the OAS Convention prohibits any bribe paid in relation to "any act or omission in the performance of that official's public function" (Article VIII, OAS Convention), it is broader than the equivalent OECD Anti-Bribery Convention provision, which only criminalizes bribery when it relates to a business transaction or contract. In addition, the OAS Convention encourages signatory states to criminalize other acts of corruption not strictly covered under anti-bribery laws, such as the misuse of confidential information by public officials.

As Webb notes, the OAS Convention's greatest weakness is its lack of a strong enforcement mechanism. In 2001 the Conference of State Parties established a peer review system to monitor implementation of the Convention. Under this system a Committee of Experts selects a state for review and then prepares a preliminary report on that country's implementation of the Convention. This report is then made available for review by the subject state. The final report is then submitted to the Conference of States Parties and published. The Committee of Experts can only make recommendations for improvements and cannot recommend sanctions for states who fail to meet their international obligations under the Convention.

6.2.2 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)

As discussed in the excerpt from Martin's article, "The Development of International Bribery Law," the OECD Anti-Bribery Convention was a key development in the international fight against corruption. The Convention has now been ratified by 35 OECD member states and 7 non-member countries (Argentina, Brazil, Bulgaria, Colombia, Costa Rica, Lithuania, Russia and South Africa).[192] While the OECD Convention initially seemed to come with a more rigorous review process than the OAS Convention, Webb writes that the monitoring mechanism had "mixed results."[193] Implementation of the OECD Anti-Bribery Convention is monitored by the OECD Working Group on Bribery, which uses a multi-phase peer-review system to evaluate and report on state parties' implementation of the Convention. The review system has worked slowly at times and has not always been well-funded. In many countries the introduction of new anti-corruption legislation has not had a significant impact domestically. Webb concludes that "[d]espite its focused scope, widespread ratification, and well developed monitory system, it [the OECD Anti-Bribery Convention] is yet to produce significant changes on the ground."[194] Some other commentators have a more positive view of the impacts of the OECD Anti-Bribery Convention. In my view, the OECD Convention's review system has prompted more government attention (and funding) for anti-corruption activities and, at least for Canada and the UK, has prompted some legislative

[192] OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, online: <http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm>.
[193] Webb (2005) at 197.
[194] *Ibid* at 198.

and practice improvements. For example, in Canada, new federal money was directed towards enforcement of the *Corruption of Foreign Public Officials Act (CFPOA)* and amendments were made to the Act due to criticisms and suggestions from the OECD review mechanism. Pressure for the new UK *Bribery Act, 2010* arose from many sources including the OECD review mechanism.

A detailed review of the activities of the OECD Working Group on Bribery can be found in their 2013 and 2014 Annual Reports.[195]

For further background on the development of the OECD Anti-Bribery Convention and a review of its application in member countries' domestic legislation, see Davids and Schubert, "The global architecture of foreign bribery control: Applying the OECD Bribery Convention" in Graycar and Smith, (2011).

6.2.3 Council of Europe Criminal Law and Civil Law Conventions on Corruption (1999)

(i) The Council of Europe Criminal Law Convention on Corruption

This multilateral instrument was adopted by the Council of Europe in 1999. The Council of Europe (COE) is a political organization composed of 45 European nations, including many from Central and Eastern Europe. The COE Criminal Law Convention on Corruption (COE Criminal Law Convention) may also be adopted by non-European states. Indeed, both Mexico and the United States are both signatories to the Convention. The Convention applies to private sector as well as public sector bribery. The Convention requires that member states prohibit active and passive bribery, but does not require that signatory states criminalize other forms of corruption. The COE Criminal law Convention also provides support mechanisms for parties fighting corruption, such as the requirement that signatory countries protect informants. In addition, although the facilitation of the tracing and seizing of assets is addressed, the Convention does not deal with the return of stolen assets exported out of the country of origin.

(ii) The Council of Europe Civil Law Convention on Corruption

The COE Civil Law Convention on Corruption (COE Civil Law Convention) is the first international instrument to address civil law legal remedies for those affected by corruption. Like the COE Criminal Law Convention, the COE Civil Law Convention may also be adopted by non-COE member states. As of May, 2013, 33 states had ratified the Convention. The COE Civil Law Convention focuses on the act of bribery and requires that signatory states provide domestic legal avenues for victims of corruption to recover damages against those who participated in acts of corruption as well as those who failed to take reasonable care to prevent corruption. The Convention addresses the protection of whistleblowers and

[195] OECD Working Group on Bribery, *Annual Report on Activities Undertaken in 2013* (OECD, 2014), online: <http://www.oecd.org/tax/crime/oecdworkinggrouponbribery-annualreport.htm>.

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allows courts to declare a contract invalid if its validity was "undermined by an act of corruption" (Article 8 COE Civil Law Convention). Although civil law mechanisms may allow victims of corruption to participate in the enforcement of anti-corruption laws on their own initiative, Webb notes that there are several disadvantages with addressing corruption through civil law means. Civil enforcement of anti-corruption laws could lead to a reduced ability of government agencies to control the overall anti-corruption strategy. As well, many victims of corruption may not have the means to take a civil claim to court.

(iii) Group of States against Corruption

The Group of States against Corruption (GRECO) is a monitoring organization that was established in 1999 by the Council of Europe. It monitors compliance with the Council of Europe's anti-corruption standards. All states that are party to either the Criminal or Civil Law Conventions on Corruption are subject to GRECO's compliance monitoring. Currently, GRECO includes 48 European States, as well as the US.

A team of experts nominated by GRECO members evaluates state parties' implementation of the Council of Europe's anti-corruption conventions. Each evaluation round assesses member states on a different corruption subtopic. First, member states are evaluated and recommendations are issued on how the state could improve its compliance. Next, a compliance report that evaluates how well the country complied with the recommendations of the earlier evaluation report is completed. All evaluation and compliance reports are made public and are available on GRECO's website.[196]

6.2.4 Convention of the European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States (1997)

The Convention of the European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States (EU Convention) builds on the 1995 Convention on the Protection of the European Communities Financial Interests and the 1996 and 1997 Protocols. The EU Convention is focused on addressing bribery of officials. It is limited to acts that are harmful to the EU's economic interests and only addresses corruption occurring within EU member nations. Following the EU Convention, the EU addressed private sector corruption in the 1998 EU *Joint Action Act*. The 2003 Communication on a Comprehensive EU Policy against Corruption encouraged member states to act on their multilateral anti-corruption obligations; however, it was drafted in non-binding language.

For a recent, detailed analysis of European countries which have progressed and those that have regressed in the past 15 years, see Mungiu-Pippidi, *The Good, the Bad and the Ugly:*

[196] Group of States against Corruption, online: <http://www.coe.int/t/dghl/monitoring/greco/default_en.asp>.

Controlling Corruption in the European Union, Working Paper 35, European Research Centre for Anti-Corruption and State-Building (Oslo: NORAD, 2013), online: <http://www.againstcorruption.eu/?post_type =reports>.

6.2.5 African Union Convention on Preventing and Combating Corruption (2003)

The African Union Convention on Preventing and Combating Corruption (AU Convention) is a broadly conceived, regional anti-corruption agreement. It was adopted in 2003 potentially covering 53 states. It required 15 states to ratify before coming into force and this was achieved in 2006. As of May 2013, 31 states ratified the Convention.[197] While the Convention is very comprehensive and is generally phrased in mandatory language, its enforcement mechanism relies on self-reporting. State parties are required to report on their implementation of the Convention to an Advisory Board elected by the Executive Council. However there is no obligation on the part of the Advisory Board to check the veracity of the country reports. Webb states that the lack of follow-up mechanisms to monitor enforcement may allow state parties to avoid fully implementing the Convention. However, Carr takes a more optimistic view of the AU Convention. She states that the "AU Convention is progressing in the right direction and with more harmonisation on the way through international and inter-regional agreements on various strengthening measures, such as codes of conduct for public officials and protection of informants, the war [against corruption] should ease in intensity."[198]

For an in-depth review of the AU Convention and a comparison between it and other international and domestic instruments, see Thomas R. Snider and Won Kidane, "Combating Corruption Through International Law in Africa: A Comparative Analysis" (2007) 40 Corn ILJ 691.

For further information on corruption and anti-corruption strategies in Africa see:

- John Hatchard, *Combatting Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Cheltenham, UK; Northampton US: Edward Elgar, 2014).
- The African Development Bank Group, http://www.afdb.org
- The African Parliamentarians Network Against Corruption (APNAC), www.apnacafrica.org and
- The African Union Advisory Board on Corruption, http://www.auanticorruption.org/

[197] African Union, "African Union Convention on Preventing and Combating Corruption", online: <https://www.au.int/en/treaties/african-union-convention-preventing-and-combating-corruption>.
[198] Indira Carr, "Corruption in Africa: Is the African Union Convention on Combating Corruption the Answer?" (2007) J Bus L 111 at 136.

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6.2.6 United Nations Convention Against Corruption (2003)

The United Nations Convention Against Corruption (UNCAC) was adopted by the General Assembly in December, 2003 and came into force in 2005 (with 140 state signatories). As of February 2017, 183 states are parties to UNCAC.[199] The term "State Parties" refers to states that have ratified or acceded to the Convention, thereby expressing their consent to be bound by the Convention; the term "signatories" refers to those states that signed the Convention before it entered into force in December 2005, thereby indicating their intent to ratify the Convention.

Webb notes that the negotiating process leading to UNCAC grew out of negotiation of the United Nations Convention Against Transnational Organized Crime (UNCTOC, 2000). As part of its strategy to curb organized crime, UNCTOC also requires that signatory states criminalize active and passive bribery relating to public officials. For a good description of the negotiations behind, and the content of, UNCTOC, see Dimitri Vlassis, "UNCTOC and its Protocols" in *The Changing Face of International Criminal Law: Select Papers* (International Centre for Criminal Law Reform and Criminal Justice Policy: Vancouver, 2002) at 75-103.

By December 2000, however, the United Nations General Assembly decided that a more comprehensive international agreement on anti-corruption was needed. Over seven sessions, in 2002 and 2003, the Ad Hoc Committee for the Negotiation of the Convention against Corruption negotiated the text of the Convention. The draft version of UNCAC was adopted by the General Assembly in October 2003 and was officially signed at Merida, Mexico in December 2003.

The UNCAC is broader in scope than the OECD Anti-Bribery Convention and many of the earlier, regional anti-bribery agreements. As Webb notes, the Convention addresses the following three main anti-corruption strategies:

- *Prevention*: The provisions of Chapter II of UNCAC contain preventative measures which target both the public and private sectors. These non-mandatory provisions propose the establishment of anti-corruption organizations and lay out measures for preventing corruption in the judiciary and public procurement. Member states are encouraged to involve nongovernmental organizations (NGOs) in uncovering and stopping corruption. (See UNCAC Articles 11, 9 and 6).
- *Criminalization*: Chapter III of UNCAC requires member states to criminalize a wide array of corruption activities, including bribery, embezzlement of public funds, trading in influence, concealing corruption and money laundering related to corruption. Though these measures are mandatory, the UNCAC adds qualifying clauses allowing member states some flexibility in adopting criminal legislation "in

[199] United Nations Office on Drugs and Crime, "United Nations Convention against Corruption", online:
<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.

accordance with fundamental principles of domestic law" or "to the greatest extent possible within [the state's] domestic legal system" (See UNCAC Articles 23 and 31). Resistant government officials could potentially use these clauses to justify inaction.

- *International Cooperation*: Chapter IV mandates that member states cooperate in preventing, investigating and prosecuting corruption. Signatories of UNCAC agree to give mutual legal assistance through gathering and transferring evidence for court trials and extraditing accused offenders. Furthermore, member states must also support each other in tracing, freezing, seizing, and confiscating proceeds of corruption.[200]

The negotiation process was not without controversy. According to Webb, the topics that generated the most disagreement among negotiating parties were the provisions addressing asset recovery, private sector corruption, political corruption, and implementation of the Convention.

Asset Recovery: A key aspect of UNCAC is the fact that it addresses the recovery of state assets exported from state coffers by corrupt officials. In this regard Webb states:[201]

> Asset recovery therefore became a sort of 'litmus test' for the success of the negotiating process as a whole. Although there were intense debates on how to reconcile the needs of the countries seeking the return of the assets with the legal and procedural safeguards of the countries whose assistance is needed, the representatives always emphasized its importance throughout the negotiations. The high priority of the issue was bolstered by the Security Council resolution deciding that all UN member states should take steps to freeze funds removed from Iraq by the Saddam Hussein or his senior officials and immediately transfer them to the Development Fund for Iraq, and take steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property that had been illegally removed. The African representative, in particular, believed that the words and spirit of this resolution should be incorporated into the UNCAC.
>
> In the end, provisions on asset recovery formed an entire chapter of the UNCAC. The provisions have been hailed as 'ground-breaking'. But this overstates their true impact. [footnotes omitted]

Then Webb adds:

> The effectiveness of the asset recovery provisions depend to a large extent on the measures for mutual legal assistance. ... Overall, even though the chapter on asset recovery is not as revolutionary as some people say, it is a

[200] Webb (2005) at 205–206.
[201] *Ibid* at 208–209.

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> significant step forward in dealing with a complex problem in international affairs. Most importantly, the Convention ties the asset recovery provisions to a wide range of corrupt acts, not just bribery.[202]

Asset Recovery is dealt with in detail in Chapter 5.

Private Sector: Considering the economic strength of many multinational corporations, private sector corruption was also considered during the UNCAC negotiating process. The European Union was strongly in favour of including the criminalization of private sector bribery during the UNCAC negotiations. The United States was opposed as it viewed this initiative as an undesirable constraint on private sector business dealing. The final version of UNCAC only includes non-binding articles relating to the criminalization of private sector bribery and embezzlement. UNCAC does, however, require that state parties take steps to prevent private sector corruption. As well, the Convention requires state parties to ensure that individuals and other legal entities that suffered damages as a result of corruption have the right to bring civil cases against those who are responsible. Due in part to the American business community's fears of a plethora of lawsuits being brought against American companies by overseas litigants, each state has the ability to determine under what circumstances these types of claims will be permitted.

In regard to private-to-public sphere corruption, UNCAC is more comprehensive than the OECD Anti-Bribery Convention in several respects. UNCAC criminalizes the bribery of domestic officials as well as foreign officials. Also UNCAC mandates that state parties prohibit bribes from being tax deductible; in comparison, this step is only a recommendation in the OECD Anti-Bribery Convention.

Financing of Political Parties: At one point in the negotiating process Austria, France, and the Netherlands proposed an article (Article 10) that mandated signatory countries adopt regulations aimed at addressing corruption and increasing transparency in elections and campaign financing. The United States voiced strong opposition to the mandatory language of the article. This was a reversal from the American stance on the same issue during the OECD Anti-Bribery Convention negotiations 20 years earlier. Eventually a compromise was struck and the mandatory directions in Article 10 were replaced with Article 6, which only asks that states "consider" taking steps to enhance transparency in elections and campaign financing. As Webb writes, "[t]he Ad Hoc Committee ultimately had to recognize that campaign contributions are a crucial part of the election systems in many countries and it had to tread carefully in order to avoid the Convention coming into conflict with a core aspect of democratic politics."[203] Despite strong public concern on this issue, the UNCAC negotiating committee failed to reach agreement on a binding article addressing corruption in campaign financing.

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[202] *Ibid* at 210.

[203] *Ibid* at 218.

Implementation, Enforcement, and Monitoring: Despite stronger proposals by several delegations, the final version of UNCAC was criticized for not establishing stronger monitoring mechanisms to ensure that signatory states comply with the Convention. UNCAC established a "Conference of State Parties," meant to enable the exchange of information and cooperation among signatory states, but no formal review mechanism was agreed upon. In 2009, the Conference of State Parties agreed on a peer review process to evaluate state parties' self-assessments of compliance with the Convention. The review process comprised of two five-year cycles with a quarter of the member states reviewed each year: the first cycle (2010-2015) reviews compliance with Chapters III (Criminalization) and IV (International Cooperation) and the second cycle (2015-2020) will cover Chapters II (Preventative Measures) and V (Asset Recovery).

UNCAC has influenced global cooperation in fighting corruption. In "The United Nations Convention Against Corruption," Jousten highlights UNCAC's impact in three areas:

- as a global convention it has considerably expanded the geographical scope of cooperation,
- it provides common definitions of certain key offences, and requires (or, in some cases, at least encourages) States Parties to criminalize these acts, and
- it has standardized, and contributed to, the development of procedural forms of co-operation.[204]

The UNODC developed materials for a university-level course on UNCAC. The course materials are available on the UNODC's webportal TRACK (Tools and Resources for Anti-Corruption Knowledge, under the section "Education": www.track.unodc.org). The "Education" section of TRACK also contains a Menu of Resources which identifies 20 anti-corruption topics and provides a list of relevant academic articles, books, reports etc., on each topic. In addition, this book is also available on UNODC's TRACK webportal: http://www.track.unodc.org/Education/Pages/ACAD.aspx.

For a discussion of the compliance challenges and impacts of UNCAC, see Ophelie Brunelle-Quaraishi, "Assessing the Relevancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis" (2011) 2:1 Notre Dame Intl & Comp LJ 101. See also Jan Wouters, Cedric Ryngaert and Ann Sofie Cloots, "The International Legal Framework Against Corruption: Achievements and Challenges" (June 2013) 14:1 Melb J Intl L 205.

6.3 The Meaning and Effect of International Conventions

In international law, a convention (or treaty) is a statement of principles, rules and procedures on a specific topic which is adopted by international bodies such as the United

[204] Matti Jousten, "The United Nations Convention Against Corruption" in Graycar & Smith, eds, (2011).

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Nations. The adoption of a convention by the UN does not automatically bind all UN members to comply with the convention. At the time a convention is adopted, a number of countries will sign (become signatories) to the convention. By becoming signatories, those countries indicate their general agreement with the principles and purposes of the convention. However, countries are only bound by a convention or treaty by ratifying it. Ratification signals that a country has laws and practices in place that are in compliance with the convention and that the country is ready to be bound by the treaty under international law.

In countries such as England, Canada and Australia, ratification is a power exercised by the Executive (i.e., the elected government and, more specifically, the cabinet). Parliamentary approval is not required, although all treaties and conventions are tabled in Parliament before ratification by Canada. In the US, ratification takes place through the combined actions of the Executive and a two-thirds vote of the Senate.

Once ratified, the particular state becomes a "party" or "state party" to the convention.

Some conventions have protocols. A protocol is an addition or a supplement to an existing convention. State parties are not automatically required to adopt protocols and for that reason protocols are often referred to as "optional protocols." In the case of the OECD Anti-Bribery Convention, there have been three subsequent instruments, called "Recommendations," which are also optional.

If states disagree on the interpretation of a convention or treaty provision, the dispute can be referred to an international tribunal or arbiter for resolution. Conventions and treaties frequently have specific provisions allowing countries to withdraw from (or denounce) the convention (e.g., Article 70 of UNCAC and Article 17 of the OECD Anti-Bribery Convention).

On the topic of enforcement of conventions and treaties, *Canada's Approach to Treaty Making*, a publication from Canada's Library of Parliament, states:[205]

> Compliance with and the enforceability of international treaties is a broad topic that cannot be dealt with in any comprehensive manner in a few paragraphs. Ultimately, there are multiple forms of international treaties, multiple levels of enforceability, and multiple mechanisms for enforcement. Various bodies are available to assist with the enforcement of international treaties and conventions at the international and regional levels. For example, trade treaties may be subject to enforcement under the NAFTA or through the World Trade Organization, which have various levels of tribunals to ensure compliance with their standards. Other trade treaties are subject to enforcement by arbitral tribunals that can impose financial

[205] Laura Barnett, "Canada's Approach to Treaty Making Process" (revised November 2012) Library of Parliament, Legal and Legislative Affairs Division Background Paper No 2008-45-E at 5, online: <http://www.parl.gc.ca/content/lop/researchpublications/2008-45-e.htm>.

> penalties on parties to the agreement. By contrast, human rights treaties are often subject to some form of oversight through the United Nations treaty bodies. The Concluding Observations issued with respect to country compliance under these UN treaty bodies are not legally binding, but they do carry significant moral suasion. Breaches of humanitarian law, such as war crimes and crimes against humanity, are dealt with by the International Criminal Court, which has the power to sentence individuals to imprisonment. The International Court of Justice is also charged with settling legal disputes submitted to it by states in accordance with international law generally, and with giving advisory opinions on legal questions referred to it by UN organs and specialized agencies. [Footnotes omitted]

On a practical level, enforcement of UNCAC and the OECD Convention is dependent on the implementation monitoring process which the State Parties have agreed to in each Convention.[206] In accordance with Article 12 of the OECD Convention, a detailed monitoring program of each state party is done under a framework developed and conducted by its Working Group on Bribery (see 2009 Recommendation of the Council for Further Combatting Bribery of Foreign Public Officials, Recommendations XIV and XV). The Working Group's Evaluation and Monitoring Reports for each country can be viewed on their website.[207] Once the enforcement recommendations set out in the Country Evaluation Report are made public that country is under political and moral pressure to comply with the recommendations.

Article 63 of UNCAC leaves the issue of monitoring State Parties compliance to the Conference of State Parties who are directed to agree upon activities, procedures and methods of work to achieve the Convention's objectives, including (in Article 63(4)(e)) periodic review of the "implementation of the Convention by its State Parties." UNCAC adopted a review mechanism during the 3rd Conference of State Parties in Doha in 2009

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[206] Monitoring and compliance are challenging tasks in relation to international conventions. Clare Fletcher and Daniela Hermann describe the difficulty of enforcement in *The Internationalisation of Corruption* (Burlington, VT: Ashgate, 2012) at 73: "[t]heoretically, when a treaty comes into existence, ratifying states are legally bound to comply with it. ... As we have seen, however, in the contemporary international system there is no single political authority above the state. In practical terms, therefore, states cannot be forced to comply." Fletcher and Hermann also point out that monitoring without infringing on state sovereignty is problematic, while compliance with UNCAC and the OECD Convention is further jeopardized by the challenges of pursuing complex and expensive corruption cases within states. Further, as seen in the BAE case (described in more detail at Part 10 of this chapter and Chapter 6, Part 1 of this book), compliance with UNCAC and the OECD Convention also depends on political will in each ratifying state. For Rose-Ackerman and Bonne Palifka's analysis of feasible options available to international bodies in fighting corruption see Chapter 14 of Rose-Ackerman & Palifka (2016).

[207] OECD Convention Working Group on Bribery, "Country Reports on the Implementation of the OECD Anti-Bribery Convention" online: <http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm>.

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(Resolution 3/1). Under the review mechanism, each state party is reviewed by two peer states under the co-ordination of the UNODC Secretariat. The terms of reference, guidelines and blueprint for UNCAC reviews can be found in the 2011 UNODC publication *Mechanisms for the Review of Implementation of the United Nations Convention against Corruption: Basic Documents*. In short, peer reviews of all states are to begin over a four-year time frame beginning in 2010, with a country's year of review being determined by lottery. [Canada is in year 3, the UK in year 2, the US in year 1]. The two peer review countries are made up of one review country from the same region as the country being reviewed and another review country from a different region. The first step of the review is the completion and submission of a detailed self-assessment report by the country under review, followed by electronic communication; then (normally) a site visit and the writing of the review report (the executive summary is made public, but not the report itself). For more information on the progress of the UNCAC review mechanism, see the April 7, 2016 Progress Report of the Implementation of the Mandates of the Implementation Review Group."[208] Each evaluation cycle of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption lasts four years. The Progress Report from the most recent session of the Implementation Review Group, which occurred in April of 2016, provides information on the first review cycle. At this seventh session, country pairings for the second cycle of reviews were drawn.[209] Thirty countries are expected to be reviewed during the first year of the second cycle.

6.4 Development and Revision of National Laws Against Corruption

6.4.1 US and UK Anti-Corruption Laws

Following the multilateral agreements reached in the international forum, many countries have enacted or revised domestic laws to comply with their international convention obligations. As already noted, the United States' *Foreign Corrupt Practices Act* (1977) was an

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[208] Implementation Review Group, "Progress Report on the Implementation of the Mandates of the Implementation Review Group" (7 April 2016), online: <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/20-24June2016/V1602026e.pdf>. The Implementation Review Group's Canadian Progress Report can be found at: <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1400913e.pdf>. The United Kingdom's Progress Report can be found at: <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1382015e.pdf>. The United States' Progress Report can be found at: <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1251970e.pdf>. China is being reviewed by Viet Nam and Bahamas, but its report has not yet been published.

[209] "Country Pairings for the Second Cycle of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption" (14 July 2106), online: <http://www.unodc.org/documents/treaties/UNCAC/Review-Mechanism/CountryPairingSchedule/2016_07_14_Country_pairings_SecondCycle.pdf>.

influential example of a rigorous anti-corruption law long before the international instruments were established. The United Kingdom's *Bribery Act* (2010) is the latest illustration of a strong and broad domestic anti-corruption law. Both the US and UK laws have broad extra-territorial provisions, and therefore foreign companies and persons conducting global businesses with a link to either country must comply with these two "domestic" laws. Both US and UK corruption laws will be examined throughout this book as illustrations of how other countries could comply with UNCAC and other anti-corruption conventions.

Compliance by state parties with international anti-corruption obligations remains inconsistent. The 2015 Transparency International (TI) report "Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention Progress Report 2015" indicates that of the 39 state parties to the OECD Convention, only four (Germany, Switzerland, the UK, and the US) are actively enforcing the OECD Convention, while six countries (including Canada) have moderate enforcement, nine others have limited enforcement, and twenty have little or no enforcement.[210] TI views the "Active Enforcement" ranking as a necessary step to effectively deterring companies and individuals from bribing foreign public officials.

6.4.2 Canada's Domestic Legislation

Canadian corruption and bribery laws will be examined in detail in subsequent chapters of this book. In short, the 1998 *Corruption of Foreign Public Officials Act* (*CFPOA*) was enacted in order to fulfill Canada's obligations under the OECD Anti-Bribery Convention. The *CFPOA* makes it a criminal offence in Canada for Canadian corporations or individuals to bribe or offer a bribe to a foreign official in order to win business or gain an improper advantage. In 2013, the federal government amended the *CFPOA* in several ways to increase its scope and effectiveness. Canada currently meets its anti-corruption international obligations under UNCAC by a combination of provisions in its *Criminal Code* and *CFPOA*.

Enforcement of the *CFPOA* was nearly non-existent prior to 2008-2009 since there were no police resources specifically allocated to *CFPOA* enforcement. Canada was criticized by many commentators and eventually by the OECD Working Group on Bribery for its non-enforcement of *CFPOA* provisions. As a consequence of this criticism, the federal government funded the creation of two new RCMP foreign corruption units. Since that time there have been a few major convictions for foreign bribery, two other cases awaiting trial, and apparently 10 to 15 other cases under investigation. TI currently ranks Canada's

[210] Fritz Heimann & Gillian Dell, "Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention Progress Report 2015" (Transparency International, 2015), online: <http://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2015_assessing_enforcement_of_the_oecd>.

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enforcement of the OECD Convention as "Moderate," one level below the "Active Enforcement" level, which is considered the appropriate level.[211]

7. DIVERGENT POLITICAL AND ECONOMIC VIEWS ON CORRUPTION

7.1 Libertarians, Cultural Ethnographers and Liberal Democrats

In her article "Corruption: Greed, Culture and the State," Rose-Ackerman argues that while lawyers view corruption mainly as a problem of law enforcement, some commentators in other disciplines contest the very concept of corruption.[212] To analyze this perspective, Rose-Ackerman reviews how both free-market libertarians and cultural ethnographers have drawn on a distrust of the modern state to legitimize, excuse, and explain corruption. She further argues that these views are overly simplistic and are at times, internally inconsistent. Instead, she advocates for an approach to anti-corruption theory that acknowledges the importance of the modern state and seeks to build transparency and accountability in government institutions.

Libertarians and Corruption

Rose-Ackerman describes the libertarian view of corruption "as a symptom of an intrusive, meddling state that systematically reins in the free market and undermines entrepreneurial activity and competition… [Libertarians] argue that market actors who pay bribes to avoid complying with the rules, to lower tax bills, or to get favours, limit the harm that the state can do, and consequently enhance the benevolent operation of the free market as a locus of individual freedom."[213] She suggests that libertarians prefer very little state regulation and view bribery as a technique that can be used to facilitate the efficient functioning of free markets. As an example, Rose-Ackerman submits that a libertarian would not be concerned about the illegality of using a bribe to get around a costly regulation, and instead would approve of this transaction. In support of this libertarian position, Rose-Ackerman cites Becker[214] and the authors of "Economic Freedom and Corruption" who write, "The fewer

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[211] *Ibid*.

[212] Susan Rose-Ackerman, "Corruption: Greed, Culture and the State" (2010) 120 Yale LJ 125, online: <http://www.yalelawjournal.org/forum/corruption-greed-culture-and-the-state>.

[213] *Ibid* at 126.

[214] Gary S Becker, "To Root Out Corruption, Boot out Big Government", *Business Week* (31 January 1994) at 18.

resources (includes assets and regulatory power) a government controls, the fewer the opportunities for corruption."[215]

Furthermore, Rose-Ackerman describes the extreme libertarian views of Brennan and Buchanan, who perceive state taxation and regulation as equivalent to theft.[216] Brennan and Buchanan's view, Rose-Ackerman argues, would allow government officials to act in self-interest and extract private benefits, initiating the government's devolution into a kleptocratic monster. Rose-Ackerman critiques this libertarian view and maintains that democracies, while not always completely efficient or perfect, are the best available way to reflect the will of the people. Indeed, as long as the rules of the constitution are followed, and human rights are respected, Rose-Ackerman argues that using government inefficiency, or bad laws, as a way to justify bribery "trivializes and undermines democratic institutions."[217]

Ethnography and Corruption

Rose-Ackerman also asserts that cultural anthropologists and ethnographers excuse the corrupt giving of gifts and favours, but do so by employing different justifications than libertarians. From the perspective of a cultural anthropologist, Rose-Ackerman argues traditions that emphasize payments, gifts or favours to friends and family are privileged over formal rules and laws. Indeed, she states "scholars in this tradition often refuse to label transactions as corrupt if they are based on affective ties, or they claim that, even if formally illegal, the practices are socially acceptable, economically beneficial, and compensate for the imperfections of government and of electoral institutions."[218]

The author suggests that cultural anthropologists blame corruption on a mismatch between traditional practices and the development of impartial bureaucratic and democratic systems. Thus, if a society is transitioning from personal transactions to a formal set of rules and laws, cultural feelings of duty may clash with professional obligations and lead to corrupt acts. Additionally, Rose-Ackerman asserts that in some cultures, many ethnographers find the current, dominant conception of corruption is simply a part of everyday life in a citizen's social interactions with the state. In these instances, such as paying a fee to avoid taxes or bribing a judge for the "loss" of a key legal document, the social norms justify the behaviour, even though they mix economic motives and social practices. As examples of these

[215] Rose-Ackerman (2010) at 127, citing Alejandro A Chafuen & Eugenio Guzman, "Economic Freedom and Corruption" in Gerald P O'Driscoll, Jr, Kim R Holmes & Melanie Kirkpatrick, eds, *2000 Index of Economic Freedom* (2000) 51 at 59.
[216] Geoffrey Brennan & James M Buchanan, *The Power to Tax: Analytical Foundations of a Fiscal Constitution* (Indianapolis: Liberty Fund, 1980).
[217] Rose-Ackerman (2010) at 128.
[218] *Ibid* at 128.

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anthropologic assertions, Rose-Ackerman relies on the work of de Sardan,[219] Hasty[220] and Smith[221] who developed these themes in the African context. Specifically, Rose-Ackerman cites Smith's studies of Nigerian culture, where locals considered modern conceptions of corruption, which involved helping friends and family, proper moral behaviour. Furthermore, Rose-Ackerman submits that in Africa corruption is recognized and criticized by many people, even though "they themselves participate in networks that socially reproduce corruption."[222] Rose-Ackerman also acknowledges a similar cultural norm of ambiguity regarding bribes to friends and family in China, termed *guanzi*, or as it translates "social connections."

Rose-Ackerman while sympathetic to the position of those who find their social obligations conflict with their professional ones, reasons that "while deeply embedded and self-reinforcing, … norms must change … if a society is ever to build a legitimate democracy."[223] She further argues that the current condemnation of corruption by citizens leaves openings for potential reform.

In summary, Rose-Ackerman believes libertarians and ethnographers share very similar normative positions. She states, "both stress the way payoffs to public officials permit nonstate institutions to flourish in spite of a set of formal rules that constrain private behaviour. However, each gives a different set of institutions priority – the market for one and social ties for the other."[224] In addition, Rose-Ackerman argues both groups perceive corruption as a response to a dysfunctional reality.

Grand Corruption

The main type of corruption Rose-Ackerman is concerned with is what she terms "grand corruption." In instances of grand corruption, those at the top of the state hierarchy, such as political leaders, participate in corrupt acts in return for funds. The problem with this, Rose-Ackerman argues, is that grand corruption will lead to distortions in the quality and quantity of government decisions, divert funds to public officials' private accounts and create unfair electoral advantages. Grand corruption is sometimes initiated by multinational firms, whom Rose-Ackerman contends, invoke cultural norms as their justification for giving bribes to public officials. For example, Rose-Ackerman cites the 2006 international arbitration dispute where a firm paid a two-million-dollar bribe to the President of Kenya and tried to argue that the payment was made to satisfy the local custom of *harambee*. The Kenya government,

[219] JP Olivier de Sardan, "A Moral Economy of Corruption in Africa?" (1999) 37:1 J Modern Afr Stud 25.
[220] Jennifer Hasty, "The Pleasures of Corruption: Desire and Discipline in Ghanaian Political Culture" (2005) 20:1 Cultural Anthropology 271 at 273.
[221] Daniel Jordan Smith, "Kinship and Corruption in Contemporary Nigeria" (2001) 66:3 Ethnos 344.
[222] Rose-Ackerman (2010) at 130.
[223] *Ibid* at 130.
[224] *Ibid* at 131.

under new leadership argued there was no valid contract because of the bribe and the arbitration tribunal agreed with them.[225]

Rose-Ackerman analyzes multiple justifications she believes others use to excuse grand corruption.[226] First, multinational firms argue that presenting bribes is simply an attempt to be culturally sensitive. The author points out this excuse is invalid because the unfavourable terms of the contract, obtained because of the bribe, negatively affected the citizens of the nation. Thus, if the firm was being culturally sensitive they would consider the cultural needs of more than just the one public official whom they bribed. Second, Rose-Ackerman critiques the argument used by high ranking officials that a bribe is simply a tribute to their prestigious status, in line with cultural traditions--an argument which conflicts with established tradition where bribes go from higher-status to lower-status individuals. If high ranking officials were really following traditions, Rose-Ackerman claims, they would be insulted by these bribes and reject them. Third, Rose-Ackerman states culturalists argue that grand corruption is imported from wealthy, capitalist countries where businesses have profit-maximization as their goal. In other words, the bribes and corruption only occur because of this western influence. In her assessment this argument is too simple because both parties, including the political leaders, must agree to make a corrupt deal and some are willing to use the excuse of culture to justify self-gain. Thus, Rose-Ackerman assets "one needs to be cautious in accepting at face value assertions that seemingly corrupt transactions reflect entrenched cultural practices acceptable to most people."[227]

Democratic Legitimacy and the Control of Corruption

The author asserts that a democratic state may exercise coercive power in making decisions, which may have a greater cost on some individuals over others, as long as the state publicly justifies its exercise of power. Furthermore, Rose-Ackerman recognizes that a democracy does not mean unanimous consent or a lack of policymaking delegation. Broadly speaking, Rose-Ackerman believes a properly functioning democracy is a legitimate way to organize society. However, Rose-Ackerman argues if elected officials or bureaucrats engage in self-interested behaviour, such as corruption, this undermines the state's claim to legitimacy. She acknowledges that in situations where public power is bound up with paternalistic obligations, it may be difficult to separate corrupt dealings with local practices. Nevertheless, Rose-Ackerman argues if corruption is allowed to take place in government, state agents will likely rewrite rules to increase their self-gain and will create a feedback loop that weakens the legitimacy of the government. Furthermore, Rose-Ackerman argues that "tensions

[225] *Ibid* at 132, citing *World Duty Free Co v Republic of Kenya*, ICSID Case No. ARB/00/7, at 190-191 (4 October 2006).
[226] For more on grand corruption and an economic analysis on how to reduce the incentives and increase the cost of corruption, see Chapters 3, 4 and 5 of Rose-Ackerman & Palifka, (2016).
[227] *Ibid* at 134.

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between the democratic welfare state and the private market and between that state and a country's traditional cultural practices are all but inevitable."[228]

Therefore, Rose-Ackerman suggests that anti-corruption policy can take three paths: first, to accept the presence of cultural norms and channel them into less destructive paths; second, to bypass cultural norms by substituting institutions that require other skills and values; or third, to transform these cultural norms. She also cautions that aggressive approaches to anti-corruption may destroy the goodwill and loyalty of citizens. Rose-Ackerman acknowledges there is no easy solution to the critiques of anti-corruption efforts, but provides eight potential areas of reform.

1. Simple Transparency is Necessary

   There must be the publication of and easy access to all laws, statutes, regulations, legal guidelines and practice manuals. Moreover, there should be an independent external audit body, which oversees government spending.

2. External Oversight of Government Activity is Essential

   Removing press restrictions and sponsoring training in investigative journalism is one solution to provide external monitoring of government action. This area of reform is tied to the first suggestion, as civilians must have access to information before they can review it and issue complaints.

3. Transparent and Competitive Processes for Large-Scale Procurement Should Exist

   This measure is specifically aimed at countering grand corruption, but she recognizes there will be an occasional need for sole-source procurement. In these instances, she advises the government be transparent with their negotiations and attempt to obtain a high quality result at a good price.

4. The State Should Enforce Bribery Laws Against Major Offenders both Inside and Outside of Government

   This may entail, making special efforts to apprehend organized crime involved in corruption.

5. Creation of a Complaint Mechanism Process to Report Bribes

   There should be a way for individuals and businesses to report bribes and have their claims dealt with in a timely manner.

[228] *Ibid* at 136.

6. Reforms Should Be Made to Improve Government Function and Reduce Corruption

   Rules and regulations should be studied to identify where reforms or repeals may be necessary to reduce corruption.

7. The Working Conditions of Civil Servants and the Judiciary Should be Improved

   Improving the pay, working conditions and recruitment process of civil servants, coupled with increased internal monitoring, should help reduce the likelihood of corruption.

8. Electoral Law May Need Reform

   In areas where politicians are found to be corrupt, electoral law and its enforcement may need to be reformed.[229]

In conclusion, Rose-Ackerman acknowledges that while international treaties and civil society initiatives aimed at curbing global corruption are a step in the right direction, their effects do not have the same "bite as hard law" and are only a complement to much needed domestic reform. In addition, she urges moving away from simplistic claims such as corruption is necessary because of a dysfunctional government, and instead, argues for realistic domestic reforms, such as increasing the effectiveness of public services and ensuring conflicts are resolved fairly, in order to reduce corruption.[230]

7.2 The Three Authority Systems: Traditional, Patrimonial and Rational-Legal

In his article "Corruption in the Broad Sweep of History," Marcus Felson uses Max Weber's three categories of historical authority systems to conceptualize corruption and place it within its political and economic context.

BEGINNING OF EXCERPT

Corruption is a product of the interplay between (a) primary human imperatives and (b) an economic and social system trying to control and channel those imperatives. Primary human imperatives include both looking after one's personal interests and meeting social commitments to friends and relatives. A strong tension is inherent

[229] Rose-Ackerman & Palifka (2016).

[230] For further exploration of the relationship between culture and corruption, see Chapter 7 of Rose-Ackerman & Palifka (2016).

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between these primary human imperatives and the larger economic and social system. That tension is strongest with the modern form of economic organization. Hence corruption, despite its ancient presence, becomes especially relevant in a modern world. Although corruption becomes especially an issue as developing nations move towards a modern world, we should not assume that the tension will go away once they are developed.

Those aware of Max Weber (1947 [1904]) will immediately recognize the origins of the current argument in his description and analysis of the broad sweep of economic and social history. Weber was perhaps the greatest historical theorist of economic and social life. On the one hand, he gathered vast detail as he studied and described each society. On the other hand, Weber summarized those details within a very general analytical framework. Each society has a prevalent authority system that governs its behavior, and that authority system is central for understanding it. Weber synthesized information about the broad sweep of economic and social history with three authority systems: (a) traditional, (b) patrimonial, and (c) rational-legal. This chapter explains his general categories, then shows why they help us to understand and conceptualize corruption.

Within a traditional system, individuals are constrained by the rules and mores of society, but those constraints do not stand between primary human imperatives and productivity. Thus a traditional hunting and gathering society follows the teachings of the past and the social ties of kinship, whether or not these lead to greater efficiency. Traditional systems often apply in agrarian societies with small village life, and are not oriented towards a modern society. However, traditional systems may persist into the modern era. A prime example of a traditional system is the interplay of the Hindu religion and the economy in India. Each economic role is largely defined by caste and hence by tradition, within minimal economic flexibility and little regard to efficiency. Within a traditional system, many economic behaviours that we might regard as corrupt from an outside viewpoint are actually part of the rules. Thus assigning jobs by caste and village is intrinsic to the way of life, and should not be viewed as corrupt behavior as a matter of personal deviance, except when those collective obligations are circumvented.

The patrimonial system is very distinct from the traditional system because of its reliance on personal rule. In this system the ruler does not distinguish between personal and public life, treating state resources and decisions as his personal affair. The agents of the ruler act in his name and on his behalf. It is still possible for those agents to be corrupt only in the sense that they cheat the ruler of his due. If the ruler's agents mistreat the citizens, they are acting within the rules of the system—so long as they send the proceeds back to the ruler and do not take more than their allotted share. This is quite evident in the history of tax farmers whose job was to demand tribute and payments from the provinces. They would be perceived as corrupt to us today,

but they were not corrupt in terms of their system, unless they hid the proceeds from the ruler in their own selfish interest. Examples of patrimony range from Roman emperors to President Ferdinand Marcos in the Philippines and Colonel Khadaffi in Libya—reflecting extension of authority beyond a local area. This leads us to as whether such power has been established by force or by normative authority or some combination. But regardless of the answer to that question, extracting resources from the population is intrinsic to the system, not a violation of it.

The rational-legal system of economic and social organization has an entirely different set of expectations from the traditional and patrimonial systems. The rational-legal system is closely related to Weber's textbook concept of 'formal organization' and bureaucracy—a word he uses in positive terms. Under this system, all persons follow rules and fit into formal roles that are separate from the personal, family, and friendship interests of their incumbents. The rulers and role incumbents are substitutable, so that a formal organization persists over time, pursuing goals beyond the individual. This impersonality includes hiring based on competence and certification, and promotion based on ability and productivity. The role incumbents must follow rules, and must be oriented towards goal achievement beyond themselves. They are also supposed to treat each client equally, according to the rules, ignoring personal ties and predilections. Thus modern life conflicts fundamentally with primary human imperatives. Bureaucracy in Weber's terms is like a machine, since it separates personal interests (including family and friend commitments) from interests, facilitating the latter. Yet this form of economic and social organization only emerged in the past 200 years or less in Europe, and in most of the world did not begin to spread until after 1950. In many parts of the world, the rational-legal form is only beginning to emerge. The distinction between persons and positions is difficult to accept fully in any era, which helps explain why it was so late to arrive.

Of course, Weber's concept of rational formal organization is an ideal type. It describes the official position of many modern societies; but that does not mean that everybody follows those rules all of the time. Indeed, a rational-legal system creates a fundamental tension in society, because it is only natural for each person to take care of oneself and one's family and friends, even in in violation of general rules and roles. Thus the rational-legal system is almost directly in conflict with primary human imperatives—which do not go away simply because society no longer welcomes them as much as before. Indeed, corruption has much greater potential in the rational legal system than in the traditional or patrimonial systems of economic and social organization. The levels of corruption possible in a rational-legal system far exceed anything possible in the traditional system, which provides more local controls and hardly expects people to abandon their personal ties while engaging in productive work. The corruption in a modern system also exceeds the corruption of the patrimonial system, within which one must cheat the ruler in order to be corrupt, but

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the ruler and his agents extracting from everybody else is part and parcel of that economic and social system.

The corruption potential of a rational-legal system is dramatically greater mainly because that system conflicts with basic human tendencies. If human beings are both selfish and social, then the modern form conflicts with each. It conflicts with the selfish tendencies because each individual has something to gain from evading less pleasant role assignments or taking resources beyond entitlement. It conflicts with social tendencies because each individual feels commitment to friends, family and those with less social distance and wants to help them more than strangers. Hence treating everybody alike under the rules is unnatural for real people.

Given its conflict with human selfishness and human sociability, the rational-legal system should have died an early death. Yet it survives and spreads for a simple reason: this strange and hardly human form of social and economic organization is extremely productive in material terms. It makes more cars. It processes more customers and clients. It shortens lines and puts a chicken in every pot. And so the least human of social and economic systems is also the most productive. Thus our selfish and social interests are torn between the immediate gains from violating the rules and the more general gains from following them. The best individual solution is to break the rules yourself but get everybody else to follow them, yielding a productive society as a whole that you can then exploit. However, if too many people do that then the productivity of the whole system declines and the rational-legal system becomes a figment of the imagination.

Imaginary rational-legal systems are all too common. In a way the real lesson of the 2000 Presidential election and the case of *Gore vs Bush* in Florida is the corruption and mismanagement of state and local governments in the United States. In Weber's terms, each occupational role is assigned to a specialist, with overlapping roles minimized. Those familiar with corruption issues will immediately recognize this as a flaw, for the lack of overlap makes it easier for one person to corrupt the system and avoid discovery. In contrast, overlapping makes it possible for someone else to check, or more generally for the people to check one another.

Weber relied too much on the power of the normative system to keep each incumbent performing properly. Here we turn to another great theorist, James Madison (1787), whose famous Federalist Paper Number 10 explained the need for a system of checks and balances. Although Madison was considering legislative matters, his general principle was that individuals are corruptible (in the broad sense), but that their selfish and personal interests can be used to counter one another.

The theory of checks and balances may be the essential general theory of corruption control. In both government and business, checks and balances are employed to

protect responsible decisions and actions. Rival political parties, parliamentary question periods, a free press, regulatory agencies, free competition in the marketplace, overlapping roles, auditors and accountants—each of these is a special example of the general rule that checks and balances are needed to prevent personal and social interests from impairing efficiency and productivity. Thus Madison sought to reconcile primary human imperatives with the requirement that everyone has a fair shake.

Modern corruption has to do with positions, and modern organization creates lots of positions demanding that people suppress their selfish interests. In the era of traditional and patrimonial authority, corruption was limited and modern corruption did not exist (although a more primitive and limited form of corruption did apply, even then). When organization is poorly designed and managed, we can expect corruption as a result; but we can also expect various organizational goals to be poorly achieved. In fighting corruption, we must always remember what we are asking of people: to set aside personal interest and personal ties and to follow rules for the greater *impersonal* good. But we must also understand that we can never completely win the war against corruption, nor can we give it up. We can never win it because primary human imperatives always outweigh impersonal goals. We can never give up the struggle because our modern prosperity depends on containing these personal and social goals while on the job. But if we don't contain it, it grows and takes over. Like housekeeping, no vacuum sweeper works permanently but the failure to vacuum lets a home get dirtier and dirtier.

Yet corruption cannot be controlled by assuming that people can be trained in ethics alone, since it is impossible to talk people out of being people. But it is possible to train people to supervise one another and hence to provide a system of checks and balances. Such a system works best when criminalization and punishment work only at the extreme, when the system operates on a normal basis without getting to that point. Control depends on designing more secure systems, efficient supervision, and effective checks and balances. As technology takes new forms, it brings new opportunities for corruption and hence demands new checking and balancing. With the march of technology, more and more value is intangible—contained in electronic data that are not easily watched with the naked eye. But systems can be designed to keep track of electronic data, too, thus interfering with the opportunities for corruption. As society becomes more complex in technology, corrupt practices can more easily escape notice, at least for a while. But in time we learn to use technology to reduce the complexity of supervision and thence to create methods for managing, checking, and balancing so that formal organization keeps personal and social needs under a reasonable degree of containment. An organization must find simplicity and accountability to avoid corruption. That means overcoming organizational and technical complexity with new forms of simple checks and balances. When that is achieved, modern society can achieve simple monitoring while requiring complex

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> conspiring, and corruption will diminish. Developing nations face the same principles but at an earlier stage, with formal organization replacing family and patrimonial systems in places not yet ready for that to happen. But, of course, no place is fully ready to give up its personal and social tendencies, and so the work of reducing corruption is never complete.[231]
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> END OF EXCERPT

Felson's contention that the rational-legal system holds the greatest potential for corruption is reflected in empirical data. In their article "Democracy and Corruption: a Complex Relationship," Shrabani Saha et al. use sophisticated econometric models to show the rise in corruption in countries that have transitioned from autocratic regimes to electoral democracies (the ultimate rational-legal system).[232] The authors conclude that electoral democracy and political rights alone are insufficient to reduce corruption; in fact, electoral democracy alone aggravates widespread corruption because there are less checks and balances against corruption in an electoral democracy than in an autocratic regime. Effective democratic institutions, such as an independent judiciary, free press, strong rule of law in the economic system and distribution of social benefits and respect for civil rights, are crucial to reducing corruption. These institutions deter corruption by increasing the probability that corrupt acts will be detected and punished.

For a counterpoint to "economistic" understandings of corruption, see Barry Hindess, "Good government and corruption" in Peter Larmour and Nick Wolanin, eds, *Corruption and Anti-Corruption* (Canberra: Asia Pacific Press, 2001). Hindess argues that a narrow focus on economic corruption obscures other, more general forms of corruption in government. By ignoring these other forms of corruption, we fail to see the damaging effects of party politics, police corruption and other insidious problems of political life in western democracies.

For an analysis of how unethical, yet technically, legal *quid pro quos* are institutionalized in professional environments, and how this institutionalized corruption affects the independence of politics and professions, see Garry C Gray, "Insider Accounts of Institutional Corruption: Examining the Social Organization of Unethical Behaviour" (2013) 53 Brit J Criminol 533.

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[231] Marcus Felson, "Corruption in the Broad Sweep of History" in Graycar and Smith, (2011) at 12.
[232] Shrabani Saha et al, "Democracy and Corruption: A Complex Relationship" (2014) 61:3 Crime L & Soc Change 287.

8. A SOCIOLOGICAL PERSPECTIVE ON INSTITUTIONAL CORRUPTION

by Garry Gray

Section 8 was written by Professor Garry Gray, Assistant Professor of Sociology, University of Victoria

As conventional wisdom would have it, corruption and illegality go hand in hand. Tacitus' famed words, *Corruptissima re publica plurimae leges*, often translated as 'the more corrupt the state, the more numerous the laws,' evokes multiple meanings, but one rendering elucidates on the expansiveness of corruption beyond the law.[233] Bribery and other direct quid pro quo conflict of interest exchanges involving public officials and fiduciaries are well recognized as indictable offences in many countries, but corruption also operates on an invisible level, embedded within the social norms and institutional practices of professional environments. This form of corruption can be referred to as institutional corruption. Conceptually it requires that we go beyond the focus on illegal behaviour to also include unethical and professional activities that violate public trust. Institutional corruption therefore requires a shift in focus towards examining "*influences* that implicitly or purposively serve to distort the *independence* of a professional in a position of public trust."[234]

In summarizing an account from a confidential interview that I conducted with a consultant for a multilateral development institution who was also a tenured professor, we can observe distinctions between traditional corruption and institutional corruption.[235] Over more than a decade, Anthony had taken on consulting assignments that required him to evaluate projects being considered for grant funding from a multi-lateral donor.[236] On more than one occasion while abroad on assignment, he had been offered bribes in return for writing favorable reports. He said these bribes could involve very large sums of money. In one case the bribe was perhaps five percent of the grant total, amounting to more than double the annual salary that he was earning as a tenured professor. Anthony acknowledged that these overtly illegal and at times threatening experiences fit the traditional conceptualization of corruption.

Following this discussion I asked Anthony if he had experienced other kinds of conflicts, namely situations that caused him to wrestle with what to do in his work for the multilateral

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[233] George Long, *The Annals of Tacitus with a Commentary by the Rev. Percival Frost, M.A.* (Whittaker & Co, 1872).

[234] Garry C Gray, "Insider Accounts of Institutional Corruption: Examining the Social Organization of Unethical Behaviour" (2013) 53 Brit J Crim 533.

[235] This interview was conducted as part of a larger project on behavioural ethics among professionals in positions of public trust and funded by the Edmond J Safra Center for Ethics at Harvard University.

[236] The name Anthony is a pseudonym.

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donor. Anthony recounted a situation where his research findings and recommendations in a commissioned report did not fit with the ideological perspective held by his manager at the multilateral development institution. After some careful consideration he felt he could not compromise, because of the impact the alternative could potentially have for the country in question. Anthony recalled having a lengthy conversation over the phone with that manager and being asked to change the report. He refused, and acknowledged in that phone call that his contract was coming up for renewal and that he knew this disagreement could affect it. He saw this possible consequence as an expected, even logical outcome given the norms of consulting. There was nothing illegal about the situation, but the 'corrupting' effect of the earlier bribery examples and the threat of reduced hours is the same: both were influences intended to alter the outcomes of Anthony's reports.

Looking back on that exchange, Anthony is convinced that he would have been offered more consulting hours in the subsequent year had he submitted a report that fit with his manager's desired outcome. He also questioned what he would have done had he not held a tenured professorship, and if consulting had been his primary mode of employment. He was convinced that his professorship had structurally enabled him to stand behind his report. In this case, he was able to resist institutional corruption, but acknowledges that he still felt pressured to 'go along, to get along'.

The concept of public trust is an important element of institutional corruption theory. If Anthony was not a university professor, but instead was a full-time consultant who depended on the availability of future consulting opportunities, should we be less trusting of Anthony's ability to remain independent? Would the possibility of missing out on future consulting opportunities lead to subtle forms of dependency within Anthony's social and professional networks? If so, then what other subtle improper influences may exist in professional environments that could compromise the *independence* of professionals in positions of public trust?

From Bribery to Political Corruption

While the United States, since the enactment of the *FCPA* in 1977, has been a driving force behind global attempts to regulate quid-pro-quo corruption and in particular, bribery, (c.f., the OECD Anti-Bribery Convention in 1999 and the UNCAC in 2005), it has been reluctant to impose similar regulations on political corruption. During the UNCAC negotiations, the United States resisted proposals from Austria, France, and the Netherlands to impose mandatory regulations that would address issues of corruption in campaign finance. While campaign finance reform, and the issue of money in politics, is a contentious policy issue in

the United States[237] it also provides a good example of the value of an institutional corruption approach.[238]

Political Corruption: The Case of Jack Abramoff

Prior to being convicted of fraud and being sent to prison, Jack Abramoff was one of the most influential lobbyists in the United States.[239] Upon release from prison, Abramoff now spends his time exposing the role that institutional corruption plays in political decision-making and campaign financing. During one public interview, Abramoff told the interviewer the following: "We know a bribe is when you show up with a stack of cash and say, 'Here's $10,000 in cash, and can you do this for me?' But if I show up with 10 $1,000 campaign contributions and say the same thing, that's not a bribe in Washington. Outside of Washington, everybody gets this… but inside Washington, that's the way it's done… We have institutionalized corruption in Washington. It's perfectly accepted, and it's acceptable to virtually everybody, and that's where things need to change."[240]

The role of money in politics, in particular through campaign finances, is attracting increased international attention. For instance, in response to major corruption scandals in Brazil, the Supreme Court of Brazil declared on September 17, 2015, that corporate donations to election campaigns are unconstitutional.[241] And, in the United States, several US politicians seeking the party nomination for leader of the Democratic Party, including Hillary Clinton, Bernie Sanders, and Lawrence Lessig, campaigned for the November 2016 election with campaign finance reform as a major component of their election platform. There is a growing narrative developing in the United Sates that politicians are becoming less dependent upon the people they represent and more dependent on those who support their campaign finance initiatives.

However, rather than leading to direct quid-pro-quo corruption, the growing dependency on funders of campaigns in the United States is contributing to more subtle forms of institutionalized corruption through relational forms of dependency corruption. By creating situations where politicians become dependent on funders, it is suggested that integrity and independence are compromised. In turn, this leads to situations where self-censoring behaviour (such as deciding which policies or amendments to pursue, or alternatively, vote against) can begin to feel normal and perhaps even justified among politicians in positions

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[237] Jennifer Heerwig & Katherine Shaw, "Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure" (2014) 102 Geo LJ 1443; Garry C Gray & Michael D Jones, "A Qualitative Narrative Policy Framework: Examining the Policy Narratives of US Campaign Finance Regulatory Reform", *American Sociological Association Meetings* (Chicago: August 24, 2015).

[238] Lawrence Lessig, *Republic Lost: How Money Corrupts Congress—and a Plan to Stop It* (Twelve, 2011).

[239] *United States of America v Jack Abramoff*, 2006, online: <http://www.npr.org/documents/2006/jan/abramoff_charges.pdf>.

[240] PBS Interview (4 April 2012), online: <http://www.pbs.org/wnet/tavissmiley/interviews/former-lobbyist-jack-abramoff/>.

[241] Paul Kiernan, "Brazil Supreme Court Bans Corporate Donations to Politicians and Parties", *The Wall Street Journal* (18 September 2015), online: <http://www.wsj.com/articles/brazil-supreme-court-bans-corporate-donations-to-politicians-and-parties-1442616836>.

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of public trust. As Lawrence Lessig notes, "knowing that there are members of Congress dependent on campaign cash, private interests exploit that dependency, by seeking special benefits from the governments ('rents') and returning the favor ever so indirectly with campaign contributions. And knowing that they are so dependent upon private support, members of Congress will work to keep their fingers in as much of private life as possible… [And] because this is 'just the way things are done', no one needs to feel guilty, or evil in this system."[242]

Given that the corruption described here is institutional in nature and often rationalized as a normal part of politics, a sociological account of institutional corruption is timely. For instance, an analysis of the insider accounts of institutional corruption provided by Jack Abramoff after he was released from prison reveals the mechanics of how the independence of American politicians can be exploited by lobbyists. In particular, through various techniques such as campaign finance contributions, legal loopholes, and the manipulation of social networks that result in improper influences that while often legal, may lead to corrupting outcomes.

Take for instance, the revolving door metaphor, where professionals holding jobs in congressional offices move into lobbying jobs and vice versa. Abramoff shows how this can contribute to institutionalized forms of corruption given the subtle and often hidden financial incentives that exist for public representatives.[243] According to Abramoff, industry lobbyists are well aware of the importance of social relationships and social networks in a revolving door system. While there are cooling-off regulations in some countries that attempt to limit government employees from immediately going through the revolving door to a lobbying job, there still remains various corrupt ways that these regulations can be skirted. According to Abramoff, lobbyists are still able to informally capture individual members of the United States Congress, as well as their staff, even without offering a formal contract of employment. Improper influences can be quite insidious Abramoff states:

> As I started hiring staff, particularly chiefs of staff [to members of Congress], I would say 'hey look when do you want to leave the hill?' 'Well, I don't want to leave for two years.' 'Ok, in two years I'll hire you.' I hired them right then. The minute they knew they were coming to work for me their whole job changed. They are human beings. If you have a job and you know you are going somewhere else you are at least going to be thinking about the next job. You don't want that business to go away… When I tell people this… they don't understand that their staff becomes my staffer. For two years that staffer is not only my staffer… but is better than my staffer. Because my staffer can't find the things that person is going to find and look out for our interests more than we could… one of the real pernicious and

[242] Lessig (2011) at 237-8.
[243] Jordi Blanes, Mirko Draca & Christian Fons-Rosen, "Revolving Door Lobbyists" (2010) London School of Economics and Political Science Centre for Economic Performance Discussion Paper No 993.

> corrupt parts of the system, and again completely legal, and unknown entirely.[244]

According to Abramoff, he cultivated these kinds of improper influences in close to 100 of the 435 United States congressional offices. He also noted that staffers were "perfect targets for revolving-door techniques."[245] The impact of the revolving door is that it contributes to dependencies between lobbyists and government officials (dependence corruption) whereby "public officials might be more likely to insert legal content known as riders that are favourable to lobbying clients into bills that are to be voted on by members of Congress."[246] As Abramoff notes:

> a lobbyist trying to enact his client's wishes needs to get his amendment onto a bill likely to pass both the House and the Senate, to then be signed by the president. No bill is more likely to pass than a reform bill… so smart lobbyists always keep an eye out for reform bills. It's ironic, if not horrific, that this is the case. The very bills designed to limit corruption and improve our system of government sometimes serve as vehicles for special interests.[247]

According to Abramoff, the technique of inserting corrupt riders into a reform bill is a common practice, one that is intertwined with problems of political corruption embedded in the revolving door between government and industry. While reform efforts attempt to prevent political corruption, in particular, gifts that represent an illegal and overt attempt to buy influence, they do not always capture or prevent the more subtle forms of institutional corruption. Abramoff's insider accounts reveal that political contributions to campaigns "are a significant form of indirect gifting that can accomplish the same things [as quid-pro-quo corruption] but without the legal ramifications."[248] As Abramoff commented in an interview:

> You can't take a congressman to lunch for $25 and buy him a hamburger or a steak or something like that. But you can take him to a fundraising lunch and not only buy him that steak but give him $25,000 extra and call it a fundraiser. And you have all the same access and all the same interaction with that congressman.[249]

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[244] Gray (2013) at 543.
[245] *Ibid* at 543.
[246] *Ibid* at 544.
[247] *Ibid* at 544.
[248] *Ibid* at 542.
[249] *Ibid* at 542.

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The above insider accounts of structured and systematic corruption provided by Jack Abramoff illustrate the value of an institutional corruption approach to traditional studies of political corruption.[250]

Conclusion

Corruption, especially corruption that is specialized and intricately woven beyond the public eye, is often legal despite its potential for harm. Far too often, the general public has no choice but to trust that professionals will both recognize and resist corrupting influences when they arise in their professional environments. However, rather than simply trust that each individual professional will "do the right thing" and maintain integrity in the face of improper and potentially corrupting influences, institutional corruption theory offers an alternative. Examine institutional practices, structures, and relationships that bear on the trustworthiness and independence of public officials and professionals, and corrupting systems can be exposed, understood, and eventually mitigated.

9. CORPORATE SOCIAL RESPONSIBILITY AND CORRUPTION

In his article "Enhancing the Effectiveness of the Foreign Corrupt Practices Act Through Corporate Social Responsibility," Dan Heiss states "over the last decade, combating corruption has taken a place alongside human rights, labour rights, and environmental protection as one of the major issues in corporate social responsibility (CSR)."[251] He further argues, "…to be truly effective in reducing the level of bribery in international business, the FCPA must work to encourage corporations to be socially responsible. Thus, to reduce corruption, corporations should be encouraged to think about not just what they should *not* do, but also what they *can* do. That is, corporations need to consider what they can do to work with other businesses, home and host country governments, local communities, and civil society organizations to reduce the levels of corruption in any particular country. To assist in this process, … the enforcement of the FCPA should be structured to support the various actors and major initiatives in the CSR field that combat corruption."

9.1 What is Corporate Social Responsibility?

Corporate social responsibility (CSR) is a broad and evolving concept.[252] Its content is shaped by shifting societal expectations which are dependent in part on the industrial context in which it operates and the people who are impacted by its behaviour. The John F. Kennedy

[250] For a full account of both the Jack Abramoff case and other techniques of institutional corruption, see Gray (2013).
[251] Dan Heiss, "Enhancing the Effectiveness of the Foreign Corrupt Practices Act Through Corporate Social Responsibility" (2012) 73 Ohio St LJ 1121 at 1122.
[252] Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (LexisNexis Canada Inc, 2009) at 5.

School of Government at Harvard University explains that CSR is a concept that arises from the growing expectation that businesses should embrace social accountability.[253] In the same vein, the Conference Board of Canada suggests that the foundation of CSR is the notion that corporations have responsibilities to stakeholders other than their shareholders.[254]

Industry Canada, a government department, defines CSR as "the way a company achieves a balance or integration of economic, environmental and social imperatives while at the same time addressing shareholder and stakeholder expectations."[255] The UK Government describes CSR as "the voluntary actions that businesses can take over and above legal requirements to manage and enhance economic, environmental and societal impacts."[256] Though definitions of CSR vary, international sources reflect consensus on the following characteristics:

- CSR involves obligations apart from the formal requirements of law, and is instead a reflection of normative standards;
- CSR involves companies demonstrating varying degrees of commitment to concepts such as corporate citizenship, sustainable development, and environmental sustainability; and,
- governments, citizens, and investors now generally expect companies to adopt some form of internal CSR business strategy.[257]

While CSR is dynamic and still developing, it is clear that the global corporate community has adopted CSR as an important item on the business agenda.[258]

9.2 How Did CSR Develop?

Carroll, in his article "Corporate Social Responsibility: Evolution of a Definitional Construct," suggests that our contemporary notion of CSR is the product of an American school of thought dating to the mid-twentieth century, perhaps originating with Howard R. Bowen's seminal book *Social Responsibilities of the Businessman* (1953).[259] Bowen asked the fundamental question, "What responsibilities to society may businessmen [and business

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[253] Kennedy School of Government, "Our Approach to CSR" (2008), *Corporate Social Responsibility Initiative*, online: <http://www.hks.harvard.edu/m-rcbg/CSRI/init_approach.html>.
[254] The Conference Board of Canada, "The Conference Board of Canada", *CSR-directory.net*, online: <http://csr-news.net/directory/the-conference-board-of-canada>.
[255] Industry Canada, "Governance for Sustainability" (September 2011), *Corporate Social Responsibility*, online: <https://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/h_rs00577.html>.
[256] United Kingdom, Department for Business Innovation & Skills, *Good for Business & Society: Government Response to Call for Views on Corporate Responsibility* (April 2014) at 3.
[257] Kerr, Janda & Pitts (2009) at 6–8.
[258] *Ibid* at 33–34.
[259] Archie B Carroll, "Corporate Social Responsibility: Evolution of a Definitional Construct" (1999) 38 Bus & Soc 269.

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women] reasonably be expected to assume?"[260] He suggested that businesspersons have a responsibility to act in accordance with society's values and best interests. Carroll notes that the Committee for Economic Development (CED), which published *Social Responsibilities of Business Corporations* in 1971, asserted that society expected businesses to assume greater moral responsibility and "contribute to the quality of American life."[261] In 1979, Carroll outlined three dimensions of CSR: corporate responsibilities, social issues of business, and corporate actions.[262] Otherwise put, corporate responsibilities lead corporations to respond to certain social issues, as determined by societal and corporate values and priorities.[263] While Carroll's concept of CSR has evolved in subsequent decades, it remains foundational for contemporary CSR theory.[264] Today, CSR is one of many related concepts that influence the role of businesses in society. These include corporate social performance (CSP), corporate citizenship, inclusive business, social entrepreneurship, and sustainable development. In a recent UNESCAP Report, the authors stated the following in regard to the development of the concept of corporate social responsibility:

> [T]he focus on developing new or refined concepts of CSR gradually gave way to alternative approaches such as corporate citizenship (Pinkston and Carroll, 1994), business ethics (Shapiro, 1995) and stakeholder theory (Freeman, 1984), although the core concerns of CSR were reflected in those new approaches. The CSR concept served as the basis, building block or point-of-departure for other related initiatives, many of which adopted CSR principles (Carroll, 2008).
>
> Since entering into the twenty-first century, more focus has been given to implementation of CSR initiatives and empirical study of CSR impacts. However, some development of the CSR concept has been continuously observed. Schwartz and Carroll (2003) reduced Carroll's four categories of corporate responsibilities (i.e. economic, legal, ethical and philanthropic) to a three-domain approach, namely economic, legal and ethical. The International Labour Organization (ILO) (2007) redefined CSR as a way that enterprises consider the impact of their operations on society and CSR principles are integrated in enterprises' internal processes and interactions with stakeholders on a voluntary basis. More recently, the European Commission (2011) simplified the CSR definition as the responsibility of enterprises for their impacts on society, which indicates that enterprises should have a process in place to integrate CSR agenda into their operations and core strategies in close corporation with stakeholders. The World

[260] *Ibid* at 270 citing Howard R Bowen, *Social Responsibilities of the Businessman* (Harper & Row, 1953).
[261] *Ibid* at 274–75.
[262] Masato Abe & Wanida Ruanglikhitkul, "Developments in the Concept of Corporate Social Responsibility" in *From Corporate Social Responsibility to Corporate Sustainability: Moving the Agenda Forward in Asia and the Pacific, Studies in Trade and Investment No 77* (UNESCAP, 2013) at 11.
[263] *Ibid*.
[264] *Ibid*.

> Business Council for Sustainable Development (WBCSD) (2012) also emphasized a balance of return on financial, natural and social capitals, particularly suggesting the integration of CSR reporting into annual report.[265]

For further reading on the evolution of CSR, see Archie B. Carrol, "Corporate Social Responsibility: Evolution of a Definitional Construct" (1999) 38 Bus & Soc'y 268. See also *From Corporate Social Responsibility to Corporate Sustainability: Moving the Agenda Forward in Asia and the Pacific*, Studies in Trade and Investment No 77 (UNESCAP: 2013).

There are also critics and skeptics of the notion of corporate social responsibility: for example, in Dustin Gumpinger's article "Corporate Social Responsibility, Social Justice, and the Politics of Difference: Towards a Participatory Model of the Corporation," the author states:[266]

> The problem is that the notion of corporate social responsibility, under the current corporate law framework, is an oxymoron. The corporation's legal mandate is to pursue its own best interests and thus to maximize the wealth of its shareholders. Hence, corporate social responsibility is illegal and impossible to the extent that it undermines a company's bottom line. Acting out of social concern can only be justified insofar as it tends to bolster the corporation's interests. It is not surprising then that critics have characterized corporate social responsibility as an "ideological movement" designed to legitimize the power of transnational corporations.
>
> In order to foster a world in which corporate decision-makers act genuinely in the interest of individuals and groups other than shareholders, the institutional nature of the corporate form must be reconceptualised. But if corporate social responsibility is an ineffective tool for evaluating corporate decisions, actions and outcomes, where should we turn? I shall argue that, as a dominant social institution, the corporation ought to be held to the same theoretical standards as other social institutions: namely, to the standard of social justice. [Footnotes omitted]

Gumpinger concludes with the following thoughts:

> Historically, corporations were public purpose institutions; today, they remain legal institutions in that they rely on legislation to create and enable them. Under this legal framework, corporations have come to govern virtually every aspect of our daily lives, despite the fact that they lack the democratic accountability of governments. This fusion of power and

[265] *Ibid* at 11–12.

[266] Dustin Gumpinger, "Corporate Social Responsibility, Social Justice, and the Politics of Difference: Towards a Participatory Model of the Corporation" (2011) 16:1 Appeal 101 at 102.

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> unaccountability has given rise to claims that the corporate form is inherently unjust and should be changed.
>
> …
>
> The corporation's propensity to cause and reinforce dominations and oppression highlight the need to build democratic decision-making structures into the corporate form. To achieve this goal, corporate law theory needs to abandon its desire for political unity, which tends to exclude the perspectives of the oppressed and the disadvantaged. Rather, a theory of the firm ought to be based on a heterogeneous notion of the public which gives voice to those who are systematically excluded from corporate decision-making. Hence, corporate law ought to provide the means through which the distinct voices and perspectives of those who are oppressed and disadvantaged by the corporation may be recognized and represented. If the corporation proves unable to serve this goal in addition to its primary goal of accumulating and generating wealth then it may be time to conceptualize an institution that can.[267]

9.3 Some Current CSR Policies and Initiatives

In order to develop an understanding of current expectations for CSR policies, it is helpful to consult commonly referenced international instruments. Though CSR is reflected in a vast array of global policies and initiatives, the following standards are referred to across the globe to aid businesses forming internal CSR strategies:

- International Organization for Standardization ("ISO") 26000: Provides guidance on how businesses and organizations can operate in a socially responsible way and helps to clarify the concept of social responsibility. See www.iso.org/iso/home/standards/iso26000. Other ISO standards, such as ISO 9000 on corporate quality management and ISO 14001 on environmental management are also relevant in the CSR context.
- Global Reporting Initiative G4 Guidelines ("GRI G4"): Promotes corporate transparency by providing guidance on how to disclose information and what types of information should be disclosed. Anti-corruption is addressed as an aspect of the "society" reporting category. See https://www.globalreporting.org/resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf.

[267] *Ibid* at 120.

- Transparency International's Business Principles for Countering Bribery (TI Principles): Provides a framework for companies to develop comprehensive anti-bribery programs. See http://www.transparency.org/whatwedo/pub/business_principles_for_countering_bribery.
- The World Economic Forum Partnering Against Corruption Principles for Countering Bribery (PACI Principles) is derived from the TI Principles. See http://www3.weforum.org/docs/WEF_PACI_Principles_2009.pdf.
  - The TI and PACI Principles are discussed and critiqued in Adeyeye's book *Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-Corruption.*[268]
- The UN Global Compact: Is the largest global corporate citizenship initiative. It proposes ten principles of responsible and sustainable corporate conduct. See https://www.unglobalcompact.org/what-is-gc/mission/principles.

By way of illustration, the UN Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment, and anti-corruption. These core values are expressed in the form of ten principles set out below:

Human Rights

- Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
- Principle 2: make sure that they are not complicit in human rights abuses.

Labour

- Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- Principle 4: the elimination of all forms of forced and compulsory labour;
- Principle 5: the effective abolition of child labour; and
- Principle 6: the elimination of discrimination in respect of employment and occupation.

Environment

- Principle 7: Businesses should support a precautionary approach to environmental challenges;

[268] Adefolake Adeyeye, *Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-Corruption* (Cambridge University Press, 2012) at 49–54.

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- Principle 8: undertake initiatives to promote greater environmental responsibility; and
- Principle 9: encourage the development and diffusion of environmentally friendly technologies.

Anti-Corruption

- Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.[269]

In regard to the 10th Principle, the UN Global Compact website, amongst other things, provides the following commentary:

BEGINNING OF EXCERPT

Why should companies care?

There are many reasons why the elimination of corruption has become a priority within the business community. Confidence and trust in business among investors, customers, employees and the public have been eroded by recent waves of business ethics scandals around the globe. Companies are learning the hard way that they can be held responsible for not paying enough attention to the actions of their employees, associated companies, business partners and agents.

The rapid development of rules of corporate governance around the world is also prompting companies to focus on anti-corruption measures as part of their mechanisms to express corporate sustainability and to protect their reputations and the interests of their stakeholders. Their anti-corruption systems are increasingly being extended to a range of ethics and integrity issues, and a growing number of investment managers are looking to these systems as evidence that the companies undertake good and well-managed business practice.

Businesses face high ethical and business risks and potential costs when they fail to effectively combat corruption in all its forms. All companies, large and small, are vulnerable to corruption, and the potential for damage is considerable. Business can face:

[269] "The Ten Principles of the UN Global Compact" (UN Global Compact), online: <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

- legal risks: not only are most forms of corruption illegal where they occur but it is also increasingly becoming illegal in a company's home country to engage in corrupt practices in another country;
- Reputational risks: companies whose policies and practices fail to meet high ethical standards, or that take a relaxed attitude toward compliance with laws, are exposed to serious reputational risks. Often it is enough to be accused of malpractice for a company's reputation to be damaged even if a court subsequently determines the contrary;
- Financial costs: there is clear evidence that many countries lose close to $1 trillion due to fraud, corruption and shady business transactions and in certain cases, corruption can cost a country up to 17% of its GDP, according to the UN Development Programme in 2014. This undermines business performance and diverts public resources from legitimate sustainable development;
- Erosion of internal trust and confidence as unethical behaviour damages staff loyalty to the company as well as the overall ethical culture of the company.

What can companies do?

The UN Global Compact suggests that participants consider the following three elements when fighting corruption and implementing the 10th principle:

- **Internal:** As a first and basic step, introduce anti-corruption policies and programmes within their organizations and their business operations;
- **External:** Report on the work against corruption in the annual Communication on Progress; and share experiences and best practices through the submission of examples and case stories;
- **Collective Action:** Join forces with industry peers and with other stakeholders to scale up anti-corruption efforts, level the playing field and create fair competition for all. Companies can use the Anti-Corruption Collective Action Hub to create a company profile, propose projects, find partners and on-going projects as well as resources on anti-corruption collective action;
- **Sign the "*Anti-corruption Call to Action*"**, which is a call from Business to Governments to address corruption and foster effective governance for a sustainable and inclusive global economy.[270]

END OF EXCERPT

[270] "Principle Ten: Anti-Corruption," online: <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-10>.

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9.4 The Need for Increased Trust in Business

Kimmel in a *FCPA Blog* post reports on the *Edelman 2017 Trust Barometer* as follows:

BEGINNING OF EXCERPT

Earlier today Edelman released the findings of its 17th annual Trust Barometer, a poll of 33,000 respondents in 28 countries. This year's results were strikingly different from their 2016 findings. In fact, trust to "do what is right" declined in all four major institutions: NGOs, Business, Media and Government.

I had the good fortune of an invitation to a pre-release webinar hosted by Edelman on January 13, enabling me to report early on the 2017 Trust Barometer findings.

As Trust Across America continues its mission to help build trust in business, the following are some of the key takeaways from the presentation:

- Only 37 percent of respondents trust the CEO as a credible spokesperson.
- CEO credibility dropped in all 28 markets, reflecting a global crisis of leadership.
- 82 percent of respondents believe "Big Pharma" needs greater regulation.
- 53 percent of respondents do not believe that financial institutions have been reined in "enough."
- The main opportunities for businesses to prove they are "doing no harm" include focus on bribery, executive compensation, tax havens, overcharging for products, and reducing costs by decreasing product quality.
- The ways business can best show they are "doing more" is through their treatment of employees, producing high quality products, listening to customers, paying their fair share of taxes, and employing ethical business practices.
- CEOs must engage in talking "with" not "at" people. They should be more spontaneous, blunt, include personal experience in dialogue, and participate in their company's social media.
- And finally, Edelman's survey results reflect a fundamental shift from the old "For the people" to the new "With the people."

What actions must big business take?

It is incumbent on Boards of Directors, CEOs and their C-Suites to:

- Acknowledge that they individually have a problem, and collectively are responsible for the growing crisis of trust in business.
- Recognize that trust is indeed a hard asset and a measurable currency, not an intangible to be taken for granted.
- Find the courage and take action to elevate trust across and among all stakeholder groups.

Through its *FACTS® Framework, Trust Across America's research focus picks up where Edelman's findings leave off. For the past eight years we have been measuring the trust "worthiness" or integrity of the largest 1,500 U.S. public companies.

We find that industry is *not* destiny and a handful of corporate leaders are already reaping the rewards of high trust. Edelman's 2017 findings do, however, support our call for a different "way" of doing business, and perhaps that "way" will find increasing support from big business in 2017.[271]

END OF EXCERPT

9.5 Concluding Note

Chapter 8 of this book considers the role of the corporate lawyer in anti-corruption initiatives. Legal counsel should be prepared to provide corporate clients with guidance on developing internal policies that will ensure fulfillment of legal and ethical obligations from both an anti-corruption and CSR perspective. Chapter 8 provides guidance to corporate lawyers who want to ensure that their clients' anti-corruption policy and programs are conforming to national and international expectations for corporate behaviour.

[271] Barbara Brooks Kimmel, "Edelman 2017 Trust Barometer: Most Think CEOs Aren't Credible", *The FCPA Blog* (16 January 2017), online: <http://www.fcpablog.com/blog/2017/1/16/edelman-2017-trust-barometer-most-think-ceos-arent-credible.html>.

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10. SUCCESSES AND FAILURES IN INTERNATIONAL CONTROL OF CORRUPTION: GOOD GOVERNANCE

10.1 Ten Lessons to Be Learned in Designing Anti-Corruption Initiatives

In the 2011 report *Contextual Choices in Fighting Corruption: Lessons Learned,*[272] prepared by the Hertie School of Governance for the Norwegian Agency for Development Cooperation (NORAD), Alina Mungiu-Pippidi et al. review the successes and failures of the international community's anti-corruption initiatives and strategies in the previous fifteen years.[273] From this review, the authors extract the lessons learned to help guide future anti-corruption initiatives. It should be noted that the authors' conclusions are not necessarily agreed upon by all anti-corruption scholars and practitioners.

The excerpts below are from the Executive Summary and provide an overview of the report's findings:

BEGINNING OF EXCERPT

[xix:]

Fifteen years have passed since World Bank President James Wolfensohn called for a global fight against the 'cancer' of corruption, a call that was answered by much of the development community. Since then, awareness of the systemic nature of corruption has dramatically increased, mostly due to the advocacy efforts of NGOs such as Transparency International and the visibility of corruption rankings such as TI's CPI and the World Bank's Governance Indicators (WGI). The demand also increased for a comprehensive and integrated global legal framework to fight corruption, which was eventually met with the adoption of the UNCAC. This report is a general reflection on the impact of this global effort and is not intended as an evaluation. Its main objectives are to understand and assess the cognitive framework of the global anti-corruption effort; its relevance for the development agenda; and to offer some explanations and solutions fifteen years later.

[272] Alina Mungiu-Pippidi et al, "Contextual Choices in Fighting Corruption: Lessons Learned" (2011) European Research Centre for Anti-Corruption and State-Building Working Paper No 30, online: <http://www.againstcorruption.eu/wp-content/uploads/2012/09/WP-30-Contextual-Choices-new_merged2.pdf>.

[273] Alina Mungiu-Pippidi expands on her analysis of guiding principles for government anti-corruption initiatives in her book, *The Quest for Good Governance: How Societies Develop Control of Corruption* (Cambridge University Press, 2015).

Once it became apparent that development resources could potentially disappear in environments characterized by weak governance and corruption, anti-corruption developed into a specific approach to development assistance (good governance as means). Promoting good governance, however, also become an objective in itself (good governance as end), as donors realized that the economy of aid could not be separated from the broader country governance. Unfortunately, not much significant progress has been registered globally since the World Bank began monitoring the world governance indicators, despite an unprecedented investment in good governance policies and an unprecedented rise in awareness (Kaufmann, 2009). Progress seems to be made in atypical polities, such as the United Arab Emirates, Hong Kong or Cape Verde, or remains controversial (Georgia). Countries that have evolved within the previous decade have, in fact, regressed in the fifteen years of global anti-corruption. When reviewing countries continent by continent, it is almost impossible to find a steady progression to the 'green' area which represents the top quarter of ratings, although the lower part of the scale shows better results. What we do find, however, is involution: South Africa, Argentina, Malaysia or Ukraine. Good governance is not only hard to achieve, but difficult to sustain.

[xiii-xiv:]

Why, despite unprecedented investment in anti-corruption in the last fifteen years and since the implementation of global monitoring instruments and global legislation, have so few countries managed to register progress? This new report commissioned by the Norwegian Agency for Development Cooperation (NORAD) to the Hertie School of Governance argues that conceptual flaws, imprecise measurement instruments and inadequate strategies are to blame. But it also argues that the quest for public integrity is a political one, between predatory elites in a society and its losers and fought primarily on domestic playgrounds. As such, the donor community can play only a limited part and it needs to play this part strategically in order to create results. Based on new statistical evidence, the report recommends cash-on-delivery/selectivity approaches for anti-corruption assistance [cash-on-delivery is a term used in the aid community to mean an aid scheme whereby funding is only delivered once progress on an agreed upon goal is achieved by the aid recipient]. Effective and sustainable policies for good governance need to diminish the political and material resources of corruption and build normative constraints in the form of domestic collective action. Most of the current anti-corruption strategies, on the contrary, focus on increasing legal constraints, which often fail because most interventions are localized in societies that lack the rule of law.

As governance is defined as the set of formal and informal institutions shaping "who gets what" in a given polity, the understanding of governance regimes is an indispensable step towards creating a more strategic approach to anti-corruption. Three distinct types of governance regimes are described in the report: open access or

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ethical universalism regimes, which exist in most of the developed world; closed access regimes, divided between neo-patrimonial (where power is monopolized by the ruler and their clique) and competitive particularistic (where several groups compete for the spoils, but spoiling the state remains the rule of the game). Free elections by themselves do not solve the problem of corruption: more democracies than autocracies feature presently among systemically corrupt countries. The widely used perception indicators, which are presumed to measure corruption, actually measure governance in general, not only illegal corruption, which is only a small part of the overall picture (hence their insensitivity to change). Governance regimes are stable: the few countries that succeeded in changing over the last few decades are presented in section 7 on page 72 [these countries include Tanzania, Albania, Indonesia, Paraguay and Georgia].

Most corruption academic literature conceptualizes anti-corruption at the individual level, as do most current theories about anti-corruption. This presumes that corruption is a deviation from an otherwise established norm of ethical universalism, where every citizen is treated equally by the state and all public resources are distributed impartially. In fact, outside the developed world, the norm is not ethical universalism, since the process of modernization leading to an impersonal state autonomous from private interest was never completed in most countries. Most anti-corruption instruments that donors favour are norm-infringing instruments from the developed context, when they should be norm-building instruments for developing contexts. There is a gross inadequacy of institutional imports from developed countries which enjoy rule of law to developing contexts, shown in section 6 (Table 13 on page 56) of the report, where statistical evidence found no impact by anti-corruption agencies, Ombudsmen-like institutions and the ratification of the United Nations Convention against Corruption (UNCAC). What is presented in most anti-corruption literature as a principal-agent problem is in fact a collective action problem, since societies reach a sub-optimal equilibrium of poor governance with an insufficient domestic agency pushing for change.

The report argues that the question "what causes corruption" is therefore absurd. Particularism exists by default, since most human societies have limited resources to share, and people tend to share them in a particular way, most notably with their closest kin and not with everyone else. Modern states are based on universal citizenship, which entails fair treatment of every citizen by the government. But there are very few states that have thus far succeeded in moving from the natural state to this ideal of modernity. The question should change from "what causes corruption" to "what makes particularism evolve into universalism". What determines a change in the equilibrium?

The classic answer offered by modernization theory is development. As societies grow richer, people become more autonomous, with normative constraints to discretionary

power and corrupt allocation as the result. Even countries with a poor quality of governance grow, with examples ranging from Italy to Mexico. However, in many cases development is systematically hindered by government favouritism towards private actors and non-rational (particular) allocation, resulting in a vicious circle of captive states and poor societies. Disregarding factors that cannot be influenced by policy, the report found quite a few significant determinants of the degree of control of corruption where human agency can play an important role (see Table 12 on page 49), including the strong impact of the internet infrastructure, reduction in red tape, economic openness, civil society activity, freedom of information acts and media freedom. These are all areas where development donors can play a large role, even when disregarding individual rights and independence of the judiciary, which are more political and thus more difficult to influence. Although some of these proxies do not seem to address corruption directly, any contribution to their improvement is a clear and substantial anti-corruption aid that can be measured.

[xiv-xviii: The report concludes with a list of the ten lessons that can be learned from the fifteen years since the World Bank called for a global fight against corruption. These include:]

1. Although globalization has turned corruption into a global phenomenon, subsequently addressed by a global governance approach (anti-bribery conventions, UNCAC, the emergence of a global civil society), **the battlefield where this war is lost or won remains national**. Case studies of historical and contemporary achievers show that although external constraints played a large role in inducing disequilibrium in particularistic countries and triggering change, a transformation has to be reflected in a new equilibrium of power at the society level for it to be both profound and sustainable.

2. **Transitions from corrupt regimes to regimes where ethical universalism is the norm are political and not technical-legal processes.** There is no global success case of anti-corruption as promoted by the international anti-corruption community. Successful countries followed paths of their own. Fighting corruption in societies where particularism is the norm is similar to inducing a regime change: this requires a broad basis of participation to succeed and it is highly unrealistic to expect this to happen in such a short interval of time and with non-political instruments. **The main actors should be broad national coalitions, and the main role of the international community is to support them in becoming both broad and powerful.** All good governance programs should be designed to promote this political approach: audits, controls and reviews should be entrusted to 'losers' and draw on natural competition to fight favouritism and privilege granting. No country can change without domes-tic collective action which is both representative and sustainable over time. The media, political oppositions and civil society should not be seen as non-permanent guests taking part in consultations on legal drafts but as main permanent actors in the process

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of anti-corruption and holding decisive seats in all institutions promoting ethical universalism. **Which windows of opportunities to use, what actors have more interest in changing the rules of the game and how to sequence the change depends on the diagnosis of each society and cannot be solved by a one-size-fits all solution.** Chapter 2 of UNCAC, Preventive measures, can accommodate a variety of such programs. But also a number of what are seen as democracy promotion efforts (building a free media, civil society, community voice, empowerment) should in fact be considered as anti-corruption programs.

3. **Lesson number three is that on this political front, the international community has often played an ambiguous and inconsistent role and has thus sabotaged its own efforts.** The failure of the anti-corruption conditionality is partly grounded in the lack of understanding of particularism as a regime of governance and in consequently selecting various implausible principals as main actors to change the regime. Just as importantly, it is also partly caused by the overriding of good governance promotion by other strategic policy priorities. To minimize this in the future, good governance programs and **particularly UNCAC implementation should be tied to assistance on a cash-by-delivery mechanism only**, as the European Union has already suggested for its revamped North African European Neighbourhood Policy support. Diplomacy should also act in concert with aid, promoting representative anti-corruption actors in societies and avoiding the 'professionalization' of anti-corruption by limitation to a circle of 'experts'.

4. **Lesson number four is that there are no silver bullets or maverick institutions in fighting corruption.** We found no impact of anticorruption agencies (explained by their inadequacy in an environment without an independent judiciary and where particularism is the rule of the game, not the exception) and of Ombudsman (explained by the control of such agencies by the government or group in power). Particularly in African countries, where particularism is the norm and predatory elites are in charge, it is inadequate to transplant new institutions and try to ring-fence them against particularism (Simons 2008). We found, however, some limited impact of freedom of information acts (FOIA). The impact of FOIA and the second generation transparency tools (transparency of budgets, legislative drafts, statements of assets) which is substantiated by qualitative evaluation studies is explained by the fact that their implementation depends to a great extent on non-governmental actors.

5. **Lesson number five is about the lack of significant impact (in statistical tests) by the UNCAC after five years**, which should not come as a surprise in this context. After all, five years after the 1948 adoption of the Universal Declaration of Human Rights, only a handful of countries in the world were considered as fully respecting such rights. By 2010, according to Freedom House, their number had grown to 87, representing 45 percent of the world's 194 polities and 43 percent of the global population. 57 percent of the global population still lives in countries where human

rights are only imperfectly observed, if at all. The advance in this interval is attributed to liberalizing autocrats, international pressures for norm adoption and implementation, but primarily to freedom fighters and the rise in demand for freedom in each of these countries. The story of UNCAC is similar. **The norm was set: many countries formally adopted ethical universalism as a norm, which simplifies the job of anti-corruption fighters. But without massive domestic demand for new rules of the game and public participation in a sustainable mechanism which would prevent the eternal reproduction of privilege and shift allocation to ethical universalism, we are unlikely to see significant progress. Strategies must be conceived accordingly: UNCAC is a collection of institutional tools, not all similarly effective or useful, of which some have the potential to become effective weapons. This is true, however, only if local actors take them up and fight the long fight with them. What the international community can do, in any event, is to push UNCAC implementation and review as a mechanism to stir collective action. UNCAC will have an impact only if the entire society contributes to a check on the government. Such a permanent check could play a far more important role than the international review of UNCAC. For example, if the country of Ruritania were to ratify UNCAC, donors should push for a national stakeholders' commission to check on implementation, including media, local communities, and anti-corruption NGOs. The review should take place on an annual basis and those in charge of implementation should report to this body and make the report public. Accountability to the entire society regarding the implementation of UNCAC is a minimal requirement in building the general accountability of governments. In this context, the ownership principle in anti-corruption must simply be interpreted as ownership by the society, not by the government. Funds for anti-corruption should also be disbursed only in consultation with such an inclusive stakeholder body and after its assessment of trend and impact.**

6. **Lesson number six is about the importance of civil society, for which the report finds statistical and qualitative evidence.** However, the kind of civil society needed to serve as a watchdog at the community as well as national level is frequently missing in many countries. In the last ten years and due to donors funding, the world was more populated with professional 'expert' civil society than with watchdog and whistle-blowing civil society. Any country ruled by particularism is bound to have many 'losers' who are shortcut by networks of privilege. Without their collective action, there is no sustainable change in the rules of the game, and their empowerment becomes therefore the chief priority. We do see success models in South Korea and a few Eastern European countries.

7. **Lesson seven is about developing indicators and measures to allow better monitoring of trends and impact of policies.** The aggregate measures of corruption, particularly the WGI Control of Corruption, which allows measuring confidence error on top of perceptions of corruption, have played a great role by setting the stage for a

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global competition for integrity among countries. But once it comes to the process of change itself and the impact of certain policies, they become less helpful. **Section 3 of this report suggests the use of a new generation of indicators which allow us to understand what the real norm (practice) is and how it changes over time.** The full reports on Brazil and Romania posted online present such indicators.

8. **Lesson eight is about the fit of repressive policies to various development contexts. It is very risky to fight corruption by repressive means whenever particularism is the main allocation norm because some people will be above the law and the selection of those to be prosecuted cannot be anything but biased.** The risk is that the whole judicial aspect of AC will simply become a hunt for opponents or those poorly connected who cannot bail themselves out. The case of corruption determined by scarcity in very poor countries, for example when the government is in payment arrears or severely underfunds certain sectors, deserves a completely different treatment. A repressive approach has never solved scarcity problems. Either the state should abandon the task if it is unable to fund it, or funds should be found to pay policemen, doctors, and the rest. Resorting to a more ancient system of collecting fees for services, or transferring ownership of the service to anyone who can fund it, might prove palliative. This problem cannot be fought by anticorruption measures, and should not be even considered as corruption. Unless, such policies are implemented, an investment on the part of the country and donors of raising legal constraints will fail (and this is frequently the only AC policy promoted). Investment in strong legal constraints only works in developed institutional environments.

9. **Lesson number nine is that policies of drying resources for corruption are essential, along with increasing normative constraints.** The long term advocated – and partly discredited – economic liberal policies of the World Bank have an important good governance component which has proved significant both in our statistics models (and of others) and in the case studies. The discredit does not come from their failure to produce growth but from the difficulty of transposing them into practice: privatizations often produce private rents, as governments embark in such policies and then try to control competition and preserve them. But the success stories are mostly the successes of liberal economic policies, particularly of red tape reduction, tax simplification and privatization.

10. **The final lesson is about formalization, which plays an important role in explaining corruption**. Societies become transparent, and thus modern, following a process of bargaining where individuals agree to pay taxes in exchange for certain public goods. This agreement does not exist in particularistic societies, as everyone knows that access is not equal, and this hinders their development. **Societies hide from predatory rulers to defend themselves, and this is why it is important that government and society work together for more transparency.** Successful policies of formalization are based on bargaining, not repression, except in the area of criminal

economy (smuggling, drugs, traffic, money laundering). Formalization, understood as a process of persuasion and incentivizing of property and business registration, is an essential step in reducing informality. [footnotes omitted]

END OF EXCERPT

Heeks and Mathisen, in "Understanding Success and Failure of Anti-Corruption Initiatives," argue that anti-corruption initiatives often fail because of "design-reality gaps," which they describe as "a mismatch between the expectations built into their design as compared to on-the-ground realities in the context of their implementation. Successful initiatives find ways to minimize or close these gaps. Effective design and implementation processes enable gap closure and improve the likelihood of success."[274]

11. ANOTHER CASE STUDY: BAE ENGAGES IN LARGE-SCALE CORRUPTION IN SAUDI ARABIA

In "**Black Money**," ***Frontline*** **(PBS, 2009)** available online: http://video.pbs.org/video/1114436938/ (55 min), Lowell Bergman investigates an $80 billion arms deal between BAE Systems, a British corporation, and Saudi Arabia. Details of the contract were not released publicly. At the same time, members of the Saudi royal family and Saudi government officials received huge personal payments and gifts from BAE. When British prosecutors began investigations, Saudi Arabia threatened to pull support for Britain's fight against terrorism. The British prosecutors backed off. The video introduces some of the major anti-corruption legal developments in international as well as British and American law. It highlights the scale with which multinational corporations have been involved in the shadowy world of international bribery.

Update: In 2010, BAE pled guilty in the US to charges of failing to keep accurate accounting records and conspiring to make false statements to the US government. Although the charges related to various cases of corruption, BAE did not, however, admit to actual bribery in the plea bargain. BAE was required to pay $400 million to the US Treasury. The company avoided further sanctions, such as debarment from public procurement in the US, because it did not plead guilty to actual corruption offences. In the same plea deal, BAE was also required to pay £30 million to the UK and Tanzania. The UK's Serious Fraud Office was investigating allegations of corruption by BAE in seven or eight other countries, but dropped the other cases after settling the Tanzania case.

[274] Richard Heeks & Harald Mathisen, "Understanding Success and Failure of Anti-Corruption Initiatives" (2012) 58:5 Crime L & Soc Change 533.

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In 2011, BAE was required to pay a further $79 million as a civil penalty to the US Department of State for alleged violations of the *Arms Export Control Act* and the *International Traffic in Arms Regulations*. The Department of State imposed a statutory debarment from the US public procurement process but concurrently rescinded the debarment, implying that BAE is "too big to debar."[275]

See Chapter 7, Section 4.6 for further discussion of the BAE case.

Discussion Questions:

(1) A former Siemens employee asserts that the company's international reputation was not harmed by the public acknowledgement of its bribery offences because bribery is such a common-place business practice worldwide (the Siemens case is briefly discussed at Section 1.2 of this chapter). He argues that Siemens will be perceived merely as unlucky, not corrupt, and its business prospects will be unaffected by the conviction. Do you think this is true?

(2) Should the USA be allowed to prosecute foreign companies like Siemens or BAE just because these companies are traded on American stock exchanges? Should a prosecuting country have to consider another country's political, economic or strategic military interests before pursuing corruption charges? What if a prosecuting country uses the threat of corruption charges as a bargaining chip in forcing their foreign policy agenda?

(3) Did BAE's bribery of Saudi officials really hurt anyone? It secured a contract that brought thousands of jobs to the UK and cemented a strategic alliance between the UK and Saudi Arabia. What about BAE's bribery of South African officials to secure a $2 billion contract for weapons that South Africans could ill afford? Did that hurt anyone?

(4) Is it right for western democracies like the USA, the UK, Canada, Switzerland, Denmark, etc., to stand in judgment of "bribery" of Saudi officials when gift giving and nepotism are a cultural part of Saudi business practices? Why or why not?

[275] Nick Wagoner, "Was BAE Too Big to Debar?", *The FCPA Blog* (19 April 2011), online: <http://www.fcpablog.com/blog/2011/4/19/was-bae-too-big-to-debar.html>.

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CHAPTER 2

BRIBERY AND OTHER CORRUPTION OFFENCES

CONTENTS

1. INTRODUCTION AND OVERVIEW

2. DOMESTIC BRIBERY

3. BRIBERY OF FOREIGN PUBLIC OFFICIALS

4. FACILITATION PAYMENTS AND THE OFFENCE OF BRIBERY

5. ACCOUNTING (BOOKS AND RECORDS) OFFENCES RELATED TO CORRUPTION

APPENDIX 2.1

1. INTRODUCTION AND OVERVIEW

As noted in Chapter 1, corruption is a broad concept. In part, what counts as corruption is shaped by social, political and economic beliefs and norms in a given society. While there are legitimate disputes on whether certain forms of conduct are or should be classified as corruption, there is a core of conduct which is almost unanimously viewed as corruption. The fact that the periphery of corruption is grey does not provide any insurmountable barrier to defining and criminalizing the core of corruption.

If the concept of corruption is generally understood, in the words of Transparency International, to be "the abuse of entrusted power for private gain," it is readily apparent that there are many types of behaviour that constitute corrupt abuse of public power for private gain. For the most part, states do not treat corruption as one offence, but rather create a number of separate offences to deal with corrupt behaviour. Those separate offences can be defined narrowly to apply only to corrupt behaviour in the sense of the misuse of public power or they may be defined to apply more broadly to all persons, whether or not those persons are in positions of public power. For example:

- Theft (embezzlement) is (in general) the unlawful taking of another's property. When that taking is by a public official in respect to public funds, that conduct is corrupt. States can treat this latter corrupt behaviour as simply one example of the general offence of theft, or can create a specific crime of corruption called theft by public officials in respect to their entrusted powers.
- Fraud is (in general) the unlawful taking or use of another's property by dishonest means (i.e., lies, false pretences, omission of material information, etc.). When that fraud is committed by a public official in respect to their public functions that conduct is corrupt. States can treat this latter conduct as simply one example of the general offence of fraud, or they can create a specific crime of fraud by public officials carrying out their public duties. Bribes offered or received in the context of

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public procurement and bid rigging can be treated as offences of fraud or as specific corruption offences.

- Extortion is a third example. It is (in general) a crime of theft which is committed by threatening economic or physical harm to another, unless the threatened person gives the person making the threat the money or other benefit or advantage being demanded. Once again, extortion can be committed by or in respect to a public official in the context of their public functions in which case the conduct can be criminalized under a specific crime of extortion by, or of, public officials, or it can be treated as one example of the general offence of extortion.

On the other hand, there are offences that are specifically created to deal with the corrupt behaviour of public officials in respect to their public functions. For example:

- Bribery is (in general) the asking or taking by a public official of a benefit or advantage for private gain in exchange for a misuse of the official's entrusted powers. Bribery is also a bilateral offence—it criminalizes the conduct of the public official and also the conduct of third party bribers who have offered, given or agreed to give a bribe to a public official.
- Buying or selling a public office or exercising or promising to exercise improper influence on an appointment to a public office is an offence of corruption and is a specific offence in the penal codes of many nations.

There are other offences relevant to corruption and bribery. These offences include money laundering and books and records offences, which are seen as necessary to effectively fight against the commission of large-scale bribery, as well as other economic crimes.

Rose-Ackerman notes that merely creating offences will not on its own adequately address corruption. She states:

> A narrowly focused reform may not limit corruption unless combined with greater overall governmental transparency and outside monitoring. Particular laws against bribery, extortion, and self-dealing will never be sufficient to deal with widespread corruption. Fundamental redesign of the relations between the state and society will often be the only way to control systemic corruption. Nevertheless, well-designed and enforced laws against bribery and extortion are a necessary backup to any broader reform.[1]

As noted in Chapter 1, the United Nations Convention against Corruption (UNCAC) has been ratified by 183 countries across the globe. It is by far the most influential international anti-corruption instrument. State Parties to UNCAC are required to enact legislation criminalizing certain offences and are required to consider criminalizing other offences. In other words, UNCAC contains both mandatory and optional corruption offences and

[1] Susan Rose-Ackerman, "The Law and Economics of Bribery and Extortion" (2010) 6 Annual Rev Law Soc Sci 217 at 220-221.

provisions. Signatories to UNCAC and members of the OECD are required to implement mandatory offences and to consider implementing optional offences. Both types of provisions are listed below.

Mandatory Offences:

(1) Bribery of National Public Officials
(2) Bribery of Foreign Public Officials
(3) Public Embezzlement
(4) Money Laundering
(5) Obstruction
(6) Liability of Legal Entities
(7) Accomplices and Attempts
(8) Conspiracy to Commit Money Laundering
(9) Book and Records Offences[2]

The OECD Convention is restricted to criminalizing bribery of foreign public officials in the course of international business transactions. The OECD Convention does not contain offence provisions on items (1), (3) and (5) listed above from UNCAC.

As you will see in the course of reading this chapter, domestic law in the US, UK and Canada incorporates all the mandatory provisions set out above, albeit with slightly different language and scope. Appendix 1 of this chapter references the exact provisions in each country that correspond to the UNCAC provisions.

Optional Offences:

(1) Foreign Official Taking a Bribe
(2) Giving a Bribe for Influence Peddling
(3) Accepting a Bribe for Influence Peddling
(4) Abuse of Public Function to Obtain a Bribe
(5) Illicit Enrichment
(6) Private Sector Bribery
(7) Embezzlement in the Private Sector
(8) Concealing Bribery Property

Apart from the offence of illicit enrichment, these optional offences can also be found in US, UK and Canadian law.

[2] UNCAC does not require State Parties to "criminalize" books and records offences per se but instead requires signatories to take necessary steps to prevent the creation and use of improper and fraudulent books and records.

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While UNCAC and the OECD Anti-Bribery Convention include a number of corruption offences, this chapter explores the two most commonly charged offences: (1) bribery of national and foreign public officials and (2) books and records offences. The other Convention offences are listed in Appendix I at the end of this chapter. The offence of money laundering is explored in detail in Chapter 4 of this book. The remainder of this chapter involves a description of the elements of and relevant defences to bribery and books and records offences both domestically and in foreign countries under:

(1) UNCAC
(2) OECD Convention on Corruption of Foreign Officials
(3) US law, especially the *Foreign Corrupt Practices Act* (*FCPA*)
(4) UK law, especially the *Bribery Act 2010* and
(5) Canadian law, especially the *Corruption of Foreign Public Officials Act* (*CFPOA*).

Chapter 3 then continues with an analysis of several general criminal law principles that are relevant to defining the scope of bribery and books and records offences, namely:

(1) extra-territorial jurisdiction for bribery offences
(2) criminal liability of corporations and other legal entities
(3) party or accomplice liability and
(4) inchoate liability (attempts, conspiracy and solicitation).

An understanding of the foreign bribery laws of the US and UK is especially important for lawyers and their corporate clients in other jurisdictions because these two countries have wide extra-territorial jurisdiction provisions in their bribery statutes. Foreign persons and companies can often be prosecuted under the US or UK law. For example, a Canadian company which offers a bribe to a public official in Bangladesh can be prosecuted not only in Canada, but also in the US under the *FCPA* if the Canadian company's shares are listed on the New York Stock Exchange (or any other US Stock Exchange).

2. DOMESTIC BRIBERY

2.1 UNCAC

2.1.1 Offence of Bribery of a National Public Official

Article 15 of UNCAC requires State Parties to create a criminal offence in respect to bribery of its public officials. Article 15 states:

> *Article 15. Bribery of national public officials*
>
> Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

> (a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;
>
> (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

(i) Active and Passive Bribery

Article 15(a) is sometimes referred to as active bribery of a domestic public official, while Article 15(b) is sometimes called passive bribery. "Active" bribery refers to the giving or the offering of a bribe or other form of "undue advantage" to a national public official. "Passive" bribery, though somewhat a misnomer, refers to the actions of the corrupt public official who accepts, or in some cases, actively solicits, a bribe.

(ii) Public Official

Bribery is an offence involving public officials. "Public official" is defined in Article 2(a) of UNCAC as follows:

> "Public official" shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) any other person who performs a public function including for a public agency or public enterprise, or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a "public official" in the domestic law of a State Party.

As Michael Kubiciel notes in his article "Core Criminal Law Provisions in the United Nations Convention Against Corruption," the UNCAC definition of "public official" is very broad.[3] It includes persons who do not hold official positions but perform a public function or provide a public service. This definition is more expansive than the definition prescribed by earlier multilateral conventions. The definition recognizes that even those who do not occupy official positions may still exercise influence and be subject to corruption.

(iii) Undue Advantage

Another key term in Article 15 is "undue advantage." The United Nations Office on Drugs and Crime (UNODC)'s *Legislative Guide for the Implementation of the United Nations Convention against Corruption* states that an "undue advantage may be something tangible or intangible,

[3] Michael Kubiciel, "Core Criminal Law Provisions in the United Nations Convention Against Corruption" (2009) 9 Intl Crim L Rev 139.

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whether pecuniary or non-pecuniary."[4] As Kubiciel notes, the word "undue" is an imprecise term. According to a strict interpretation, "undue advantage" could mean all types of advantages, even small, culturally acceptable gifts. The word "undue" could also support a flexible interpretation and exclude gifts of low value that are generally socially acceptable (e.g., a cup of coffee). He warns, however, that the "line between an acceptable gift and corruption is thin."[5] A tradition of gift-giving should not necessarily be an automatic defence to a bribery charge. Kubiciel argues that states should be careful to evaluate which behaviours are actually cultural traditions, and whether even those that can be characterized as cultural traditions are nonetheless harmful to public confidence in the state. Some countries deal with the issue by passing laws or regulations requiring all public officials to report (and sometimes surrender) to an appropriate authority a) the receipt of any gift/advantage, or b) the receipt of a gift/advantage over a specified monetary value.

(iv) Offering, Promising or Giving

Article 15(a) criminalizes the "offering, promising or giving" of an undue advantage. Therefore, the unilateral offer of a bribe, irrespective of whether the offer was accepted, must be criminalized by State Parties.

(v) Soliciting or Accepting

Similarly, a request for a bribe, whether or not a bribe is agreed to or is actually given is to be criminalized (Article 15(b)). Kubiciel argues that the prohibition of an "acceptance" of an "undue advantage" (Article 15(b)) should be interpreted to mean that an offence is committed even if the public official acquiesces to the offer of a bribe, but subsequently returns the bribe or does not follow through on performance of the corrupt agreement. The latter circumstances would be, however, relevant to determining an appropriate sentence for the public official. It also raises the issue of whether voluntary withdrawal from the bribery scheme might be accepted as a defence as it is in the law of attempts in some countries.

(vi) Intention

Article 15 clearly states that the prohibited conduct in that article must be committed intentionally. The phrase in subparagraphs (a) and (b) "in order to act or refrain from acting in the exercise of his or her official duties" requires that "some link must be established between the offer or advantage and inducing the official to act or refrain from acting in the course of his or her official duties."[6] In instances where the accused offers a bribe that is not accepted, the accused must have intended to offer the advantage and must also have

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[4] United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption* [Legislative Guide (2012)], 2nd ed (United Nations, 2012), at 65, online: <https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf>.

[5] Kubiciel (2009).

[6] Legislative Guide (2012) at 65.

intended to influence the behaviour of the recipient in the future. Kubiciel notes that this phrase does not expressly prohibit instances where an undue advantage is offered or received by an official after the official has acted or refrained from acting in the exercise of his or her official duties. It could be argued that such conduct does constitute "indirectly" giving an undue advantage if the parties know or reasonably suspect that an undue advantage will be given after the fact. Alternatively, if courts do not adopt that interpretation of "indirectly," State Parties could consider implementing legislation that criminalizes this type of behaviour.

2.1.2 Defences

There are no special defences for domestic bribery under UNCAC. Of course, the absence of any elements of the offences in Articles 15 to 25 will constitute a defence.

Article 28 of UNCAC deals with knowledge, intent and purpose as elements of an offence. The provision states that "[k]nowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances." Absence of these objective factual circumstances is a defence if the knowledge, intent or purpose is not proven in another way. The UNCAC Commentary provides that "national drafters should see that their evidentiary provisions enable such inference with respect to the mental state of an offender, rather than requiring direct evidence, such as a confession, before the mental state is deemed proven."

The issue of whether facilitation payments are prohibited by UNCAC is discussed in Section 4 below.

2.1.3 Limitation Periods

Article 29 of UNCAC sets out its requirements in respect to limitation periods. Article 29 states:

> Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.

The *Legislative Guide* notes "the concern underlying this provision is to strike a balance between the interests of swift justice, closure and fairness to victims and defendants and the recognition that corruption offences often take a long time to be discovered and established."[7] This justifies the wording of Article 29, which requires States to "introduce

[7] *Ibid* at 108.

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long periods for all offences established in accordance with the Convention and longer periods for alleged offenders that have evaded the administration of justice."[8]

The provisions under UNCAC with regard to limitation periods parallel those under the OECD Convention, but with the additional option of suspending the limitation period when the offender is found to have been evading the administration of justice. The *Legislative Guide* suggests two ways that State Parties may implement Article 29. The first is to review the length of time provided for by existing statutes of limitations. The second is to review the way in which limitation periods are calculated. The *Legislative Guide* notes that "Article 29 does not require States parties without statutes of limitation to introduce them."[9]

2.1.4 Sanctions

UNCAC has very little in the way of requirements or guidance for sanctions and sentencing in regard to corrupt conduct. It does not specify any maximum or minimum sentences for corruption offences. Instead, Article 12(1) of UNCAC provides that "each State Party shall take measures, in accordance with... its domestic law... to provide effective, proportionate and dissuasive civil, administrative or criminal penalties" for violation of corruption prevention standards and offences involving the private sector. And Article 30(1) provides that "each State Party shall make the commission of [corruption] offences ... liable to sanctions that take into account the gravity of that offence." As an ancillary consequence, Article 30(7) indicates that State Parties should consider disqualification of persons convicted of corruption from holding public office for a period of time.

2.2 OECD Convention

As the name of the Convention implies, the OECD *Convention on Combatting Corruption of Foreign Public Officials in International Business Transactions* only deals with bribery of foreign public officials, not domestic public officials.[10] Thus the OECD Convention is not relevant to this section on domestic bribery.

2.3 US Law

2.3.1 Offense of Bribery of a National Public Official

Domestic bribery is criminalized under both state and federal criminal law. Federal law (18 USC., chapter 11) sets out a number of offenses dealing with bribery, graft and conflict of interest. The principal federal section prohibiting both active and passive bribery is section 201 of 18 USC. Section 201(b)(1) which criminalizes any person who "directly or indirectly,

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[8] *Ibid* at 109.
[9] *Ibid*.
[10] OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), [OECD Convention (1997)], online: <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>.

corruptly gives, offers or promises anything of value" to (or for the benefit of) any public official (or person nominated or selected to be a public official) with intent to influence any official act or the commission of any act of fraud by that official on the US, or to induce a public official to violate that official's lawful duties. Section 201(b)(2) creates similar offenses for a public official to "corruptly demand, seek, receive, accept or agree to receive or accept anything of value" in return for improper influence or use of his or her public powers and duties. Section 201(a) defines "public official," "person selected as a public official" and "official act." The above offenses are similar to bribery offenses in most countries. The conduct (*actus reus*) elements which need to be proven are: (1) the offering/giving or seeking/receiving of "anything of value" to or by (2) a current or selected public official (3) for improper influence of an official act or duty. The mental element (*mens rea*) is doing so "corruptly with intent to influence an official act or duty." The expression "anything of value" is very wide and can include many things other than money. Also, there is no minimum economic value (or dollar figure) placed on a thing of value. A prosecutor who offers an accomplice immunity or leniency is offering a thing of value, but that is not bribery because the offer is not for a corrupt purpose. "Public official" is also defined widely. The expression "an official act" is defined in § 201(a) as follows:

> (3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

In *R v McDonnell*,[11] the US Supreme Court interpreted the meaning of "official act." The Court held that the prosecutor must "identify a 'question, matter, cause, suit, proceeding or controversy' that 'may at any time be pending' or 'may by law be brought' before a public official" and then prove the public official made a decision or took action on that issue or agreed to do so.[12] The action taken must involve formal exercise of governmental power similar in nature to a lawsuit, determination before an agency or hearing before a committee.[13] In this regard, a typical meeting, call or event will not be an "official act." The Court was critical of the prosecution's expansive definition of "official act" noting that "White House counsel who worked in every administration from that of President Reagan to President Obama warn that the Government's 'breathtaking expansion of public corruption law would likely chill federal officials' interactions with the people they serve.'"[14]

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[11] *R v McDonnell,* No 15-474 (2016) (Supreme Court of the United States), 579 US __ (2016), at 14. For a brief summary of the case, see Richard L Cassin, "Supreme Court Tosses McDonnell Conviction, Knock DOJ's 'Boundless Interpretation' of Federal Bribery Law", *The FCPA Blog* (27 June 2016), online: <http://www.fcpablog.com/blog/2016/6/27/supremes-toss-mcdonnell-conviction-knock-dojs-boundless-inte.html>. See also Bill Steinman, "Bill Steinman: What Does the Bob McDonnell Ruling Mean for the FCPA", *The FCPA Blog* (29 June 2016), online: <http://www.fcpablog.com/blog/2016/6/29/bill-steinman-what-does-the-bob-mcdonnell-ruling-mean-for-th.html>.

[12] *Ibid* at 14.

[13] *Ibid* at 26.

[14] *Ibid* at 22-23.

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The US Supreme Court's decision has been widely criticized and has provoked calls for reform.[15]

In regard to the mental element—a corrupt intent to influence, or be influenced in, the commission of an official act—the US Supreme Court has held that the prosecution must establish a *quid pro quo*, that is "specific intent to give or receive something of value in exchange for an official act."[16] This excludes vague expectations or generalized hope of some future benefit and in this way excludes election campaign donations if they are not made in exchange for a specific official act.[17]

Section 201(c) creates a separate offense sometimes referred to as giving or promising "illegal gratuities." Section 201(c) involves giving or accepting a gratuity for or because of the performance of an official act. There is no need to show the official act was conducted improperly or illegally, nor any need to show a *quid pro quo* for the gratuity. In effect, the section provides that it is an offense to give or accept a gratuity in respect to the official's public duties. As the US Supreme Court said in *Sun-Diamond Growers* "[F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken."[18]

2.3.2 Defenses

A person charged with a domestic bribery or illegal gratuities offense is entitled to plead any general defense that is applicable to any other crime. These defenses might include claims of entrapment or abuse of due process, but both of these defenses have requirements that will limit their availability in most bribery cases. If a person engages in bribery under physical duress, that duress will constitute a defense if the general requirements for the defense of duress exist. Likewise, necessity may be a defense, if there was no other reasonable option but to pay a bribe. For example, paying a bribe (which was more than a facilitation payment) to a customs officer who demands a bribe before allowing a shipload of perishable goods to be lawfully unloaded may well be excused on the basis of necessity (assuming there was no

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[15] See Carl Hulse, "Is the Supreme Court Clueless About Corruption? Ask Jack Abramoff", *The New York Times* (5 July 2016), online: <http://www.nytimes.com/2016/07/06/us/politics/is-the-supreme-court-clueless-about-corruption-ask-jack-abramoff.html?_r=1>; Claudia Dumas, Shruti Shah & Jacqui de Gramont, "Gov. McDonnell and the Supremes: Corruption by Any Other Name Is Still Corruption", *The FCPA Blog* (17 June 2016), and subsequent reader comments, online: <http://www.fcpablog.com/blog/2016/6/17/gov-mcdonnell-and-the-supremes-corruption-by-any-other-name.html>; PJ D'Annunzio, "McDonnell Case Casts Long Shadow in Public Corruption Prosecutions", *The National Law Journal* (27 December 2016), online: <http://www.nationallawjournal.com/home/id=1202775543648/McDonnell-Case-Casts-Long-Shadow-in-PublicCorruption-Prosecutions?mcode=1202617074964&curindex=4&slreturn=20170003135314>.

[16] *Ibid* at 404-405.

[17] *United States v Jennings*, 160 F3d 1006 (4th Cir 1998) and *United States v Tomlin*, 46 F3d 1369 (5th Cir 1995).

[18] *United States v Sun-Diamond Growers*, 526 US 398 at 404-405.

other reasonable option). Likewise, the general defenses of double jeopardy, *res judicata* and incapacity are available. Also, prosecution of the offense is barred if the prosecution violates an applicable state or federal statute of limitations.[19]

2.3.3 Limitation Periods

18 USC. Chapter 11 does not set out any specific limitation periods. Accordingly, the general statute of limitations of five years for non-capital offenses applies to the bribery offences under the US Code.[20] This five-year limitation can be extended by three more years in certain circumstances (see Section 3.3.3 below).

2.3.4 Sanctions

According to § 202(b)(4), whoever commits the offense of bribery under § 202(b) "shall be fined under this title [a maximum of $250,000 for individuals or $500,000 for organizations] or no more than three times the monetary equivalent of the thing of value, whichever is the greater, or to imprisonment for not more than fifteen years, or to both, and may be disqualified from holding any office of honor, trust or profit under the United States."

Anyone committing the offense of illegal gratuities under § 201(c) is "fined under this title [a maximum of $250,000 for individuals or $500,000 for organizations] or imprisoned for not more than two years, or both." The actual sentences imposed for both offenses are subject to the US Federal Sentencing Guidelines.[21] For a description of sentencing principles and practices applicable to corruption offenses, see Chapter 7, Section 4 of this book.

[19] For a more detailed analysis of the offences and defences to domestic bribery and illegal gratuities, see 18 USC. Annotated 456-562 (West Group, 2000 and Cumulative Annual Pocket Part), and C Dixou, J Krisch and C Thedwall, "Public Corruption" (2009) 46 Am Crim L Rev 928.

[20] See 18 USC § 3282.

[21] See United States Sentencing Commission, "Guidelines Manual", s 2C1.1 (2013), online: <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/Chapter_2_A-C.pdf> and the discussion of aggravating factors in C Dixou, J Krisch & C Thedwall, "Public Corruption" (2009) 46 Am Crim L Rev 928 at 942-949.

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2.4 UK Law

2.4.1 Introduction

The *Bribery Act 2010* (hereinafter referred to as the *Bribery Act*) came into force on July 1, 2011. It is the culmination of 10 to 12 years of study, consultation and debate.[22] The *Bribery Act* constitutes a codification of the law of bribery in England which prior to that time was a complex amalgamation of statute and common law.[23] The new Act creates four bribery offences. There are two general offences: (1) offering or giving a bribe and (2) accepting a bribe. There is also a third offence of bribing a foreign public official and a new fourth offence of failure of a "commercial organization" to prevent bribery by one of its associates.

The *Bribery Act* is broad in several respects. Both domestic and foreign bribery are covered in this one statute. And as will be discussed in Chapter 3, the extra-territorial reach of the *Bribery Act* is quite extensive. Further, apart from the offence of bribing a foreign public official, the other three offences apply to giving or taking a bribe in both the public *and the private* sectors. This lack of distinction between public and private or commercial bribery has been criticized by Stuart P. Green. Green advocates treating commercial bribery as a crime, but also argues that its treatment should be distinguished from that of public bribery due to the distinct "moral and political character" of public bribery.[24] As explained by Peter Alldridge, commercial or private bribery "distort[s] the operation of a legitimate market," while public bribery creates "a market in things that should never be sold."[25]

It is rather artificial to divide the offences under the *Bribery Act* into domestic and foreign offences since, with the exception of bribery of a foreign public official, the other three offences apply to both domestic and foreign activities over which the UK asserts fairly wide jurisdiction. In this section, I cover these latter three offences which apply both domestically and to certain foreign activities. The offence of bribery of a foreign official will be dealt with in Section 3.4 below.[26]

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[22] GR Sullivan notes in "The *Bribery Act* 2010: An Overview" (2011) Crim L Rev 87 at 87, n9, that "the reform process was initiated by the publication of the Law Commission, *Legislating the Criminal Code: Corruption* 1997, Consultation Paper No. 145, followed by a final report, then another consultation paper, another final report, various interventions by the Home Office, the Ministry of Justice, several parliamentary select committees' reports, and parliamentary debates along the way." For an analysis of the *Bribery Act 2010*, see C Nicholls et al, *Corruption and Misuse of Public Office* (Oxford University Press, 2011).

[23] For a detailed description of the law before the *Bribery Act 2010*, see C Nicholls et al, *Corruption and Misuse of Public Office*, 2nd ed (Oxford University Press, 2011).

[24] Stuart P Green, "Official and Commercial Bribery: Should They Be Distinguished?" in Jeremy Horder and Peter Alldridge, eds, *Modern Bribery Law: Comparative Perspectives* (Cambridge University Press, 2013) at 65.

[25] *Ibid.*

[26] For a detailed analysis of the UK *Bribery Act* offences, see Nicholls et al (2011).

2.4.2 Offences

(i) Offence of Bribing another Person: Section 1

Section 1 of the UK *Bribery Act* sets out two cases or scenarios in which a person will be guilty of the offence of "bribing another person" or "active bribery." In both cases, section 1(5) specifies that it does not matter whether the bribe is made by a person directly or through a third party. Furthermore, it does not matter if the bribe is actually completed; the offer or promise is enough to make out the offence.

The offence of bribing another person in Case 1 (section 1(2)) occurs where a person "offers, promises or gives a financial or other advantage to another person," and intends that advantage to either "induce a person to perform improperly a relevant function or activity," or "reward a person for the improper performance of such a function or activity." This means the parties must intend acts beyond the offering or receiving of the bribe. Section 1(4) stipulates that it does not matter whether the person who has been bribed is the same person who is to perform (or has already performed) the activity in question.

Section 1(3) describes Case 2 as a situation where a person "offers, promises or gives a financial or other advantage to another person," and "knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity." The receiver need not behave improperly nor even intend to do so; in this case, the receipt of the advantage is itself improper.

Note also that "person," as defined by the UK *Interpretation Act* 1976, extends to "a body of persons corporate or incorporate" and thus a body corporate can be liable if its "directing mind and will" was implicated in the wrongdoing.[27]

The expression "a relevant function or activity," which is a component of the offence in all cases, is described in section 3 of the *Bribery Act* as:

(a) any function of a public nature,
(b) any activity connected with a business [which includes a trade or profession],
(c) any activity performed in the course of a person's employment, and
(d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).

The activity, if one of the above, must then meet one or more of the following conditions:

- Condition A is that a person performing the function or activity is expected to perform it in good faith.
- Condition B is that a person performing the function or activity is expected to perform it impartially.

[27] *Ibid* at para 4.27.

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- Condition C is that a person performing the function or activity is in a position of trust by virtue of performing it.

A function or activity can be "relevant" even if it has no connection with the UK at all and is performed outside of the UK. This question of the jurisdictional reach of the UK *Bribery Act* is more fully examined below in Section 1.8 of Chapter 3.

Section 4 of the *Bribery Act* explains that a relevant function or activity is performed "improperly" if it is performed in breach of a relevant expectation or where there is a failure to perform the function in circumstances where that failure is itself a breach of a relevant expectation. Relevant expectations are described in Conditions A, B and C above. Therefore, a person exercising a relevant function will be expected to act in good faith, to perform their function impartially or to avoid breaching trust. This means that the performance of the function in Case 1, or the mere acceptance of the financial advantage in Case 2, might be improper if it demonstrates bad faith, partiality or a breach of trust.[28]

Finally, section 5(1) states that "the test of what is expected is a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned." Section 5(2) adds that if the performance is not part of the law of the UK, then local customs and practices must be disregarded unless they are part of the written law (either legislative or judicially created) applicable to the country or territory in question. Ultimately this extends UK norms and standards to foreign sovereign nations, a position which will undoubtedly prove controversial. According to the Joint Committee on the Draft Bribery Bill, the UK Government's deliberate intention is to "encourage a change in culture in emerging markets" by eliminating local custom from a criminal court's considerations.

(ii) Offences Relating to Being Bribed: Section 2

Section 2 of the *Bribery Act* sets out four cases in which a person will be guilty of offences related to being bribed. The offence of "being bribed" is sometimes referred to as "passive bribery" despite the fact that section 2 also includes active conduct on the part of a government official or other person "requesting" a bribe. The offences are formulated in a rather complex way and often appear to overlap, but the drafter's intention is to ensure that the provisions will cover all the ways in which being bribed might occur.[29] In all cases, it does not matter if the person actually receives the bribe; the offence may be made out simply by requesting or agreeing to receive the bribe.

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[28] GR Sullivan points out that such a finding would be easy to prove in cases where an individual takes a bribe in advance of some decision he or she is due to make in their capacity as a judge, civil servant, agent, etc, where the briber has an interest that may be affected by the individual's decision. Evidence of taking this advantage may be proof in and of itself of improper performance even before a decision is made; GR Sullivan (2011) at 90, n 15.

[29] James Maton, "The UK *Bribery Act* 2010" (2010) 36:3 Employee Rel LJ 37 at 38; Maton states that the need for such detail was suggested by the Law Commission when publishing draft legislation.

There are four possible routes to liability:

> **Section 2(2):** The first offence is described as "Case 3" (Cases 1 and 2 are dealt with in section 1). In this scenario, the person "requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly" (whether by the person mentioned or another person). The key in this case is that the recipient of the bribe intends improper performance to follow as a consequence of the bribe. The improper performance may be done by the receiver or by another person.
>
> **Section 2(3):** In Case 4, a person is guilty where he or she "requests, agrees to receive or accepts a financial or other advantage" and "the request, agreement or acceptance itself constitutes the improper performance by the person of a relevant function or activity." In this case, the taking of the bribe in and of itself amounts to improper performance of the relevant function. As described above with regard to Case 2, for this case to be made out the request, agreement or acceptance must itself prove bad faith, partiality, or a breach of trust. For example, the offence would be made out if a civil servant requested $1000 in order to process a routine application.[30]
>
> **Section 2(4):** Case 5 deals with a person who requests, agrees to receive or accepts the bribe "as a reward for the improper performance… of a relevant function or activity." The performance can be done by the person being bribed or another person.
>
> **Section 2(5):** Finally, Case 6 deals with a situation where, "in anticipation of or in consequence of a person requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly" (either by that person or by another person at the culpable receiver's request or with the receiver's assent or acquiescence). According to section 2(8), if a person performing the function or activity is someone other than the receiver, it "does not matter whether that performer knows or believes that the performance of the function or activity is improper."

In all cases, it does not matter whether the bribe is accepted directly by the receiver or through a third party, and it does not matter if the bribe is for the benefit of the receiver or another person.

The descriptions in Section 2.4.2(i) above pertaining to the definitions of "relevant function or activity," "improper performance" and "expectation" apply equally to section 2 offences.

In Cases 4, 5 and 6, according to section 2(7), "it does not matter whether the person knows or believes that the performance of the function or activity is improper." This section has resulted in a lack of clarity concerning the *mens rea* for the various cases in both sections 1 and 2. Section 2(7) seems to create a distinction between sections 1 and 2: in section 1, the

[30] Nicholls et al (2011) at para 4.46.

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"briber" must intend improper performance or improper receipt, whereas the "bribee" in section 2 can be guilty even if he or she did not know his or her performance was improper.[31] G.R. Sullivan has considered the varying interpretations and suggests that section 2(7) was included for the sake of certainty, in order to confirm that normative awareness of wrongfulness is not necessary for those who accept advantages.[32] The goal, according to the Joint Committee on the Draft Bribery Bill, is to encourage people to "think twice" when seeking or taking an advantage.[33] Sullivan further suggests that the same concept can be taken for granted in Cases 1-3, which would mean a briber is not required to know that the behaviour they intend to induce in the bribee is improper. Put another way, ignorance of the law is not a defence.

(iii) Commercial Organization Failing to Prevent Bribery: Section 7

Section 7 of the *Bribery Act* creates a new strict liability offence of failure of a commercial organization to prevent bribery. Section 7 defines the scope of this new offence in the following words:

> (1) A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—
>
> (a) to obtain or retain business for C, or
>
> (b) to obtain or retain an advantage in the conduct of business for C.[34]

For more information on section 7, refer to Section 2.6.1 of Chapter 3.

(iv) Offence by Consent or Connivance of Senior Officers: Section 14

If any of the bribery offences under sections 1, 2 or 6 are committed by a body corporate or a Scottish partnership, section 14 of the *Bribery Act* mandates that a "senior officer" or someone purporting to act in that capacity will be personally criminally liable (as will the body corporate) if the offence was committed with the officer's consent or connivance.

Senior officer is defined in section 14(14) as a "director, manager, secretary or other similar officer." While the word "manager" is not defined and could be broadly interpreted, Nicholls et al. note that it was narrowly defined in a somewhat similar provision in *R v. Boal* to include only "decision-makers within the company who have the power and responsibility to decide corporate policy and strategy. It is to catch those responsible for

[31] *Ibid* at para 4.44.
[32] GR Sullivan (2011). In respect to the offences which section 2 of the *Bribery Act* replaces, see Nicholls et al (2011).
[33] Cited in Nicholls et al, *ibid* at paras 4.44, 189, n 52.
[34] Interestingly, there is no corresponding offence of failure to prevent the taking of a bribe.

putting proper procedures in place."[35] I question whether the narrow *Boal* definition is consistent with the purpose of putting a duty on "managers" in general to not consent or connive in the commission of bribery by those under their supervision.

The words "consent and connive" are also not defined in the *Bribery Act*. Nicholls et al. suggest that section 14 will be satisfied by knowledge or "willful blindness" to the conduct that constitutes bribery along with remaining silent or doing nothing to prevent that conduct from occurring or continuing.[36] See also Chapter 3, Section 3.4.

Finally, a "senior officer" will only be liable for a bribery offence committed by the corporation if that senior officer has a "close connection" to the UK as defined in section 12(4) of the *Bribery Act*.

2.4.3 Defences

Section 5(2) of the *Bribery Act* indicates that no bribery offence is committed if the payment of a financial or other advantage "is permitted or required by the written law applicable to the country or territory concerned." In some countries, the law or government policies require the appointment of a commercial agent as a condition of doing business in that country. The agent is appointed by or associated with persons in high places and demands large agent fees for little or no work.[37] The agent's fees are shared with the high officials. This practice is a form of bribery, but it is not defined as corruption in such countries and is in fact legally required in those countries.

Section 13 of the *Bribery Act* provides a defence for persons whose conduct, which would otherwise constitute a bribery offence, is proven on a balance of probabilities to be necessary for the proper exercise of intelligence or armed services functions. Where the conduct that comprises the bribery offence is necessary for the proper exercise of any function pertaining to UK intelligence or armed services, the defence is made out. The head of the intelligence service or Defence Council must also ensure that arrangements are in place to ensure that any conduct constituting an offence will be necessary. Subsection (5) provides that where a bribe is paid by a member of the intelligence service or armed forces and they are able to rely on the section 13 defence, the receiver of that bribe is also covered by the defence. In England, legally impossible attempts are not generally recognized as crimes.

Sullivan criticizes section 13 for its potential to provide space for "what may be highly questionable conduct."[38] Although Sullivan recognizes the utility of such a defence, he worries "it might encourage payments made in circumstances far removed from matters of

[35] *R v Boal* (1992), 95 Cr App R 272.
[36] Nicholls et al (2011) at 113.
[37] GR Sullivan (2011) at 100.
[38] Bob Sullivan, "Reformulating bribery: a legal critique of the Bribery Act 2010" in Jeremy Horder and Peter Alldridge, eds, *Modern Bribery Law* (Cambridge University Press, 2013) 13 at 35.

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vital national security," especially since the duties of the Intelligence Service include protecting the UK's economic wellbeing.[39]

No other bribery-related defences are specifically set out in the *Bribery Act*, such as committing bribery under duress or by necessity. While the requirements for these defences are rather stringent, there is no reason why they should not apply if the defence requirements are present. The Ministry of Justice Guidance states explicitly that duress may be available if a bribery offence was committed to prevent loss of life, limb or liberty.[40] Since duress, which includes duress by threat or by circumstances, only applies when the defendant is under threat of immediate or nearly immediate death or serious bodily harm, the defence would not cover less pressing health and safety concerns.[41] As a result, Sullivan expresses concern regarding the potential of the *Bribery Act* to catch payments extracted through extortion, especially in light of the Act's broad jurisdiction in areas where extortionate demands are common.[42] The defence of necessity has the potential to assist defendants under the Act, but is still uncertain and relatively novel in the UK. Necessity acts as a justification for the defendant's conduct in UK law, unlike duress, which is an excuse for wrongful acts committed under pressure. Necessity is based on the idea that sometimes the benefits of breaking the law outweigh the benefits of compliance. The defence is more likely to succeed for property offences, such as bribery, than offences involving the infliction of physical harm.[43]

Other defences such as honest mistake of fact, incapacity and diplomatic immunity should also be available if the requirements for those defences are met. Immunity from the criminal law applies to foreign visiting sovereigns, foreign diplomats and members of the foreign armed forces. Entrapment is another defence available to a charge of bribery. The scope of the entrapment defence in England is set out by the House of Lords in *R. v. Loosely* and *Attorney General's Reference (No. 3 of 2000)*.[44] It is a non-exculpatory defence and therefore does not exonerate the accused. There is no verdict of not guilty, but rather a stay of proceedings on the basis that the investigative activities of the state were unfair and that prosecution of the offence would tarnish the integrity of the court and be an affront to the public conscience. The test for entrapment is whether the state activity goes beyond providing an opportunity to commit a crime and instead has actually instigated the offence. The details of this test are set out in *Loosely.* Nicholls et al. suggests that the test "is practical, secures the balance of fairness for all interests, and is 'ECHR-centric' in approach and formulation… [and] will be applicable across the range of covert investigations from a corrupt petty official… suspected of taking small bribes to long-term infiltration into commercial corruption, fraud/money laundering, or corrupt networks centered around

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[39] *Ibid*.

[40] United Kingdom, Minister of Justice, *The Bribery Act 2010: Guidance*> [UK *Bribery Act* Guidance (2010)], online: <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf .

[41] AP Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 4th ed (Hart Publishing, 2010) at 725.

[42] B Sullivan (2013) 13 at 14–15.

[43] AP Simester et al (2010).

[44] *R v Loosely*, [2002] Cr App R 29.

organized crime."[45] Random-virtue testing (offering a person an opportunity to commit a crime in circumstances in which there is no reasonable suspicion that the person intended to engage in the commission of a crime) is not permitted. Entrapment and integrity testing are also discussed in Chapter 6, Section 4.6.3.

(i) Section 7 – Adequate Procedures Defence

The "adequate procedures" defence applies to section 7 of the *Bribery Act*. Section 7(2) states that a full defence to the charge is available if the commercial organization can prove on a balance of probabilities that it had adequate procedures in place and followed those procedures at the time the bribery occurred in order to prevent associated persons from engaging in bribery. As is more fully argued by Stephen Gentle, this defence has proven to be contentious.[46]

Section 9 requires the Secretary of State to publish guidance for commercial organizations regarding the "adequate procedures" that companies should implement to prevent persons associated with the company from bribing.

After much debate, lobbying and consultation, the Secretary of State for Justice (head of the Ministry of Justice) on March 30, 2011 issued the *Bribery Act 2010 Guidance* (*Guidance,* or *UK Guidance* where required for clarity).[47] On the same day, the Serious Fraud Office (SFO) and the Crown Prosecution Service (CPS) published their *Bribery Act 2010: Joint Prosecution Guidance of the Director of the SFO and the DPP* (*Joint Guidance*) to ensure consistency between police and prosecutors and to indicate that police and prosecutors will have careful regard for the *Guidance* issued by the Secretary of State.[48]

The *Guidance* is organized around six principles for establishing adequate procedures to prevent corruption. After each principle is set out, the *Guidance* provides commentary on the meaning and scope of each principle. The six principles are as follows:

Principle 1: Proportionate procedures

> A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities.

[45] Nicholls et al (2011) at 200.
[46] Stephen Gentle, "The *Bribery Act* 2010: (2) The Corporate Offence" (2011) 2 Crim L Rev 101 at 106.
[47] UK *Bribery Act* Guidance (2010).
[48] United Kingdom, Minister of Justice, *Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions* [Joint Prosecution Guidance (2010)], online: <https://www.compliance-instituut.nl/wp-content/uploads/SFO-UK-BRIBERY-ACT-2010-JOINT-PROSECUTION-GUIDANCE.pdf>.

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Principle 2: Top-level commitment

> The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

Principle 3: Risk assessment

> The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

Principle 4: Due diligence

> The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

Principle 5: Communication (including training)

> The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training that is proportionate to the risks it faces.

Principle 6: Monitoring and Review

> The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

Appendix A of the *Guidance* is composed of eleven case studies for further illustration and clarification of the six principles for "adequate procedures." For example, case study 1 focuses on the problem of facilitation payments and discusses what a company can do when faced with demands for them.

Transparency International UK has also provided guidance on the *Bribery Act*. It produced a 100-page *Guidance on Adequate Procedures* and an 80-page *Adequate Procedures Checklist*, as well as publications on *Due Diligence, Diagnosing Bribery Risk and Assessment of Corruption in (Ten) Key Sectors*. These guidance documents are designed to assist companies to comply with the *Bribery Act* by providing clear, practical advice on good practice anti-bribery systems that in Transparency International's opinion constitute "adequate procedures" for

compliance with the *Bribery Act*.[49] Other useful documents, policies and recommended anti-bribery strategies exist and are outlined by Nicholls et al.[50]

2.4.4 Limitation Periods

In accordance with general principles of UK criminal law, the offences in the UK *Bribery Act* are not subject to any limitation periods in respect to laying charges. Applicable human rights legislation mandates that once charges have been laid, defendants are entitled to receive a public hearing within a "reasonable time" — see for example the UK *Human Rights Act 1998* and the *European Convention on Human Rights,* Article 6(1).

2.4.5 Sanctions

Section 11 describes the penalties for all of the above offences. It states:

> (1) An individual guilty of an offence under section 1, 2 or 6 is liable—
>
> (a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both,
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, or to a fine, or to both.
>
> (2) Any other person guilty of an offence under section 1, 2 or 6 is liable—
>
> (a) on summary conviction, to a fine not exceeding the statutory maximum,
>
> (b) on conviction on indictment, to a fine.
>
> (3) A person guilty of an offence under section 7 is liable on conviction on indictment to a fine.
>
> (4) The reference in subsection (1)(a) to 12 months is to be read—
>
> (a) in its application to England and Wales in relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003, and
>
> (b) in its application to Northern Ireland, as a reference to 6 months.

The statutory maximum fine is £5000 in England and Wales or £10,000 in Scotland, if the conviction is summary. If convicted on indictment, the amount of the fine is unlimited under the *Act*. Companies convicted of bribery are also liable to exclusion from obtaining future public contracts in the EU (Article 57 of Directive 2014/24/EU of the European Parliament and of the Council on public procurement (repealing Directive 2004/18/EC)).

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[49] Transparency International UK, "Adequate Procedures Guidance", online: <https://www.transparency.org.uk/our-work/business-integrity/bribery-act/adequate-procedures-guidance/>.

[50] Nicholls et al (2011) at 139.

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A section 7 offence can only be tried on indictment, and thus an organization convicted of a section 7 offence is subject to an unlimited fine, provided that fine is fair and proportionate in the circumstances of each case.

For a detailed description of sentencing principles and practices applicable to corruption offences, see Chapter 7, Section 5 of this book.

2.5 Canadian Law

2.5.1 Offences

The Canadian *Criminal Code* contains eight specific offences relating to corruption and bribery committed in Canada:

- s. 119 Bribery of Judges or Members of Parliament or Provincial Legislative Assemblies
- s. 120 Bribery of Police Officers or other Law Enforcement Officers
- s. 121 Bribery/Corruption of Government Officials [Influence Peddling]
- s. 122 Fraud or Breach of Trust by a Public Official
- s. 123 Municipal Corruption
- s. 124 Selling or Purchasing a Public Office
- s. 125 Influencing or Negotiating Appointments to Public Offices
- s. 426 Giving or Receiving Secret Commissions

The offences are in part overlapping, so the same conduct can sometimes constitute an offence under more than one provision. The offences apply to both individuals and corporations. The offences concerning bribery of judges, politicians and police officers (sections 119-120) are considered to be the most serious offences and are punishable by a maximum of 14 years imprisonment. The other bribery and corruption offences (sections 121-125 and 426) are punishable by a maximum of 5 years imprisonment.

These offences are largely unchanged since their incorporation into Canada's first criminal code in 1892. Several of these offences are loosely related to the common law offence of misconduct in public office. Canada abolished common law offences in 1955 and therefore the common law offence of misconduct in public office is of no force or effect in Canada.[51] However, this common law offence recently underwent a major resurgence in some common law jurisdictions[52] such as Hong Kong, Victoria and New South Wales in Australia, and the UK, even after the enactment of the UK's *Bribery Act 2010*.[53]

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[51] But see reference to it in *R v Boulanger,* [2006] 2 SCR 49 at paras 1, 52.

[52] D Lusty, "Revival of the Common Law Offence of Misconduct in Public Office" (2014) 38 Crim LJ 337.

[53] Nicholls et al (2011) at c 6.

The following description of domestic bribery and corruption offences in Canada is taken from G. Ferguson, "Legislative and Enforcement Framework for Corruption and Bribery Offences in Canada," a paper presented at the First ASEM Prosecutors General Conference (as part of the Canada-China Procuratorate Reform Cooperation Program) in Shenzhen, China, December 9-12, 2005. This paper has been updated to December 2016.

BEGINNING OF EXCERPT

(i) Bribery of Judges, Members of Parliament or Provincial Legislative Assemblies

Section 119 of the *Criminal Code* creates offences which apply both to the person who accepts or obtains a bribe and to the person who offers the bribe. Anyone committing this offence is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Elements of the Offence: With regard to the person accepting or obtaining the bribe, the following elements constitute the full offence:

- The accused must be the holder of a judicial office, or be a member of Parliament or the legislature of a province;
- The accused must accept or obtain, agree to accept or attempt to obtain any money, valuable consideration, office, place or employment for himself or herself or another person;[54]
- This must be done *corruptly*, and must relate to anything done or omitted or to be done or omitted by the accused in the accused's official capacity.

The offence for the person *offering* the bribe is essentially the mirror-image of that outlined above: the accused must corruptly give or offer any money, valuable consideration, office, place or employment to the holder of a judicial office or a member of Parliament or of the legislature of a province. The bribe must relate to anything done or omitted by that person in their official capacity, and may be for that person or any other person.

With respect to ministerial officers, the distinction between political and non-political officers has no significance, and includes ministers of the Crown.[55]

[54] The bribe must be proven in unequivocal terms: *R v Phillipponi*, [1978] 4 WWR 173 (BCCA).
[55] *R v Sommers*, [1959] SCR 678.

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"Corruptly"

As noted, the only specifically required mental element is that the accused act *corruptly*. "Corruptly" does not mean "wickedly" or "dishonestly"; rather, it refers to an act performed in bad faith, designed wholly or partially for the purpose of bringing about the effect forbidden by this section.[56] The accused's conduct need not amount to a bribe to perform a specific act, or a reward for its accomplishment.[57]

"Official Capacity"

Provided the accused corruptly received money for influence "in his official capacity," the use to be made of the money is irrelevant.[58] It is not necessary that the corrupt act of a Member of Parliament relate to their legislative duties; rather, it may be connected to their participation in an administrative act of government.[59] Similarly, a cabinet minister, in absence of contrary evidence, acts in their official capacity as a member of the legislature when taking ministerial actions connected with the administration of the ministry.[60]

In a highly publicized trial, Senator Michael Duffy was charged with 31 counts relating to allegations of breach of trust, fraudulent practices and accepting a bribe, and was ultimately acquitted on all charges. A charge under section 119(a) of the *Criminal Code* involved allegations that Senator Duffy improperly claimed residency expenses and repaid $90,000 using money received from Nigel Wright, Chief of Staff to then Prime Minister Harper, that the $90,000 was a corruptly received bribe. Justice Vaillancourt found that Senator Duffy did not accept the funds voluntarily but was forced to accept them so the government could manage a political fiasco. Therefore, the acceptance of funds was not done corruptly. Justice Vaillancourt found the charge would have otherwise been stayed as a result of an officially induced error.[61]

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[56] *R v Brown* (1956), 116 CCC 287 (Ont CA) and *R v Gross* (1945), 86 CCC 68 (Ont CA), cited in *R v Kelly* (1992), 73 CCC (3d) 385 (SCC).
[57] *R v Gross* (1945), 86 CCC 68 (Ont CA), cited in *R v Kelly* (1992), 73 CCC (3d) 385 (SCC).
[58] *R v Yanakis* (1981), 64 CCC (2d) 374 (Que CA) (No defence that the money was used for non-reimbursable expenses incurred by the accused).
[59] *R v Bruneau*, [1964] 1 CCC 97 (Ont CA) (accused MP acting "in official capacity" when agreeing to accept money for the use of his influence to effect the purchase of the constituent's land by the government).
[60] *Arseneau v The Queen* (1979), 45 CCC (2d) 321 (SCC) (accused's capacity as a member cannot be severed from the functions he performed as a minister).
[61] *R v Duffy*, 2016 ONCJ 220 at 1111, 1112, 1163.

(ii) Bribery of Police Officers or other Law Enforcement Officers

Section 120 of the *Criminal Code* creates offences similar to those outlined in section 119, but in relation to a different group of public officers: police officers, justices, and others involved in the administration of criminal law.

Elements of the Offence: As in section 119, the offence can be committed in two general ways. First, the accused must be a justice, police commissioner, peace officer, public officer or officer of a juvenile court, or be employed in the administration of criminal law. The accused must corruptly accept or obtain, agree to accept, or attempt to obtain for himself or herself or any other person, any money, valuable consideration, office, place or employment.

The offence may also be committed where the accused corruptly gives or offers any money, valuable consideration, office, place or employment to a justice, police commissioner, peace officer, public officer or officer of a juvenile court, or a person employed in the administration of justice. There must be an intention that the person bribed will interfere with the administration of justice, procure or facilitate the commission of an offence or protect from detection or punishment a person who has committed or who intends to commit the offence. Importantly, the individual bribing the officer must know or believe the person accepting the bribe is in fact an officer, or the requisite intent is not made out.[62]

Anyone committing this offence is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(iii) Bribery/Corruption of Government Officials [Influence Peddling]

Section 121 of the *Criminal Code* outlines seven different offences relating to fraud on the government, each briefly discussed below. The commission of any of these offences is an indictable offence punishable by imprisonment for a term not exceeding five years. Care must be taken in interpreting whether section 121 includes municipal corruption, since section 118 states that "government" means federal or provincial government, and therefore does not include municipal governments. However, the definitions of "office" and "official" have been interpreted widely to include municipal offices and officials. In any event, section 123 criminalizes municipal corruption.

[62] *R v Smith* (1921), 38 CCC 21 (Ont CA).

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(a) Giving or Accepting a Benefit

Section 121(1)(a) provides that it is an offence for a government official[63] to demand, accept, or offer to accept from any person a loan, reward, advantage or benefit of any kind as consideration in respect to the government official's duties.[64] It also creates a reciprocal offence where a person gives, offers or agrees to give or offer to an official or any member of the official's family, or to anyone for the benefit of the official, an item of the same description.

In either case, the action may be performed directly or indirectly, and must be done as consideration for cooperation, assistance, exercise of influence, or an act or omission.[65] This action must be in connection with the transaction of business with, or any other matter of business relating to, the government or a claim against Her Majesty or any other benefit that Her Majesty is entitled to bestow. It is legally irrelevant whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be. There is no requirement that the official be acting in their official capacity when contravening this section.[66]

R v Cogger[67] clarified the *mens rea* element of this offence: the accused must intentionally commit the prohibited act with knowledge of the circumstances that are necessary elements of the offence. Where the accused is an official, they must be aware that they are an official; they must intentionally demand or accept a loan, reward, advantage or benefit of any kind for themself or another person; and they must know that the reward is in consideration for their cooperation, assistance or exercise of influence in connection with the business transaction or in relation to the government.[68] However, it is irrelevant that accused did not know their act constituted a crime or that they did not intend to accept a bribe by their definition of that term.[69] Furthermore, willful blindness is a sufficient substitute for knowledge.[70]

(b) Commissions or Rewards

Section 121(1)(b) of the *Criminal Code* provides that it is an offence for anyone having dealings of any kind with the government[71] to pay a commission or reward to or confer an advantage or benefit of any kind[72] with respect to those dealings on an employee or official of the government with which the accused deals, or any member of their family, or anyone whose involvement will benefit the employee or official. Although no mental element is specified, the jurisprudence suggests that the accused must intend to confer a benefit with respect to the dealings with the government.[73] It is an offence if a gift is given for an ulterior purpose, even if no return is ultimately given and even if there is no acceptance by the official.[74]

(c) Officials and Employees

Pursuant to section 121(1)(c) of the *Criminal Code*, it is an offence for an official or employee of the government[75] to demand, accept or offer or agree to accept a commission, reward, advantage or benefit[76] from a person who has dealings with the government.[77] This may be accomplished directly or indirectly by the accused, or

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[63] Section 118 of the *Criminal Code* defines an "official" as a person who holds an office (an office or appointment under the government, a civil or military commission or a position of employment in a public department) or is appointed to discharge a public duty.

[64] "Commission" and "reward" connote compensation for services rendered. "Advantage" and "benefit" are not so limited in scope and include gifts not related to any service provided by the recipient. A government employee receives an "advantage" or "benefit" when the employee receives something of value that, in all the circumstances, the trier of fact is satisfied constitutes a profit to the employee (or family member), obtained at least in part because the employee is employed by the government, or because of the nature of the employee's work for the government: *R v Greenwood* (1991), 67 CCC (3d) 435 (Ont CA); *R v Vandenbussche* (1979), 50 CCC (2d) 15 (Ont Prov Ct).

[65] "Influence" requires the actual affecting of a decision, such as the awarding of a contract. "Cooperation" and "assistance" are broader in scope and include the opening of doors or arranging of meetings (which would not constitute exercises of influence): *R v Giguere*, [1983] 2 SCR 448.

[66] *Martineau v R*, [1966] SCR 103.

[67] [1997] 2 SCR 842 (corruption not a necessary element of *actus reus* or *mens rea*).

[68] In *R v Terra Nova Fishery Co* (1990), 84 Nfld & PEIR 13 (Nfld TD), the accused company was acquitted since reasonable doubt existed as to whether the government official upon whom the benefit was conferred was aware that it was in hope of his assistance in altering export certificates.

[69] *R v Cogger*, [1997] 1 SCR 842.

[70] *R v Greenwood* (1991), 67 CCC (3d) 435 (Ont CA).

[71] Formerly, under section 110 the term "person dealing with the government" referred to a person who, at the time of the commission of the alleged offence, had specific dealings or ongoing dealings in the course of their business with the government, where the gift could have an effect on those dealings: *R v Reid*, [1982] 3 WWR 77 (Man Prov Ct). The current, more expansive language, may encompass a wider range of dealings. "Government" is defined in s. 118 of the *Criminal Code* as the Government of Canada, the government of a province, or Her Majesty in right of Canada or a province.

[72] *R v Greenwood* (1991), 67 CCC (3d) 435 (Ont CA).

[73] *R v Cooper*, [1978] 1 SCR 860.

[74] *R v Pilarinos* (2002), 167 CCC (3d) 97.

[75] "Official... of the government" is an officer of the executive who can be terminated by the executive without reference to the legislature: *Roncarelli v Duplessis*, [1959] SCR 121; *R v Despres* (1962), 40 CR 319 (SCQ).

[76] These words are further described in *United States v Sun-Diamond Growers*, 526 US 398 at 404-405. The offence is committed even where the benefit derived only represents the true value of services rendered outside working hours: *Dore v Canada (A-G)* (1974), 17 CCC (2d) 359 (SCC).

[77] *R v Hinchey* (1996), 3 CR (5th) 187 (SCC) held that section 121(1)(c) only applies where a person with specific or ongoing commercial dealings with the government at the time of the offence confers material or tangible gain on a government employee.

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through a member of the accused's family[78], or through anyone for the benefit of the accused.

Although no mental element is specified, *R v Greenwood*[79] held that the offence is committed where the employee makes a conscious decision to accept a gift, knowing at the time of receipt that the giver has dealings with the government. There is no requirement that the accused actually intended to exercise some undue influence in the giver's favour.

(d) Influence Peddling/Pretending to Have Influence

Section 121(1)(d) of the *Criminal Code* relates to offers of influence in return for a benefit. In order to establish the elements of the offence, it must be shown that the accused had or pretended to have influence with the government or an official, and demanded, accepted or offered or agreed to accept a reward, advantage or benefit of any kind for himself or herself or another person. This acceptance must be in consideration for cooperation, assistance, exercise of influence or an act or omission in connection with the transaction of business with, or any matter of business relating to, the government, a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow, or the appointment of any person, including the accused, to office. No mental element is specified, but as a true crime, there is a presumption of *mens rea* which can be established by proof of intent, recklessness, or wilful blindness.

The Supreme Court of Canada in *R v Giguere*[80] emphasized that this subsection is limited to persons who have (or pretend to have) a significant nexus with government. "Influence" involves being able to actually affect a decision (or pretending to be able to do so), such as influencing the awarding of a contract.

The element that "the transaction of business with or any matter of business relating to the government" was considered in *R v Carson*[81] …. The accused, Carson, worked as a Senior Advisor to former Prime Minister Stephen Harper in the years 2006-2009. In 2010-2011, Carson attempted to influence the department of Indian and Northern Affairs Canada [INAC] to purchase water treatment products from a company called H20, in part to try to benefit a romantic partner. Carson admitted he had influence with the Government at the time of the alleged offence and used this influence to benefit his partner. Justice Warkentin found that INAC did not have power to

[78] *R v Mathur* (2007), 76 WCB (2d) 231, affirmed by the Ontario Court of Appeal, 2010 ONCA 311, 256 CCC (3d) 97, held that a client fee received *indirectly* by the wife of the accused was still a "benefit" to the accused and contravened section 121(1)(c).
[79] *R v Greenwood* (1991), 67 CCC (3d) 435 (Ont CA).
[80] *R v Giguere,* [1983] 2 SCR 448.
[81] *R v Carson*, 2015 ONCJ 7127.

purchase systems; that decision was left to individual First Nation communities. Therefore, the accused's conduct did not involve a matter of business relating to the government and the accused was acquitted. In a comment on the case, Steve Coughlan suggests, properly in my mind, that a conviction for attempting to commit the offence should have been entered instead.[82]

A majority of the Court of Appeal set aside the acquittal and entered a verdict of guilty. The majority stated

> Section 121 (1) provides that it matters not "whether or not, in fact, the official is able to cooperate, render assistance, exercise influence, or do or omit to do what is proposed." Accepting a benefit in exchange for exercising influence on government officials in order "to push through their water treatment products to First Nation Bands" is a "matter of business related to the government."[83]

On further appeal, a majority of the Supreme Court of Canada dismissed Mr. Carson's appeal, stating:

> In my view, the offence under s. 121(1)(d) requires that the promised influence be in fact connected to a matter of business that relates to government. Furthermore, a matter of business relates to the government if it depends on or could be facilitated by the government, given its mandate. The phrase "any matter of business relating to the government" therefore includes publicly funded commercial transactions for which the government *could* impose or amend terms and conditions that would favour one vendor over others. Governments are not static entities – legislation, policies, and structures delimiting the scope of government activity evolve constantly. "Any matter of business relating to the government" must not be considered strictly with reference to existing government operational and funding structures.[84]

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[82] Steve Coughlan, Case Comment on *R v Carson* (2016), 25 CR (7th) 353. The Ontario Court of Appeal did not discuss the issue of an impossible attempt in this case. A majority of the Supreme Court (at paras 29 and 41) indicated a verdict of attempted influence peddling would have been appropriate if they had held that Carson's conduct was not "related to government business." Côté J, dissenting at the SCC (at para 83) declined to resolve that issue since "it was not raised in the lower courts and the Crown confirmed before this Court that the offence of attempt did not form part of its theory of the case."

[83] *R v Carson*, 2017 ONCA 142 at para 50.

[84] *R v Carson*, 2018 SCC 12 at para 5.

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(e) Providing Reward

Section 121(1)(e) of the *Criminal Code* provides that it is an offence for anyone to give, offer or agree to give or offer a reward, advantage or benefit of any kind to a minister of the government or an official in consideration for cooperation, assistance, exercise of influence or an act or omission. This conduct must be in connection with the transaction of business with, or any matter of business relating to, the government, a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow, or the appointment of any person, including the accused, to office. No mental element is specified, but the normal presumption that *mens rea* (intent, recklessness or wilful blindness) is required for a true crime should apply to this offence.

(f) Tender of Contract

Section 121(1)(f) of the *Criminal Code* relates to tenders to obtain contracts with the government. The offence may be committed in two ways. First, it is an offence for anyone, having made a tender to obtain a contract with the government, to give, offer or agree to give or offer a reward, advantage or benefit of any kind to another person. That person must be someone who has made a tender, or a member of their family, or another person where that person's involvement will benefit someone who has made a tender. This must be done as consideration for the withdrawal of the other person's tender.

The offence is also committed where the accused demands, accepts, or offers or agrees to accept a reward, advantage or benefit of any kind from another person as consideration for the withdrawal of the accused's tender.

No mental element is specified for either way of committing the offence, but once again *mens rea* will be presumed.

(g) Contractor with Government Contributing to an Election Campaign

Section 121(2) of the *Criminal Code* provides that it is an offence for anyone, in order to obtain or retain a contract with the government, or as a term of any such contract, whether express or implied, to directly or indirectly subscribe or give, or agree to subscribe or give, to any person valuable consideration for one of two purposes:

- promoting the election of a candidate or a class or party of candidates to Parliament or the legislature of a province; or
- to influence or affect in any way the result of an election conducted for the purpose of electing persons to serve in Parliament or the legislature of the province.

Consequently, the required mental element of the offence is to act with the purpose of effecting one of the two objectives listed above. If the accused acts pursuant to a term of a contract with the government, no further mental element is required. Otherwise, the accused must also act "in order to" obtain or retain a contract with the government.

Section 121(1)(f) and 121(2) are public procurement offences, but they do not appear to be used. Instead, public procurement offences are prosecuted as frauds under the *Criminal Code* or as bid-rigging under section 47 of the federal *Competition Act*.

(iv) Breach of Trust by Public Officer

Section 122 is specifically directed at fraud or breach of trust committed by public officials. It is punishable by a maximum of five years imprisonment. The term "official" is defined in section 118 and was interpreted in *R v Sheets*[85] to include:

> … a position of duty, trust or authority, esp. in the public service or in some corporation, society or the like' (cf. The New Century Dictionary) or 'a position to which certain duties are attached, esp. a place of trust, authority or service under constituted authority' (cf. The Shorter Oxford Dictionary).[86]

The Supreme Court of Canada in *R v Boulanger*[87] reviewed the common law authorities relating to misfeasance in public office in order to clarify the elements of the section 122 offence. Chief Justice McLachlin for the court concluded at para 58 that the Crown must prove the following elements:

(1) The accused was an official;[88]

(2) The accused was acting in connection with the duties of his or her office;

[85] *R v Sheets*, [1971] SCR 614.

[86] *R v Sheets*, [1971] SCR 614 at para 16. This expansive definition extends to positions of public authority in Indigenous nations: *R v Yellow Old Woman*, 2003 ABCA 342.

[87] *R v Boulanger*, 2006 SCC 32.

[88] It does not matter whether the official is elected, hired under contract or appointed: *R c Cyr* (1985), 44 CR (3d) 87 (CS Que). An accused who assists an officer with the breach of trust becomes a party to the offence and can be found guilty of the offence even if he is not himself a public officer: *R v Robillard* (1985), 18 CCC (3d) 266 (Que CA). A municipal official can be charged under this section: *R v Sheets*, [1971] SCR 614; see also *R v McCarthy*, 2015 NLTD(G) 24 (town clerk's falsification of property taxes she was in charge of receiving and depositing).

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(3) The accused breached the standard of responsibility and conduct demanded of him or her by the nature of the office;[89]

(4) The conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust;[90]

(5) The accused acted with the intention to use his or her public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt, or oppressive purpose.[91]

The court's interpretation ultimately infuses section 122 with a subjective *mens rea*, adding that mere mistakes or errors of judgment do not suffice.

In *R v Vandenbussche*, (1979) 50 CCC (2d) 15, the Ontario Court of Justice held that a municipal officer, although performing his official duties in an appropriate manner, was guilty of breach of trust because he still accepted benefits and rewards for his work. Using the language in *Boulanger*, this would constitute a breach of the standard of responsibility required of the officer. As the court succinctly put it, "Need I elaborate further on the erosion of public trust which would ensue if the proper duties of a municipal official were offered for sale on the block in the marketplace?" In *R v Ellis*, 2013 ONCA 739, the Court upheld a conviction for breach of trust where an Immigration and Refugee Board adjudicator strongly implied that he would change his preliminary negative decision on the applicant's refugee status to a positive decision if she entered into an intimate relationship with him.

In *R v Cosh*, 2015 NSCA 76, the Court examined the meaning of "official", defined in section 118 within the context of section 122 of the *Criminal Code.* The accused worked as a paramedic for a private company that contracted its services with the government. After becoming addicted to narcotics, he stole morphine and falsified records to cover up his theft. He pled guilty to fraud, theft and unlawful possession of morphine but disputed the breach of trust charge. The Court held that as a paramedic employed by

[89] In order to determine the appropriate standard of conduct against which to assess the accused's conduct, expert opinion may be tendered as evidence: *R v Serré*, 2011 ONSC 5778, [2011] SJ No 6412.
[90] The court adds at paragraph 52 that "The conduct at issue… must be sufficiently serious to move it from the realm of administrative fault to that of criminal behaviour." In paragraph 54 they described the test as "analogous to the test for criminal negligence" but different in that it involves a subjective mental element: *R v Boulanger*, 2006 SCC 32. Section 122 is often used when police officers engage in dishonest or deceptive behaviour for personal gain, contrary to their duty to honestly uphold or follow the law: see, e.g. *R v Watson*, 2015 ONSC 710; *R v Whitney*, 2015 BCPC 27; *R v Mahoney-Bruer*, 2015 ONSC 1224; and *R v Kandola*, 2014 BCCA 443 (border services officer facilitating importation of cocaine).
[91] "The fact that a public officer obtains a benefit is not conclusive of a culpable *mens rea"*; conversely, "the offence may be made out where no personal benefit is involved": see *R v Boulanger,* 2006 SCC 32 at para 57.

a private company, the accused was not an "official" within the meaning of sections 118 and 122 of the *Criminal Code* and upheld the accused's acquittal on this count.

(v) Municipal Corruption

Section 123 of the *Criminal Code* creates two offences relating to municipal corruption, each of which will be discussed in turn. Both offences are indictable and subject to imprisonment for a term not exceeding five years.

(a) Loan/Reward/Advantage accepted by Municipal Officer

Section 123(1) provides that it is an offence for a municipal official[92] to demand, accept, or offer, or agree to accept, a loan, reward, advantage or benefit of any kind from any person. Conversely, it is an offence for anyone to give, offer, or agree to give or offer, a loan, reward, advantage or benefit to any kind of municipal official.[93]

In either case, the act must be done as consideration for the official performing one of four acts:

- abstaining from voting at a meeting of the municipal council or a committee thereof;
- voting in favour of or against a measure, motion or resolution;
- aiding in procuring or preventing the adoption of a measure, motion or resolution; or
- performing or failing to perform an official act.[94]

No mental element is specified, but *mens rea* will be presumed.

(b) Influence a Municipal Officer

Section 123 of the *Criminal Code* provides that it is an offence to influence or attempt to influence a municipal official to perform one of the four acts listed above by:

- suppression of the truth, in the case of a person who is under a duty to disclose the truth;
- threats or deceit; or
- by any unlawful means.

No mental element is specified; therefore, subjective *mens rea* will be presumed (which includes intent, recklessness or willful blindness).

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(vi) Selling or Purchasing a Public Office

Section 124 targets conduct that goes beyond purchasing the influence of an officer or municipal official, and instead seeks to purchase the "office" itself.[95] The section criminalizes both the sale of an appointment or resignation from office or the receipt of a reward from such a sale, as well as the purchase or giving of a reward to secure such an appointment or resignation. This offence is punishable by a maximum of five years' imprisonment.

(vii) Influencing or Negotiating Appointments to Public Offices

Closely related to the above two offences is the offence of influencing or negotiating appointments to public offices. It involves the giving or receiving of bribes in order to cooperate, assist, exercise influence, solicit, recommend or negotiate with respect to the appointment or resignation of any person from office. It also prohibits keeping without lawful authority "a place for transacting or negotiating any business relating to (i) the filling of vacancies in offices, (ii) the sale or purchase of officers, or (iii) appointments to or resignations from offices."

The acts of the accused should include something of a corrupt nature, as discussed above.[96]

The offence is punishable by indictment. If convicted, a person is liable to imprisonment for a maximum of 5 years.

(viii) Section 425.1 – Threats and Retaliations Against Employees

Section 425.1, enacted in 2004, makes it an offence for an employer or a person acting on behalf of an employer to "take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of an employee" who has provided or is going to provide information with respect to any offence committed or going to be committed by the employer (or an officer, employee, or corporate director of the employer). The information has to be reported or will be reported to a person whose duties include the enforcement of federal or provincial law. The purpose of the section

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[92] *R v Krupich* (1991), 116 AR 67 (Prov Ct) held that the supervisor of the Property Standards Section in the Buildings Regulation Division was a "municipal official," since he occupied a position under the authority of the municipal government involving duties of authority and service.
[93] *R v Leblanc* (1982), 44 NR 150 (SCC) held that preferential treatment of a town planner by a municipal treasurer, in exchange for money, constituted an "advantage or benefit".
[94] Acts performed by a "municipal official" in that capacity are "official acts": *Belzberg v R* (1961), 131 CCC 281 (SCC).
[95] *R v Hogg* (1914), 23 CCC 228 (Sask CA).
[96] *R v Melnyk*, [1938] 3 WWR 425.

is essentially to encourage employees to assist the state in the suppression of unlawful conduct and to protect employees who do report information about offences from being disciplined for doing so.[97]

The offence is punishable by indictment with a maximum of five years' imprisonment or by summary conviction (punishable under section 787).

(ix) Offering or Accepting Secret Commissions

Section 426 of the *Criminal Code* under Part X dealing with "fraudulent transactions" makes it an offence [punishable by a maximum of 5 years imprisonment] for an agent or employee[98] to corruptly (i.e. secretly) offer, give or accept a reward, advantage or benefit in respect to the affairs or business of his/her principal (the principal can be either a government or a private company or business). Thus this corruption offence can relate solely to the private sphere, with no government official involved. In that sense, it is sometimes referred to as private corruption as opposed to public corruption.

The elements of the offence are summarized in *R v Kelly* (1992), 73 CCC (3d) 385 (SCC), at p. 406 as follows:

> There are then three elements to the *actus reus* of the offence set out in s. 426(1)(a)(ii) as they apply to an accused agent/ taker with regard to the acceptance of a commission:
>
> (1) the existence of an agency relationship;
>
> (2) the accepting by an agent of a benefit as consideration for doing or forbearing to do any act in relation to the affairs of the agent's principal, and
>
> (3) the failure by the agent to make adequate and timely disclosure of the source, amount and nature of the benefit.
>
> The requisite *mens rea* must be established for each element of the *actus reus*. Pursuant to s. 426(1)(a)(ii), an accused agent/ taker:
>
> (1) must be aware of the agency relationship;
>
> (2) must knowingly accept the benefit as consideration for an act to be undertaken in relation to the affairs of the principal, and
>
> (3) must be aware of the extent of the disclosure to the principal or lack thereof.

[97] *Merk v IABSOI Local 77*, 2005 SCC 70 at para 14.

[98] The provisions do not apply to independent contractors: *R v Vici* (1911), 18 CCC 51 (Que SP).

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> If the accused was aware that some disclosure was made then it will be for the court to determine whether, in all the circumstances of the particular case, it was in fact adequate and timely.
>
> The word "corruptly" in the context of secret commissions means "secretly" or "without the requisite disclosure". There is no "corrupt bargain" requirement. Thus, it is possible to convict a taker of a reward or benefit despite the innocence of the giver of the reward or benefit. Non-disclosure will be established for the purposes of the section if the Crown demonstrates that adequate and timely disclosure of the source, amount and nature of the benefit has not been made by the agent to the principal.

The offence is made out by the acceptance of the benefit; that acceptance need not actually influence the agent in the manner he or she conducted affairs with the principal. The offence is established where the agent has, by accepting the benefit in secret, placed his or herself in a position of a conflict of interest, without informing the principal.[99] Furthermore, the agent need not actually have a specific principal at the time the offer was made.[100]

Section 426(2) elaborates that "every one commits an offence who is knowingly privy to the commission of an offence under subsection (1)". As the British Columbia Court of Appeal pointed out in *R v Tran*, the word "privy" in section 462(2) criminalizes conduct by "persons who through their own acts, participate in the prohibited conduct".[101]

END OF EXCERPT

2.5.2 Defences

An accused charged with one of the above mentioned bribery or corruption offences is entitled to the same general defences as persons charged with other offences. This includes mistake of fact, officially induced error, incapacity due to mental disorder, duress, necessity,

[99] *R v Saundercook-Menard*, 2008 ONCA 493 at para 1.
[100] *R v Wile* (1990), 58 CCC (3d) 85 (Ont CA).
[101] *R v Tran*, 2014 BCCA 343.

entrapment, diplomatic immunity and *res judicata*.[102] The scope and requirements of these defences can be found in a standard Canadian criminal law textbook.[103]

2.5.3 Limitation Periods

Where an offence is punishable by indictment in Canada, there is no limitation period. This also applies where the offence is a hybrid offence and the Crown chooses to proceed indictably. Where the offence is punishable on summary conviction, or the Crown chooses to proceed summarily, the information must be laid within 6 months of the date of the offence (see section 786 of the *Criminal Code*). All the corruption offences in the *Criminal Code* are classified as indictable offences (except 425.1), and therefore there are no limitations on when a charge for corruption/bribery may be laid. Once a charge is laid, the accused is entitled to a "trial within a reasonable time" under section 11(b) of the *Canadian Charter of Rights and Freedoms.* In *R v Jordan*, 2016 SCC 27, the Supreme Court of Canada established a new framework for s. 11(b) delay.[104]

2.5.4 Sanctions

The *Criminal Code* classifies offences as indictable (i.e., major offence) or summary conviction (i.e., less serious offence). All corruption offences in the *Criminal Code* are classified as indictable offences (except section 425.1, which can be indictable or summary conviction at the prosecution's discretion). Indictable offences are further classified into varying degrees of seriousness based upon the maximum punishment available for each offence (life, 14, 10, 5 or 2 years imprisonment). The maximum punishment is set at a very high level and is designed to deal with the "worst imaginable case" for that type of offence. The *Criminal Code* does not include any minimum punishment for corruption offences, nor does it indicate an average or common punishment for the particular offence involved. Thus individual judges have a lot of discretion in determining an appropriate penalty for each case.

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[102] See for example *R v Rouleau* (1984), 14 CCC (3d) 14 (Que CA), in which the accused deputy minister was acquitted of breach of trust on the *res judicata* doctrine after being convicted of benefitting from firms having dealings with the government.

[103] Don Stuart, *Canadian Criminal Law*, 7th ed (Carswell, 2014) at 311-656; E Colvin & S Anand, *Principles of Criminal Law*, 3rd ed (Carswell, 2007) at 553-584; and M Manning & P Sankoff, *Criminal Law*, 5th ed (Lexis Nexis, 2015) chs 8-13.

[104] *R v Jordan*, 2016 SCC 27. *Jordan* establishes a presumptive ceiling for cases, 15 months in summary matters and 30 months in indictable matters, after which delay is presumptively unreasonable. The Crown must then rebut the presumption on the basis of exceptional circumstances (at paras 46-47). Discussing exceptional circumstances, the Court notes where there is "voluminous disclosure, a large number of witnesses, significant requirements for expert evidence, and charges covering a long period of time" exceptional circumstances may be found (at para 77). As these types of circumstances often occur in corruption cases, a trial may need to exceed the presumptive ceiling by some measure before it could be subject to a stay of proceedings. The new framework will encourage the Crown to consider carefully whether to bring multiple charges for the same conduct and try multiple co-accused together (see generally para 79).

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For a description of sentencing principles and practices applicable to corruption offences, see Chapter 7, Section 6 of this book.

3. BRIBERY OF FOREIGN PUBLIC OFFICIALS

3.1 UNCAC

3.1.1 Offences

Article 16 of UNCAC requires each State Party to create a criminal offence in respect to bribery of foreign public officials. Article 16 states:

> *Article 16. Bribery of foreign public officials and officials of public international organizations*
>
> 1) Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.
>
> 2) Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

(i) Foreign Public Official

Like the definition provided for "public official," the meaning of "foreign public official" is broad and focuses on function and influence rather than official status. "Foreign pubic official" is defined in Article 2(b) as meaning: "any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise."

(ii) Officials of IPOs

In addition to prohibiting bribery of foreign public officials, the bribery of officials of international public organizations is also prohibited. An "official of a public international organization" refers to international civil servants or other persons authorized to act on behalf of public international organizations (Article 2(c)). This would include organizations such as the World Bank or International Monetary Fund. Article 16(1) also applies to corruption in the context of international aid.[105]

(iii) Active and Passive Bribery

While Article 16(1) requires criminalization of active bribery of foreign public officials, Article 16(2) only requires a State to consider criminalization of passive bribery (i.e., solicitation or acceptance of a bribe by foreign public officials). In other words, Article 16(2) does not require States to criminalize the corrupt behaviour of foreign public officials. Such conduct by foreign public officials is, or should be, a criminal offence of bribery under that public official's own state law, as required by Article 15(b) of UNCAC. However, a State's failure to enact legislation reflecting Article 16(2) would result in that State being unable to prosecute a foreign public official for passive bribery. For example, because Canada has not enacted provisions reflecting Article 16(2), Canada is unable to prosecute foreign public officials for soliciting or accepting bribes and can only prosecute Canadian legal entities for bribing foreign public officials. Prosecution of foreign public officials must be left, if at all, to the foreign public officials' State.

(iv) For Business or other Undue Advantage

Kubiciel notes another significant difference between Articles 15 and 16: namely, Article 16(1) only prohibits acts of bribery intended to "obtain or retain business or other undue advantage in relation to the conduct of international business." Article 15(a) and (b) has no similar clause. Similarly, Article 1 of the OECD Convention only requires State Parties to criminalize the offering or giving of bribes "in order to obtain or retain business or other improper advantage in the conduct of international business." For example, a Canadian citizen who bribes a police officer in Mexico to avoid being charged with drunk driving in Mexico is not subject to prosecution for bribing a foreign public official under Canada's *CFPOA*.

(v) Undue Advantage

Kubiciel also highlights the vagueness of the term "undue advantage" which appears in both Articles 15 and 16 of UNCAC (as well as Article 1 of the OECD Anti-Bribery Convention). Kubiciel states:[106]

[105] Legislative Guide (2012) at 67.
[106] Kubiciel (2009) at 153.

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> The interpretation of the term "undue advantage" is even more complicated when national courts and law enforcement agencies have to evaluate whether an advantage offered or granted abroad is undue or not. Generally speaking, courts can apply the standards of their own legal order, so that they are not bound to the perceptions abroad. Thus, local traditions or the tolerance by foreign authorities are no excuse per se for offering or giving advantages to foreign public officials or officials of international organizations. However, advantages whose acceptance is permitted or even required by the foreign law are not criminalized by Article 16. [Footnotes omitted]

3.1.2 Defences

The defences available for bribery of a foreign public official are the same as those for bribery of a domestic public official, already discussed at Section 2.1.2 above.

3.1.3 Limitation Periods

The limitation periods for bribery of a foreign public official are the same for bribery of a domestic public official, already discussed at Section 2.1.3 above.

3.1.4 Sanctions

The sanction provisions in UNCAC for foreign bribery are the same as the sanctions for domestic bribery, discussed at Section 2.1.4 above.

3.2 OECD Convention

3.2.1 Offences

Article 1(1) of the OECD Convention requires that state parties make it a criminal offence under domestic law for:

> any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

(i) Active but Not Passive Bribery

Like UNCAC, the OECD Convention *requires* state parties to criminalize active bribery, but not passive bribery, and also *requires* that the bribe be in relation to "the conduct of

international business." The OECD Convention does not require states to consider the criminalization of passive bribery like Article 16(2) of UNCAC.

(ii) Liability for Accomplices, Attempts and Conspiracy

Article 1(2) mandates that "complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence." The OECD Commentary clarifies that a foreign company that pays a bribe while bidding for a foreign contract is still committing the offence of bribery even if that company obtained the contract because they presented the best proposal rather than because of the bribe. In addition, Article 1 requires state parties to ensure that "[a]ttempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official" is an offence domestically. Inchoate offences and party liability are further explored later in Sections 3 and 4 of Chapter 3.

(iii) Definitions of Foreign Public Official and Official Duties

Article 1 also sets out the following definitions (paragraph 4):

a) "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;

b) "foreign country" includes all levels and subdivisions of government, from national to local;

c) "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorized competence.

(iv) State Flexibility in Enacting OECD Convention Provisions

Pacini, Swingen and Rogers discuss the impact of the OECD Convention in their article "The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public Officials."[107] They note that, unlike some earlier criminal law conventions, the OECD Convention is not "self-executing." This means that the prohibitions contained within the provision are not automatically part of domestic law. It is up to signatory nations to incorporate the elements of the prohibition of the bribery of foreign public officials into domestic law. The goal is "functional equivalency" (Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions "OECD Commentary," para

[107] Carl Pacini, Judyth A Swingen & Hudson Rogers, "The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public Officials" (2002) 37 J Bus Ethics 385.

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2). In effect, Pacini et al. state that the Convention allows state parties "to pass legislation at different ends of a rather broad spectrum."[108]

3.2.2 Defences

As already noted, Article 1 of the OECD Convention requires State Parties to the Convention to make it "a criminal offence for any person intentionally to offer, promise or give an undue pecuniary or other advantage… to a foreign public official… in order to obtain or retain… advantage in the conduct of international business." The Convention deals with "bribes" and leaves punishment of the foreign public official who requests or receives a bribe to the general corruption laws of the foreign state. Obviously failure to prove the elements of Article 1 constitutes a defence. The briber must (1) act "intentionally," (2) the person being bribed must meet the broad definition of "foreign public official" defined in Article 1, paragraph 4, (3) the "bribe" must constitute "an undue pecuniary or other advantage and (4) the advantage must be offered "in the conduct of international business."

(i) The Conduct of International Business

On its face, bribery by an NGO or a private company for charitable rather than business purposes may not be covered by Article 1. However, a brief on the OECD Convention (prepared by the OECD) notes that "bribes that benefit a foreign public official's family or political party, or another third party (e.g., a charity or company in which the official has an interest) – are also illegal."[109] Any uncertainty around the scope of Article 1 does not of course prevent countries from prohibiting bribes to more effectively pursue charitable purposes. Several countries, such as Canada, the US and the UK have done so in their domestic law. Canada updated its *CFPOA* in 2013 to include the "charitable sector" (see Section 3.5.1 of this chapter). Previously, the word "business" was limited by section 2 of the *CFPOA* to for-profit endeavours. The post-2013 definition of "business" is not limited in this way and applies to bribery by NGOs and other non-profit organizations.

In the US, the provisions of the *FCPA* are broader than those set out in Article 1 of the OECD Convention. According to the *FCPA* guidance released by the US Department of Justice and Securities Exchange Commission, "[i]n general, the FCPA prohibits offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business."[110] The Guide goes on to note that "[t]he FCPA does not prohibit charitable contributions or prevent corporations from acting as good corporate citizens. Companies, however, cannot

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[108] *Ibid* at 390.

[109] OECD, "The OECD Anti-Bribery Convention and the Working Group on Bribery", online: <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Anti-Bribery_Convention_and_Working_Group_Brief_ENG.pdf>.

[110] Department of Justice and Security Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012), [DJSEC Resource Guide (2012)], online: <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>.

use the pretense of charitable contributions as a way to funnel bribes to government officials."[111]

In the UK, the *Bribery Act* also provides a slightly more encompassing definition than that provided in Article 1 of the OECD Convention. Section 6 of the *Bribery Act* deals with bribery of foreign public officials. The person doing the bribing must intend to obtain or retain "business" or "an advantage in the conduct of business". This is quite similar to the wording used in Article 1 of the OECD Convention. However, under UK law the term "business" includes "what is done in the course of a trade or profession".[112] This broad definition of business suggests that it may include the activities of a charitable organization or an NGO.

Further, in its *Guidance* document, the UK Ministry of Justice addresses the meaning of "carrying on a business" (in the context of section 7, which deals with the failure of commercial organizations to prevent bribery) as follows:

> As regards bodies incorporated, or partnerships formed, in the UK, despite the fact that there are many ways in which a body corporate or a partnership can pursue business objectives, the Government expects that whether such a body or partnership can be said to be carrying on a business will be answered by applying a common sense approach. So long as the organisation in question is incorporated (by whatever means), or is a partnership, it does not matter if it pursues primarily charitable or educational aims or purely public functions. It will be caught if it engages in commercial activities, irrespective of the purpose for which profits are made.[113]

This excerpt suggests that charities and other NGO non-profit organizations are considered to be engaging in "business". If a charity is considered a "business" for the purpose of section 7 of the *Act*, it follows that the charity's activities are considered to be "business" for the purpose of section 6 of the *Act*, given the presumption of consistent usage of terms in legislation.

(ii) Undue Advantage

Article 1 also refers to "undue… advantage." Does the word "undue" permit facilitation payments? Facilitation payments are relatively small bribes paid to induce a foreign official to do something (such as issue a licence) that the official is already mandated to do. In order for a payment to be properly classified as a facilitation payment, "[t]he condition must be that these transfers really are of a *minor nature not exceeding the social norm* pertaining to them

[111] *Ibid* at 16.
[112] Nicholls et al (2011) at 87.
[113] UK *Bribery Act* Guidance (2010).

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in the society in question."[114] The OECD Convention does not clearly permit or forbid facilitation payments. The *FCPA* does not prohibit facilitation payments, but the UK *Bribery Act* does prohibit them. The 2013 amendments of the Canadian *CFPOA* also propose to prohibit facilitation payments, but the new provision was not proclaimed in force until October 31, 2017. The issue of facilitation payments is more fully analyzed in Section 4 of this chapter.

There are no special or specific defences under the OECD Convention for bribery of foreign public officials. The general assumption is that this offence will be subject to the same defences that apply to other such crimes in the State Party's criminal law.

3.2.3 Limitation Periods

Article 6 of the OECD Convention addresses statutes of limitations. It states:

> Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

The meaning of an "adequate" period of time is not clear. The OECD has not provided any further guidance to signatories regarding Article 6 in the Convention itself or in the Commentaries. There is some discussion of its meaning elsewhere.[115]

The UK and Canada have no statutory limitation periods for their bribery and corruption offences. For a discussion of US statutory limitation periods, see Section 3.3.3 below.

3.2.4 Sanctions

The OECD Convention has very few provisions on sentences and sanctions for corruption of foreign public officials. Article 3 of the OECD Convention is entitled "Sanctions." Paragraph 1 requires bribery of foreign officials to "be punishable by effective, proportionate and dissuasive criminal penalties comparable to the penalties for corruption of domestic officials."

Paragraph 2 requires State Parties which do not recognize "corporate criminal liability" to ensure that legal persons are "subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions for bribery of foreign public officials."

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[114] Ingeborg Zerbes, "Article 1 – The Offence of Bribery of Foreign Public Officials" in Mark Pieth, Lucinda A Low & Nicola Bonucci, eds, *The OECD Convention on Bribery: A Commentary* (Cambridge University Press, 2014) 59 at 171.

[115] See Christopher K Carlberg, "A Truly Level Playing Field for International Business: Improving the OECD Convention on Combating Bribery Using Clear Standards" (2003) 26 BC Intl & Comp L Rev 95, online: <http://lawdigitalcommons.bc.edu/iclr/vol26/iss1/5/>.

Paragraph 3 and 4 of Article 3 also provide as follows:

> 3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.
>
> 4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

3.3 US Law

The United States *Foreign Corrupt Practices Act* (*FCPA*) represents the first attempt by a State to criminalize the bribery of foreign public officials. First enacted in 1977, it is significant in scope and application and has led to numerous high profile prosecutions. The very broad jurisdictional reach of the *FCPA* will be analyzed in Chapter 3, Section 1.7. For now, suffice it to say, it applies not only to American citizens and corporations, but to all foreign corporations doing business (widely defined) in the US or traded on a US stock exchange. The *FCPA* has often served as a model for other countries wishing to implement similar legislation. It was amended in 1998 in order to conform to the requirements of the OECD Convention.

For an in-depth guide to the *FCPA*, see Tarun, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners* (*Handbook*)[116]; see also: *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (*Resource Guide*) and Koehler, *The Foreign Corrupt Practices Act in a New Era*.[117]

3.3.1 Offense of Bribing a Foreign Official

The following brief comments on § 78dd-1 are based on Tarun's *Handbook* and the *Resource Guide* (both cited above).

(i) Provision

Section 78dd-1 of the *FCPA* prohibits the bribing of foreign officials or political parties. As highlighted in Tarun's *Handbook*, the *FCPA*'s bribery offense contains five elements:

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[116] Robert W Tarun, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 3rd ed (American Bar Association, 2013).

[117] DJSEC Resource Guide (2012). See also Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Edward Elgar, 2014).

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1. A payment, offer, authorization, or promise to pay money or anything of value, directly or through a third party;
2. To (a) any foreign official, (b) any foreign political party or party official, (c) any candidate for foreign political office, (d) any official of a public international organization, or (e) any other person while "knowing" that the payment or promise to pay will be passed on to one of the above;
3. Using an instrumentality of interstate commerce (such as telephone, telex, email, or the mail) by any person (whether US or foreign) or an act outside the United States by a domestic concern or US person, or an act in the United States by a foreign person in furtherance of the offer, payment, or promise to pay;
4. For the corrupt purpose of (a) influencing an official act or decision of that person, (b) inducing that person to do or omit doing any act in violation of his or her lawful duty, (c) securing an improper advantage, or (d) inducing that person to use his influence with a foreign government to affect or influence any government act or decision;
5. In order to assist the company in obtaining or retaining business for or with any person or directing business to any person.[118]

It is important to note that the *FCPA* criminalizes active bribery (the person offering the bribe), but does not address passive bribery (the person receiving the bribe), and the scope of the offense is restricted to bribes made for the purpose of "obtaining or retaining business," which parallels the provisions of UNCAC and the OECD Convention. The *FCPA* also does not criminalize commercial bribery, although accounting offenses may catch commercial bribery. Deferred prosecution agreements also might require companies to refrain from commercial bribery.[119]

(ii) Authorization

Authorization can be explicit or implicit. In some circumstances, acquiescence might be sufficient to indicate authorization.[120]

(iii) Anything of Value

The phrase "anything of value" is interpreted broadly by the SEC and includes both tangible and intangible benefits. The thing of value will often be less direct than cash. There is no

[118] Tarun (2013) at 3.
[119] *Ibid* at 19.
[120] Stuart H Deming, *Anti-Bribery Laws in Common Law Jurisdictions* (Oxford University Press, 2014) at 201.

minimum threshold amount, but the SEC will generally only target small payments or gifts if they form part of a larger pattern of bribery.[121]

(iv) Foreign Official

Under the *FCPA*, "foreign official" is defined as an officer or employee of "a foreign government or any department, agency or instrumentality thereof, or of a public international organization," or any person working for or on behalf of any of those entities. Foreign governments are not included in the provisions. As a result, when the Iraqi government received kickbacks during the UN Oil-for-Food program, the DOJ was obliged to turn to the accounting offenses to charge the companies involved.[122]

According to Koehler in his book, *The Foreign Corrupt Practices Act in a New Era*, the definition of "foreign official" is in dispute, but enforcement agencies tend to interpret the phrase broadly.[123] This means that "FCPA scrutiny can arise from business interactions with a variety of individuals, not just bona fide foreign government officials."[124] According to Deming, "[a] critical factor in determining whether someone is a foreign public official is whether the individual occupies a position of public trust with official responsibilities."[125]

Whether a state-owned enterprise is an "instrumentality" is particularly open to dispute. According to the *Resource Guide*, to determine whether an entity is an "instrumentality," an entity's ownership, control, status and function should be considered. Generally, an entity will not be included in the definition of "instrumentality" if foreign government ownership is less than 50%, unless the government has special shareholder status.[126]

Public international organizations include the World Bank, International Monetary Fund, World Trade Organization, OECD, Red Cross and African Union.[127]

(v) Knowledge

Payments or offers cannot be made through third parties if the defendant knows the payment or offer will be passed on as a bribe. Actual knowledge is not required. Although carelessness or foolishness is not sufficient, knowledge includes wilful blindness towards or

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[121] DJSEC Resource Guide (2012).
[122] Tarun (2013) at 4. Note that the DOJ may also turn to the *Travel Act* in cases where the bribe receiver is not a public official. The *Act* prohibits travel in interstate or international commerce that carries out unlawful activity, which includes activity in violation of state commercial bribery laws. See Tim Martin, "International Bribery Law and Compliance Standards" (Independent Petroleum Association of America, 2013) at 7, online: <http://www.ipaa.org/wp-content/uploads/downloads/2013/08/IPAA_BriberyLawPrimer_v10.pdf>.
[123] Koehler (2014).
[124] *Ibid* at 89–90.
[125] Deming (2014) at 211.
[126] DJSEC Resource Guide (2012).
[127] Tarun (2013) at 4.

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awareness of a high probability that the payment will be used to bribe a foreign official.[128] This means companies must be alert to "red flags," such as close relations between a third party and a foreign public official or a request by the third party to make payments to offshore bank accounts.[129]

(vi) Application

The anti-bribery provisions of the *FCPA* apply to three categories of legal entities and all officers, directors, employees, agents and shareholders thereof:

1. "issuers": any company listed on a US stock exchange
2. "domestic concerns": any citizen, national, or resident of the US or any company that is organized under the laws of the US
3. "persons or entities acting within the territory of the US": any foreign national or non-issuer who engages in any act in furtherance of corruption while in the territory of the US.

As already noted, the jurisdictional reach of the *FCPA* will be dealt with in greater depth in Section 1.7 of Chapter 3.

(vii) Business Purpose Test

For a bribe to constitute an offence under the *FCPA*, the prosecution must show that the defendant bribed a foreign official intending the official to act in a manner which would assist the defendant in "obtaining or retaining business." Though this wording appears restrictive on its face, US courts have given a broad interpretation to "obtaining and retaining." For example, in *US v. Kay* (2004), the Fifth Circuit Court of Appeals held that bribes paid to obtain favorable tax treatment—which reduced a company's customs duties and sales taxes on imports—could constitute "obtaining and retaining business" within the meaning of the *FCPA*.[130] The court ruled that avoidance of taxes can provide a company with an improper advantage over its competitors, which necessarily allows the company a greater probability of obtaining and retaining business.

Bribes in the conduct of business or to gain a business advantage also satisfy the business purpose test. Other examples of prohibited actions include bribe payments to reduce or eliminate customs duties, to obtain government action to prevent competitors from entering a market, to influence the adjudication of lawsuits or enforcement actions, or to circumvent a licensing or permit requirement. As the *Resource Guide* puts it:

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[128] *Ibid* at 12.

[129] Tim Martin, "International Bribery Law and Compliance Standards" (Independent Petroleum Association of America, 2013) at 7, online: <http://www.ipaa.org/wp-content/uploads/downloads/2013/08/IPAA_BriberyLawPrimer_v10.pdf>.

[130] *US v Kay*, 359 F.3d 738 (2004).

> In short, while the FCPA does not cover every type of bribe paid around the world for every purpose, it does apply broadly to bribes paid to help obtain or retain business, which can include payments made to secure a wide variety of unfair business advantages.[131]

It should also be noted that UNCAC has expanded the definition of "international business" to include the provision of international aid. This means that nonprofit organizations "should be presumed to be fully subject to the anti-bribery provisions."[132]

(viii) Corrupt and Willful Intent

To violate the *FCPA*, a bribe must be made "corruptly," which focuses on the intention of the defendant; there must be an "evil motive" or intent to wrongfully influence the recipient. Under the *FCPA*, it is not necessary that a bribe succeed in its purpose (i.e., actually influence a foreign official to act corruptly). If the prosecution can prove that the defendant intended to induce the foreign official to misuse his or her position of power, then the burden of proof is met, regardless of the foreign official's actual conduct or the effect on the defendant's business. Practically speaking, however, even though there is no legal requirement that the defendant benefit from the corrupt bribe, the DOJ is less likely to take enforcement action where the defendant has not personally benefitted.

The prosecution must also prove that the defendant acted "willfully." This is generally construed by courts to mean an act committed "deliberately and with the intent to do something that the law forbids, that is, with a bad purpose to disobey or disregard the law."[133] It is not necessary that the defendant knew the specific law that he or she was breaking (i.e., that their conduct violated the *FCPA*), but merely that the defendant knew that his or her actions were unlawful.[134] It should be noted, however, that proof of willfulness is not required to establish corporate or civil liability.[135]

Intent is often a difficult element for the prosecution to prove beyond a reasonable doubt in relation to bribery offences. Tarun points out that the search for intent "will frequently turn on the transparency of a payment or relationship, direct or indirect, with a foreign government official. While some transactions or relationships will be fully concealed and thus likely corroborative of a corrupt plan or scheme, others will reveal a confounding mixture of visibility and secrecy that can defeat a conclusion of evil motive beyond a reasonable doubt."[136] Tarun also notes that related accounting offenses are often "telltale" indications of corrupt intent.[137]

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[131] DJSEC Resource Guide (2012).
[132] Deming (2014) at 219–220.
[133] *United States v Bourke*, 582 F Supp 2d 535 (SDNY 2008).
[134] DJSEC Resource Guide (2012).
[135] *Ibid*.
[136] Tarun (2013) at 257.
[137] *Ibid*.

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(ix) Gifts, Entertainment and Charitable Contributions

Gifts are often used to foster cordial business relationships and promote products, especially in countries where gift-giving is culturally mandated, such as China. If a gift is given with no corrupt intent, the *FCPA* will not apply. However, gifts and charitable donations often disguise bribes and the line between proper and improper gifts is fuzzy, creating a compliance minefield for companies. The *Resource Guide* states that larger, more extravagant gifts are more likely to indicate corrupt motives, although small gifts might be part of a larger pattern of bribery. For example, in *SEC v Veraz Networks, Inc* (2010), the SEC settled with Veraz for violations relating to improper gifts. According to Tarun, "[t]he Veraz gift allegations – down to the detail of giving flowers for an executive's wife – represent an extreme SEC charging example and would not by themselves have likely resulted in an enforcement action. Still, the case demonstrates that the SEC will charge even minor gift abuses if they are part of a scheme."[138] Not everyone agrees with the SEC and DOJ's line-drawing; for example, the recent decision to fine BHP Billiton $25 million for hosting foreign officials at the 2008 Olympics, despite the absence of evidence of any specific *quid pro quo*, has been criticized for going too far.[139]

According to the *Resource Guide*, the "hallmarks of appropriate gift-giving" are transparency, proper recording, a purpose of showing esteem or gratitude and permissibility under local law.[140] The DOJ has approved charitable donations, but will consider whether companies carry out proper due diligence and implement control measures to ensure that donations are unrelated to business purposes and used properly.[141]

3.3.2 Defenses

In 1988, Congress added two affirmative defenses to the *FCPA*. In order to defend against a charge of foreign bribery, the defendant must prove either that:

(a) the payment was lawful under the written laws of the foreign country, or

(b) the payment was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by a foreign official and was directly related either to (i) the promotion, demonstration or explanation of products or services, or (ii) the execution or performance of a contract (for example, this could include travel and expenses incurred for training or meetings, or to visit company facilities or operations).

The fact that an act would not be prosecuted in a foreign country is not enough to invoke the local law defense. The payment itself must be lawful under foreign law.[142] Because no foreign

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[138] *Ibid* at 168.

[139] "The World's Lawyer: Why America, and Not Another Country, Is Going after FIFA", *The Economist* (6 June 2015).

[140] DJSEC Resource Guide (2012).

[141] Martin (2013).

[142] *US v Bourke*, 582 F Supp 2d 535 (SDNY 2008).

countries permit bribery in their written laws, the local law defense is "largely meaningless," according to Koehler.[143] However, Tarun points out that the defense could be useful in the context of political campaign contributions.

The reasonable and bona fide expenditure defense can absolve a company of liability for providing gifts, travel, hospitality and entertainment for foreign officials. However, if carried too far, these expenditures can become improper and lead to *FCPA* scrutiny. For example, the defense will not cover side trips to tourist destinations with the sole purpose of personal entertainment.[144]

In addition, situations of extortion or duress afford a defense by negating "corrupt intent." That being said, "economic coercion" does not amount to extortion. In other words, the argument that the bribe was required in order to gain entry into the market or to obtain a contract will fail – see *United States v Kozeny*.[145] In addition, if extortion payments are not recorded properly, the SEC may pursue accounting offenses.[146] See Tarun for a list of potential defenses to bribery and accounting offenses under the *FCPA*.[147] See also the discussion of other criminal law defenses in Section 2.3.2.

The case of James Giffen provides an example of a unique defense, nick-named the "spy defense." Giffen was charged with violating the *FCPA* after he allegedly used $84 million from US oil companies to bribe Kazakhstan's president and various officials. However, the prosecution failed. Giffen claimed he was an informant for the CIA and argued that the US government was supporting his actions all along. The court agreed, and New York judge William Pauley called Giffen a "hero" for advancing US strategic interests in Central Asia.[148]

3.3.3 Limitation Periods for Bribery of a Foreign Official

According to the *Resource Guide*, the *FCPA* does not specify a statute of limitations and accordingly the general five-year limitation period set out in 18 USC § 3282 ("Offences not capital") applies.

However, as the *Resource Guide* points out, there are several ways to extend the limitation period. For example, if the case is one of conspiracy, the prosecution need only prove that one act in furtherance of the conspiracy occurred during the limitations period. Thus, the

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[143] Koehler (2014).
[144] Tarun (2013) at 18.
[145] *United States v Kozeny*, 582 F Supp 2d (SDNY 2008).
[146] See complaint, *SEC v NATCO Group*, No. 4:10-cv-00098 (SD Tex, January 11, 2010).
[147] Robert W Tarun, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 3rd ed (American Bar Association, 2013) at 257-259.
[148] Aaron Bornstein, "The BOTA Foundation Explained (Part Three): The Giffen Case", *The FCPA Blog* (8 April 2015), online: <http://www.fcpablog.com/blog/2015/4/8/the-bota-foundation-explained-part-three-the-giffen-case.html>.

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prosecution may be able to "reach" bribery or accounting offenses occurring prior to the five year limitation if the offenses contributed to the conspiracy.[149]

The limitation period can also be extended if the company or individual is cooperative and enters into a tolling agreement that voluntarily extends the limitation (i.e., waives the right to claim the litigation should be dismissed due to expiration of the limitation period). Koehler points out that, in practice, enforcement actions against corporations usually involve conduct outside the scope of the limitations period, since corporations are given the choice of extending the limitation or being charged by the DOJ. Koehler criticizes this tactic, pointing out that enforcement agencies face no time pressure, which means "the gray cloud of *FCPA* scrutiny often hangs over a company far too long."[150]

Finally, if the government is seeking evidence from foreign countries, the prosecutor may apply for a court order suspending the statute of limitations for up to three years.

3.3.4 Sanctions

For violation of the anti-bribery provisions, corporations and other business entities are liable to a fine of up to $2 million while individuals (including officers, directors, stockholders and agents of companies) are subject to a fine of up to $100,000 and imprisonment for a maximum of 5 years.[151]

However, the *Alternative Fines Act* 18 USC § 3571(d) provides for the imposition of higher fines at the court's discretion. The increased fine can be up to twice the benefit that the defendant obtained in making the bribe. The same Act specifies that the maximum fine for an individual charged under the *FCPA* is $250,000 (see § 3571(e)). Actual penalties are determined by reference to the US Sentencing Guidelines (§ 1A1.1 (2011). Chapter 7, Section 4 contains a detailed discussion of US sentencing practices.

3.3.5 Facilitation Payments

The *FCPA* contains a narrow exemption in § 78dd-1(b) for "facilitating or expediting payment[s]… made in furtherance of a 'routine governmental action' that involves non-discretionary acts. According to the *Resource Guide*, such governmental actions could include processing visas, providing police protection and mail service and the supply of utilities. It would not include such actions as the decision to award or continue business with a party, or any act within the official's discretion that would constitute the misuse of the official's office. The general focus is on the purpose of the payment rather than its value. The *Resource Guide* recommends companies discourage facilitating payments despite their legality under

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[149] *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Department of Justice and Securities Exchange Commission, 2012) at 35, online: <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>.

[150] Koehler (2014) at 129.

[151] 15 USC. §§ 78dd-2(g)(1)(A), 78dd-3(e)(1)(A), 78ff(c)(1)(A)), 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A).

the *FCPA*, since they may still violate local laws in the country where the company is operating, and other countries' foreign bribery laws may not contain a similar exception (such as the UK). As a result, American individuals and companies may find they still face sanctions in other countries despite the *FCPA*'s facilitation payment exception.

Finally, facilitation payments must be properly recorded in the issuer's books and records. A discussion of the *FCPA*'s facilitation payments exemption and its pros and cons is provided in Section 4.

3.4 UK Law

For a detailed analysis of the UK *Bribery Act* offences see: Nicholls et al, *Corruption and Misuse of Public Office*.[152] For a comparison of the *FCPA* and the UK *Bribery Act*, see: Nicholas Cropp, "The Bribery Act 2010: (4) A Comparison with the *FCPA*: Nuance v Nous" [2011] Crim L Rev 122.

3.4.1 Offences

As noted above in Section 2.4.2, the UK *Bribery Act* addresses both foreign and domestic bribery and applies to individuals and other legal entities. In addition to its general anti-bribery prohibitions, the *Bribery Act* also contains a discrete offence in section 6 that applies to bribery of foreign public officials. The reach of sections 1, 2 and 7 is very broad, subject only to jurisdictional constraints. As a result, it is difficult to envisage conduct falling within the foreign bribery offence that would not already be covered by the other offences. Sullivan posits that the primary role for the offence of bribing foreign public officials is to "flag clearly that the United Kingdom is compliant with its treaty obligations to combat the bribery of public officials."[153]

Section 6 criminalizes the giving or promising of an advantage to a foreign public official in order to gain or retain business or a business advantage. Importantly, the offence only covers "active bribery" and not the acceptance of bribes. The briber must know the receiver is a public official and must intend to influence the official in the performance of his or her functions as a public official. Unlike section 1, the briber need not intend to influence the recipient to act improperly. This is very different from the *FCPA*, which requires corrupt intent. Under section 6, the intention to influence the foreign official in and of itself makes out the offence, regardless of whether the briber knows their conduct is improper or unlawful. This means that a reasonable belief in a legal obligation to confer an advantage does not provide a defence.[154] Cropp criticizes this minimal *mens rea* requirement and illustrates its absurdity by describing trivial, *de minimis* scenarios that meet all the requirements of a section 6 offence. Although the Director of Public Prosecutions and the SFO are unlikely to allow prosecution of such *de minimis* allegations, Cropp argues that

[152] Nicholls et al (2011).
[153] GR Sullivan (2011) at 94.
[154] Nicholls et al (2011) at 87.

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prosecutorial discretion should not be the only check on "overbreadth of application."[155] According to Cropp, businesses should not have to depend on the whims of the prosecutor to avoid liability, but rather should be able to determine what conduct will result in prosecution from the *Act* itself. He further notes that this "unusual reliance on official discretion ... raises serious concerns about the extent to which the Act will be applied consistently and transparently."[156]

A bribe can be made directly or through a third party, and can be received by the foreign public official or by another person at the official's request or with their assent. Because the official must have assented or acquiesced to the bribe, section 6 captures less peripheral and preliminary conduct than the *FCPA*.[157] Instead, the UK regime relies on inchoate offences to capture such conduct.

"Foreign public officials" are defined in subsection (5) as individuals who hold legislative, administrative, or judicial positions, as well as individuals who are not part of government, but still exercise a public function on behalf of a country, public enterprise or international organization. The definition does not include political parties or political candidates.

Corporate hospitality presents a challenge for companies trying to comply with the foreign bribery provisions, especially in light of the absence of a corrupt intent requirement in section 6. Corporate hospitality is a legitimate part of doing business, but can easily cross the line to bribery. The Ministry of Justice *Guidance* states that the *Bribery Act* does not intend to criminalize "[b]ona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organization, better to present products and services or to establish cordial relations."[158] The *Guidance* also states that "some reasonable hospitality for the individual and his or her partner, such as fine dining and attendance at a baseball match" are unlikely to trigger section 6.[159] According to the *Guidance*, the more lavish the expenditure, the stronger the inference that the expenditure is intended to influence the official.

3.4.2 Defences

If the foreign public official is permitted or required by the written law applicable to that official to be influenced by an offer, promise, or gift, then the offence is not made out (see section 6(3)(b)). The official must be specifically entitled to accept the payment or offer; the silence of local law on the matter is not sufficient to ground the defence. Section 6(7) addresses this defence in more detail. It clarifies that where the public official's relevant function would be subject to the law of the UK, the law of the UK is applicable. If the performance of the official's actions would not be subjected to UK law, the written law is

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[155] *Ibid.*

[156] *Ibid* at 34.

[157] Nicholas Cropp, "The Bribery Act 2010: (4) A Comparison with the FCPA: Nuance v Nous" (2011) Crim L Rev 122 at 135.

[158] UK *Bribery Act* Guidance (2010).

[159] *Ibid* at 14.

either the rules of the organization or the law of the country or territory for which the foreign public official is acting (including constitutional or legislative laws as well as published judicial decisions).

The *Bribery Act* 2010 contains no other specific defences. For a discussion of general criminal law defences, see Section 2.4.3 above.

3.4.3 Limitation Periods

As described in Section 2.4.4, the UK *Bribery Act* is not subject to any limitation periods.

3.4.4 Sanctions

The applicable penalties have already been discussed above at Section 2.4.5 under domestic bribery.

3.4.5 Facilitation Payments

The UK *Bribery Act*, unlike the American *FCPA*, does not provide an exemption for facilitation payments. However the *Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions* state that whether it is in the public interest to prosecute for bribery in the case of facilitation payments will depend on a number of factors set out in the *Joint Prosecution Guidance*. The pros and cons of exempting facilitation payments from the scope of bribery offences is examined in some detail in Section 4 of this chapter.

3.5 Canadian Law

3.5.1 Offences

The *Corruption of Foreign Public Officials Act* (*CFPOA*) came into force in 1999 in order to meet Canada's obligations under the OECD Anti-Bribery Convention. Section 3(1) of the *CFPOA* states:

> Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or through a third party gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official
>
> (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or
>
> (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

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As pointed out by Deming, the inclusion of the words "in order to obtain or retain an advantage" indicates a quid pro quo element.[160] Since no particular *mens rea* is specified for this crime, Canadian law presumes that the necessary mental element is subjective. There is nothing in the context of this offence to displace that presumption. Proof of negligence will not be enough; to be held liable the accused person must have committed the offence with the intention of doing so or with recklessness or willful blindness to the facts. The definition of "person" in the *Criminal Code* also applies to the bribery offences in section 3 of the *CFPOA*, by reason of section 34(2) of the *Interpretation Act*.[161] The definition of "person" in section 2 of the *Criminal Code* includes both individuals and other organizations, including corporations.

In *R v Niko Resources Ltd* (2011), the court demonstrated that gifts of significant value are liable to be considered a "reward, advantage or benefit" under the *CFPOA*.[162] Niko, an oil and gas company, gave the Bangladeshi Minister for Energy and Mineral Resources an expensive SUV and a trip to Calgary and New York in order to influence ongoing business dealings. The minister attended an oil and gas exposition in Calgary, but the trip to New York was purely to visit family. These benefits were provided after an explosion at one of Niko's gas wells in Bangladesh, which had caused bad press and legal problems for Niko. The court imposed a fine of almost $9.5 million, in spite of the relatively small value of the gifts in comparison to the size of the fine and Niko's cooperation during the investigation.[163]

"Foreign public official" is defined in section 2 of the *CFPOA* as follows:

> (a) a person who holds a legislative, administrative or judicial position of a foreign state;
>
> (b) a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and
>
> (c) an official or agent of a public international organization that is formed by two or more states or governments, or by two or more such public international organizations.

This definition does not include political party officials or political candidates.

In response to criticism from a number of commentators as well as the OECD Working Group, Canada amended the *CFPOA*. Bill S-14, *An Act to Amend the Corruption of Foreign Public Officials Act* received royal assent and subsequently came into force in June, 2013. Previously, the word "business" was limited by section 2 of the *CFPOA* to for-profit

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[160] Deming (2014) at 53.

[161] *Interpretation Act*, RSC 1985, c I-21.

[162] *R v Niko Resources Ltd*, [2011] AJ 1586, 2011 CarswellAlta 2521 (ABQB).

[163] Norm Keith, *Canadian Anti-Corruption Law and Compliance* (LexisNexis, 2013) at 121–130.

endeavours. This has since been replaced by a definition of "business" that is not limited in this way. Thus it also applies to bribery by NGO's and other non-profit organizations, although according to Norm Keith, RCMP investigations remain focused on for-profit businesses.[164] In addition, the jurisdictional provisions under the former *CFPOA* were amended in 2013 and the *CFPOA* now applies to the acts of Canadian citizens, permanent residents and Canadian corporations while they are outside of Canadian territory. Previously, Canada's ability to prosecute those engaged in bribery of foreign officials was limited by the concept of "territoriality": in order for a person to be held liable under the *CFPOA* there had to be a real and substantial link between the acts which constituted the offence and Canada (discussed in detail in Chapter 3, Section 1.9). The 2013 amendments also establish accounting offences, which make it a crime to falsify accounting records for the purpose of facilitating or concealing the bribery of a foreign public official.

As noted by Deming, the secret commissions offence under section 426 of the *Criminal Code* may be used to supplement the *CFPOA* if Canada has territorial jurisdiction over the conduct at issue. The secret commissions offence covers any situation involving an agency relationship and is not limited to situations in which the recipient of a bribe is a public official. Section 426 could therefore be useful when dealing with recipients who do not meet the definition of a foreign public official or when commercial bribery is at issue.[165]

3.5.2 Defences

An accused charged with an offence under the *CFPOA* is entitled to the same general defences as persons charged with other offences. These include mistake of fact, incapacity due to mental disorder, duress, necessity, entrapment, diplomatic immunity and *res judicata*.

In addition, section 3(3) states that no person is guilty of an offence under section 3(1) where the loan, reward, advantage or benefit is "permitted or required under the laws of the foreign state or public international organization for which the foreign public official performs duties or functions." Further, no person will be guilty where the benefit was "made to pay the reasonable expenses incurred in good faith by or on behalf of the foreign public official" where those expenses "are directly related to the promotion, demonstration, or explanation of the person's products and services" or to "the execution or performance of a contract between the person and the foreign state for which the official performs duties or functions." According to Canada's 2013 Written Follow-Up to the OECD Phase 3 Report, the defence of "reasonable expenses incurred in good faith" has not yet been considered by any Canadian courts.

Keith pointed out the peculiarity of the wording of the defences in section 3(3). Both defences use the words "loan, reward, advantage or benefit," but Keith argues these words "tend to imply a potential questionable or even inappropriate payment to a foreign public official."[166] Keith points out that providing "personal loans, special rewards, specified advantages or

[164] *Ibid* at 21.
[165] Deming (2014) at 48.
[166] Norm Keith, *Canadian Anti-Corruption Law and Compliance* (LexisNexis, 2013) at 25–26.

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other benefits" to a foreign public official will rarely "appear ethical, lawful or permitted by the laws of a foreign government,"[167] and will rarely be appropriate as reimbursement for expenses incurred by the official. As a result, Keith argues that the wording of section 3(3) is difficult for businesses to interpret.

3.5.3 Limitation Periods

Because the offences in the *CFPOA* are punishable by indictment, there are no limitation periods in respect to laying a charge after an offence is alleged to have occurred. However, since there was no offence in Canada of bribing a foreign public official prior to the enactment of the *CFPOA*, there can be no prosecution of such conduct which occurred prior to 1999.

3.5.4 Sanctions

Bribing a foreign public official under section 3(1) is an indictable offence which was punishable by a maximum of 5 years imprisonment until amendments were enacted in 2013 raising the maximum penalty to 14 years imprisonment. The accounting offences under section 4 are also indictable and punishable by imprisonment for a maximum of 14 years.

Pursuant to recent *Criminal Code* amendments, conditional and absolute discharges or conditional sentences served in the community are no longer available sentencing options for any offence with a 14-year maximum penalty. Accused persons may also face forfeiture of the proceeds of *CFPOA* offences, and Public Works and Government Services Canada will not contract with businesses convicted under the *CFPOA*.[168] These and other consequences of a *CFPOA* conviction are dealt with in Chapter 7, Sections 7 to 10 of this book.

3.5.5 Facilitation Payments

As part of the 2013 amendments discussed above, facilitation payments, meaning those payments made to either ensure or expedite routine acts that form part of a foreign public official's official duties or functions, will no longer be exempt from liability under the *CFPOA.* This provision was proclaimed in force as of October 31, 2017. The pros and cons of facilitation payments are discussed in greater detail in Section 4, below.

4. FACILITATION PAYMENTS AND THE OFFENCE OF BRIBERY

Facilitation or "grease" payments are relatively small bribes paid to induce a foreign public official to do something (such as issue a licence) that the official is already mandated to do. As Nicholls et al. point out, "those facing demands for such payments often feel there is no

[167] *Ibid* at 25.
[168] Deming (2014) at 63.

practical alternative to acceding to them."[169] In almost every case the payment will be illegal in the public official's home state. Yet such payments are a routine way of life in most of the countries listed in the bottom half or quarter of the TI Corruption Perception Index. Some of the most developed nations do not prohibit their own nationals from making these payments to public officials elsewhere. Other nations prohibit facilitation payments, but make no effort to enforce that prohibition. There is significant disagreement among international players as to whether facilitation payments should be prohibited, although the current trend is towards their prohibition.[170] UNCAC and the OECD Convention do not expressly accept or reject exempting facilitation payments from the definition of offences of bribery.

Zerbes notes that in order for a payment to be properly classified as a facilitation payment, "[t]he condition must be that these transfers really are of a *minor nature not exceeding the social norm* pertaining to them in the society in question."[171] While some facilitation payment exemptions may be focused on payments of "a minor value," under the US *FCPA* the focus is on the purpose of the payment rather than its value (see Section 3.3.5 above). In addition, the payment must not be in exchange for a breach of duty or involve a discretionary decision; its purpose may only be for the inducement of a lawful act or decision on the part of the foreign public official that does not involve an exercise of discretion.

In her review of the ways in which Canada could improve its response to corruption of foreign public officials, Skinnider states the following in regard to facilitation payments:[172]

> A review of States' practice appears to show that the tolerance for small bribes or facilitation payments is fading. Twenty years ago, when the OECD Convention was negotiated and countries passed relevant domestic legislation, such payments were common and even legal in many countries. However, now times have changed. There is no country anywhere with a written law permitting the bribery of its own officials. The only countries that permit facilitation payments to foreign public officials are the US, Canada, Australia, New Zealand and South Korea. The Australian government has recently proposed removing the facilitation payment defence. Australian lawyers support the government's plan to ban

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[169] Nicholls et al (2011) at para 4.119.

[170] As pointed out by Tim Martin, in practice, facilitation payments are not necessarily treated differently in jurisdictions with prohibitions on facilitation payments as opposed to those without. For example, in the US, the exception for facilitation payments has been substantially narrowed, while in the UK, where facilitation payments are banned, prosecutorial policies make charges for small facilitation payments less likely. See Martin (2013).

[171] Ingeborg Zerbes, "Article 1 – The offence of bribery of foreign public officials" in Mark Pieth, Lucinda A. Low and Peter J. Cullen, eds, *The OECD Convention on Bribery: A Commentary* (Cambridge University Press, 2007) 45 at 139.

[172] Eileen Skinnider, *Corruption in Canada: Reviewing Practices from Abroad to Improve Our Response* (Vancouver: International Centre for Criminal Law Reform and Criminal Justice Policy, University of British Columbia, 2012) at 19. See also updated version by Skinnider and Ferguson (2017), online: <https://icclr.law.ubc.ca/publication/test-publication/>.

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> facilitation payments, saying the changes would bring the country into line with international best practices and address the 'weakest link' in the existing legislation". Many practitioners increasing believe that US authorities have simply read the exception for facilitation payments out of the statute. Others are calling for the US to repeal the exception. [footnotes omitted]

This section on facilitation payments begins by canvassing the major arguments for and against treating facilitation payments as bribes. Following this, the treatment of facilitation payments under the major international instruments as well as under US, UK and Canadian domestic law will be examined.

4.1 Arguments for and Against Facilitation Payments

Skinnider, in her paper *Corruption in Canada: Reviewing Practices from Abroad to Improve Our Response*, reviews the arguments for and against not treating facilitation payments as bribery as follows:[173]

BEGINNING OF EXCERPT

Arguments to support eliminating the defence of facilitation payments

Every bribe of a government official, regardless of size, breaks the law of at least one country.[174] A lack of resources, political will or interest has meant violations are rarely prosecuted, but that is changing. Permitting the citizens of one country to violate the laws of another corrodes international standards and marginalizes the global fight against corruption. It is also a double standard. The few countries that allow for facilitation payments to be made to foreign public officials prohibit their own officials from accepting them.[175]

[173] *Ibid* at 19–21.

[174] [131] A. Wrage "The Big Destructiveness of the Tiny Bribe" (Ethisphere, 2010), retrieved from http://www.forbes.com/2010/03/01/bribery-graft-law-leadership-managing-ethisphere.html.

[175] [132] Jon Jordan "The OECD's Call for an End to "Corrosive" Facilitation Payments and the International Focus on the Facilitation Payments Exception under the Foreign Corrupt Practices Act" (2011) 13 U. Pa. J. Bus. L. 881. According to TRACE, of the countries that permit these small bribes overseas, none permits them at home: A. Wrage "One Destination, Many Paths: The Anti-Bribery Thicket" (TRACE, November 2009).

Companies are concerned that paying facilitation payments could lead to costly legal complications.[176] [In countries where facilitation payments are permitted as an exception, s]ome describe it as a very limited and complicated defence and [one that] is frequently misunderstood, thus exposing businesses operating offshore to criminal liability in circumstances where they might genuinely believe they are acting lawfully.[177] It also can make it difficult for companies to follow the laws in their domestic jurisdiction if they are required to record such payments that are illegal in the country where it is being made. Furthermore, with countries like the UK prohibiting facilitation payments, there is an increasing risk that a multinational company with foreign subsidiaries will violate the laws of the country where the subsidiary is based. Companies with offices in more than one country expressed concern that if they do not abolish the use of small bribes altogether, they must undertake different compliance programs based not only upon the location of each office, but the citizenship of the people working there.[178] According to TRACE, many multinational companies are taking steps to eliminate "facilitation payments".[179]

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[176] [133] TRACE Oct 2009 facilitation payments benchmark survey. Almost 60% report that facilitation payments posed a medium to high risk of books and records violations or violations of other internal controls. Over 50% believe a company is moderately to highly likely to face a government investigation or prosecution related to facilitation payments in the country in which the company is headquartered. Representatives of the legal profession in Canada have expressed concern that this defence creates a large area of uncertainty, see OECD, "Canada: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions" (March 2011), retrieved from [updated link: http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Canadaphase3reportEN.pdf].

[177] [134] FCPA Professor Blog by Mike Koehler, "No – The Consistent Answer in DoJ Responses to Senator Questions Regarding FCPA Reform" (April 14, 2011), retrieved at [updated link: http://fcpaprofessor.com/no-the-consistent-answer-in-doj-responses-to-senator-questions-regarding-fcpa-reform/].

[178] [135] A 2008 survey by the law firm of Fulbright and Jaworski found 80% of companies in the US prohibited the use of FP. Majority of domestic companies felt that it was better to ban facilitation payments altogether than "explore a gray area inviting costly and embarrassing investigations for *FCPA* violations". KPMG survey came up with similar results. Jon Jordan "The OECD's Call for an End to "Corrosive" Facilitation Payments and the International Focus on the Facilitation Payments Exception under the Foreign Corrupt Practices Act" (2011) 13 U. Pa. J. Bus. L. 881.

[179] [136] TRACE "The High Cost of Small Bribes" (TRACE, 2009), retrieved from [updated link: https://www.traceinternational.org/Uploads/PublicationFiles/TheHighCostofSmallBribes2015.pdf]. Results show a definitive move by corporations to ban facilitation payments, coupled with an awareness of the added risk and complexity presented by facilitation payments. See also A. Wrage "The Big Destructiveness of the Tiny Bribe" (Ethisphere, 2010), retrieved from http://www.forbes.com/2010/03/01/bribery-graft-law-leadership-managing-ethisphere.html.

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TRACE asks why governments are not following what is already the practice of many major companies.[180]

Prior to the passing of the 2010 UK Bribery Act, the UK Law Commission Consultation Report listed a number of arguments against exempting facilitation payments:[181]

- Inherent difficulties in determining when a payment crosses the line (does "routine" mean "frequently" or "commonplace").[182]
- Blurs the distinction between legal and illegal payments and floodgates argument.[183]
- Weakens the corporation's ability to implement its anti-bribery programme.
- Sends confusing messages to employees.
- Creates a "pyramid scheme of bribery."[184]

Another argument supporting the prohibition of facilitation payments is the accounting dilemma. A business may be required to record a facilitation payment in its accounts by one jurisdiction, but this may then formalize an illegal act which, if concealed, may amount to tax evasion in another jurisdiction. It has been observed that often companies must opt between "falsifying their records in violation of their own laws or recording the payments accurately and documenting a violation of local law".[185]

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[180] [137] A. Wrage "One Destination, Many Paths: The Anti-Bribery Thicket" (TRACE, November 2009).

[181] [138] UK Law Commission Consultation Paper (2007) Appendix F from the UK Law Commission report: Facilitation Payments, Commission Payments and Corporate Hospitality. UK Law Commission Consultation Report notes the Association of Chartered Accountants 2007 study which stated that only 46% of its respondents felt able to differentiate between a facilitation payment and a bribe.

[182] [139] UK Law Commission Consultation Report notes the Association of Chartered Accountants 2007 study which stated that only 46% of its respondents felt able to differentiate between a facilitation payment and a bribe.

[183] [140] Floodgate argument is further discussed in Rebecca Koch, "The Foreign Corrupt Practices Act: It's Time to Cut Back the Grease and Add Some Guidance" 28 BC Int'l & Comp L. Rev. 389 (2005).

[184] [141] Junior officials who look for small bribes rise to higher positions by paying off those above them. Corruption creates pyramids of illegal payments flowing upward. Legalizing the base of the pyramid gives it a strong and lasting foundation.

[185] [142] UK Law Commission Consultation Paper (2007) Appendix F from the UK Law Commission report: Facilitation Payments, Commission Payments and Corporate Hospitality.

Facilitation payments can have a negative impact on society.[186] Such payments can interfere with the proper administration of government, impede good governance and result in social unrest. This may even go as far as encouraging governments to fix their employees' salaries in expectation of these payments. Security concerns have also been raised. "If you pay government officials to manage differently, you shouldn't be surprised if criminals and terrorists are doing the same."[187] If visas can be bought, borders won't be safe.[188]

Arguments to support retaining the defence of facilitation payments

The most cited argument is that business will "lose out" to rival foreign companies that do … make facilitation payments.[189] They will experience competitive disadvantages because prohibiting facilitation payments will result in an uneven playing field. Such payments are seen as a necessary and acceptable part of business [in many parts of the world]. Since other jurisdictions permit such payments, to exclude them would be detrimental to businesses and competitive enterprise. Another argument is that the laws permit only payments that are minor in nature, so it is argued that they will have minimal detrimental consequences. In response to the argument that business will "lose out" to rival foreign companies that do not make facilitation payments, the UK Trade and Investment Department argues that "UK companies may lose some business by taking this approach, but equally there will be those who choose to do business with UK companies precisely because we have a no-bribery reputation, and the costs and style of doing business are more transparent."[190] Research conducted by the World Bank demonstrated that in fact payment of bribes results in firms spending "more, not less, management time… negotiating regulations and facing higher, not lower, costs of capital".[191] Further it may be more difficult then to resist subsequent demands for payment. A TRACE study revealed that none of the companies that approached the issue carefully and comprehensively reported significant or prolonged disruption in their business activities.

[186] [143] A. Wrage "The Big Destructiveness of the Tiny Bribe" (Ethisphere: 2010), retrieved from http://www.forbes.com/2010/03/01/bribery-graft-law-leadership-managing-ethisphere.html.
[187] [144] ibid.
[188] [145] As TRACE noted, "the practice of bribing immigration officials can lead to serious entanglements with the enhanced security laws of the company's home country". See A. Wrage, "One Destination, Many Paths: The Anti-Bribery Thicket" (TRACE: November 2009).
[189] [146] Charles B. Weinograd "Clarifying Grease: Mitigating the Threat of Overdeterrence by Defining the Scope of the Routine Governmental Action Exception" (2010) 50 Va. J. Int'l L. 509.
[190] [147] UK Law Commission Consultation Report cites examples of BP and Shell, UK Law Commission Consultation Paper (2007) Appendix F from the UK Law Commission report: Facilitation Payments, Commission Payments and Corporate Hospitality.
[191] [148] Daniel Kaufmann and Shang-Jin Wei "Does 'grease money' speed up the wheels of commerce?" (World Bank).

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A concern has been raised that banning facilitation payments would prove impractical and ineffective. One scholar argues that in many cultures, payment for routine governmental action is a widespread practice, engrained within social norms and local mores.[192] Inadequate wages abroad and foreign custom make such payments necessary. As he notes "it would be far better to have a provision that is workable and can be enforced, rather than have one which looks good on the statute books but is totally unenforceable".[193]

END OF EXCERPT

4.2 Facilitation Payments and Culture

According to Strauss, the basic rationale for anti-bribery legislation is the belief that bribery is immoral.[194] In her view, the essence of bribery is that it involves a payment for an advantage that one does not deserve. This violates the principle of equality, as it allows some persons to be treated preferentially and skip ahead of others in the same queue. However, some commentators have argued that this principle of equality is not universal. Or even if it is, in many cultures facilitation payments are not viewed as violating the principle of equality. There are some that argue that imposing a ban on the payment of facilitation payments by US (or UK or Canadian) corporations in foreign countries amounts to a form of cultural imperialism. Strauss argues, however, that since facilitation payments are illegal under the written domestic laws of most countries, the normative ideal in most countries around the world is to eliminate these types of payments. As well, Strauss characterizes the legislative objective of the *FCPA* as improving the ethical standards of American firms, and points out that the *Act* neither intends to nor imposes ethical standards on foreign nations.

Bailes reviews the cultural and practical arguments in favour of permitting facilitation payments.[195] Ultimately, he concludes that the credibility of these arguments is diminishing as new approaches to combating bribery are gaining in acceptance and use. He argues that the distinction between bribes and facilitation payments is widely accepted as "hazy."[196] There is growing awareness that facilitation payments are not so easily separated from bribery and its accompanying debilitating economic impacts on developing and corruption-rife nations. However, the artificial separation between facilitation payments and bribery has

[192] [149] Charles B. Weinograd "Clarifying Grease: Mitigating the Threat of Overdeterrence by Defining the Scope of the Routine Governmental Action Exception" (2010) 50 Va. J. Int'l L. 509.
[193] [150] Ibid.
[194] Emily Strauss, "Easing Out the *FCPA* Facilitation Payment Exception" (2013) 93 BUL Rev 235.
[195] Robert Bailes, "Facilitation Payments: Culturally Acceptable or Unacceptably Corrupt?" (2006) 15 Bus Ethics: Eur Rev 293.
[196] *Ibid* at 295.

been institutionalized within many multinational corporations.[197] Within these corporations, facilitation payments are viewed as a simple cost of doing business in non-Western cultures.

Unlike Strauss, Bailes does not dismiss the cultural arguments for permitting facilitation payments. The "cultural absolutism" argument suggests that it is wrong for multinational corporations and foreign states to impose western-centric views on corruption and facilitation payments on countries where these payments are embedded within local customs. He notes that "practical attempts by multinationals to develop and prescribe codes of ethics that prescribe how their employees behave are misguided and do fall into the trap of cultural absolutism."[198] Instead, Bailes suggests a more culturally sensitive approach that allows individual actors to make judgement calls based on the specific issue and context.

He acknowledges the practical difficulties faced by multinational corporations; in some cases, it may not be possible to operate in a certain location without paying facilitation payments. However, he concludes that evolving methods of curbing bribery, such as industry-wide associations that prohibit bribery, or campaigns focused on encouraging transparency and accountability in financial reporting, have the potential to assist in overcoming these practical hurdles. As pressure mounts on investors to "set the rules of the game with regard to social, economic and environmental issues such as bribery and corruption" the "first mover disadvantage"—the disadvantage faced by the first company to take a zero tolerance approach when there are other firms willing to step in and continue making facilitation payments—is disappearing.[199]

As Robert Barrington, the Executive Director of Transparency International UK, puts it: "When a company pays a bribe of any size, it reinforces a culture of graft which is exceptionally damaging to the economies and societies in which they are paid."[200]

4.3 The Economic Utility of Facilitation Payments

The real economic utility of facilitation payments is also being increasingly questioned. According to Strauss, despite the views of some economists, facilitation payments are economically inefficient. These payments distort market forces and reduce economic growth by lowering both the volume and the efficiency of investment.[201] As well, as a form of bribery, facilitation payments facilitate the abuse of public office for private gain. This damages the government's credibility with both its own citizens and foreign investors.

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[197] *Ibid* at 295.

[198] *Ibid* at 296.

[199] *Ibid* at 297.

[200] Transparency International UK, "Small Bribes, Big Problem: New Guidance for Companies) (24 November 2015), online: <http://www.transparency.org.uk/press-releases/small-bribes-big-problem-new-guidance-for-companies/>.

[201] For a detailed explanation of this concept, see Hiren Sarkar & M Aynul Hasan, "Impact of Corruption on the Efficiency of Investment: Evidence from a Cross-Country Analysis" (2001) 8:2 APDJ 111.

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The contrary view is that facilitation payments can actually be economically efficient. Some commentators argue that facilitation payments permit firms to navigate more quickly through the unnecessary and time-consuming red tape that exists in certain highly bureaucratic states. However, Strauss notes that there is evidence that tolerance of facilitation payments creates incentives for bureaucrats to purposely create delays in order to increase the bribe prices firms are willing to pay.

Evidence from a study conducted by Kaufmann and Wei for the World Bank concluded that "there is no support for the 'efficient grease' hypothesis.[202] In fact, a consistent pattern is that bribery and measures of official harassment are positively correlated across firms."[203] "Official harassment" refers to "management time wasted with bureaucracy, regulatory burden, and cost of capital." Therefore, while a facilitation payment may initially appear enticing to a multinational firm, it is questionable whether such a payment makes economic sense in the long term.

In her discussion regarding the phasing out of the facilitation payments exemption from the US *FCPA*, Strauss discusses another argument against doing so: it would enable foreign corporations based in countries that do not prohibit facilitation payments to gain an advantage over American corporations. Strauss acknowledges the validity of this argument, although she notes that the reputational costs to a country that knowingly violates international anti-bribery agreements may mitigate this effect. For instance, in 2011, China passed new anti-bribery legislation that does not provide for a facilitation payment exception. But, to date, China has not prosecuted any foreign bribery cases, whether big or small.[204]

Others argue that in certain situations, demands for facilitation payments are truly extortionate, and if corporations from countries barring facilitation payments are unable to comply they will be prevented from doing business in many countries. However, research conducted by TRACE International, a non-profit association that provides anti-bribery training and education to multinational corporations and their associates, suggests that this situation is rare. Strauss argues that allowing firms to acquiesce to these demands only increases the frequency and price of future demands. Ultimately, the only real solution is "a truly global anti-corruption regime in which companies that do not cave to extortionate bribe demands cannot be supplanted by those that do."[205] Until such a regime is truly established and enforced, however, Strauss argues that any revision to the US facilitation payments exemption should recognize the difficulties firms face when confronted with truly extortionate demands.

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[202] "Does 'Grease Money' Speed Up the Wheels of Commerce" (World Bank Institute, 1999), online: <http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-2254>.
[203] *Ibid* at 16.
[204] Gerry Ferguson, "China's Deliberate Non-Enforcement of Foreign Corruption: A Practice that Needs to End" (2017) 50:3 Intl Lawyer 503.
[205] Strauss (2013) at 263.

4.4 UNCAC and OECD Convention

(i) Facilitation Payments and the OECD Convention

The Convention does not prohibit "small facilitation payments." However, Paragraph 6(i) of the OECD's 2009 *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* states that, "in view of the corrosive effect of small facilitation payments," member countries should "undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon."[206] In addition, member countries should "encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments are generally illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies' books and financial records" (para 6(ii)).

(ii) Facilitation Payments and UNCAC

There is some question as to whether facilitation payments paid to foreign public officials are prohibited under UNCAC. Article 16(1) prohibits the promising, offering or giving of an "undue advantage" to a foreign public official "in order to obtain or retain business or other advantage in relation to the conduct of international business." The phrase "other advantage in relation to the conduct of international business" is ambiguous and could encompass the advantages garnered through making facilitation payments. Kubiciel addresses the issue of facilitation payments under the OECD Convention and UNCAC as follows:

> The Commentaries on the OECD Convention suggest that these payments do not constitute advantages made to obtain or retain business or other improper advantage and, therefore, are not a criminal offence under the OECD Convention. The reason for this exemption lies in the fact that the OECD Convention primarily tackles corruption as a distortion of free competition. As small facilitation payments do not impede free trade they are not covered by the *ratio legis* of the OECD Convention. States which follow the interpretation of the OECD may abstain from criminalizing cases in which grease payments are paid to hasten the completion of a non-discretionary routine action. However, the wording of the UNCAC does not require such a wide exemption from criminalization. Rather, the facilitation of proceedings can be conceived as an "other advantage in relation to the conduct of international business". More importantly, the aim of the UNCAC suggests a comprehensive penalization of bribery, including grease payments: Unlike the OECD Convention, the UNCAC does not focus on corruption as an obstacle for fair and free trade. Rather, the preamble of

[206] OECD "Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions", online: <https://www.oecd.org/daf/anti-bribery/44176910.pdf>.

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> the UNCAC stresses "the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law". As facilitation payments can be a first move in a game that leads to grand corruption and since all forms of bribery can, in the long run, affect institutions and legal values, states should, as a general rule, criminalize facilitation bribes.[207]

Many organizations, such as the UK Serious Fraud Office, maintain that UNCAC is unequivocal in its prohibition of all corrupt payments, including facilitation payments. Skinnider also interprets UNCAC as prohibiting facilitation payments. Other scholars, however, interpret the failure of UNCAC to specifically address facilitation payments as a deliberate attempt to leave the decision on whether to criminalize facilitation payments up to signatory states. Brunelle-Quraishi suggests that the lack of a specific provision on facilitation payments leads to two possible conclusions:

> The first is that by refusing to acknowledge facilitation payments' legality, the UNCAC was inherently meant to leave a measure of discretion to the Member States. The second is that there was no consensus on the matter during negotiations and a broad definition of corruption was necessary in order to ensure that as many states as possible would adhere to the UNCAC.[208]

Indeed, as will be discussed in further detail below, the US *FCPA* continues to include an exemption for facilitation payments while the UK's new *Bribery Act* prohibits them. Canada enacted legislation in 2013 criminalizing facilitation payments, but that provision was not proclaimed in force until October 31, 2017.

4.5 US Law

As noted above, the *FCPA* does not prohibit firms operating under its jurisdiction from making facilitation payments to foreign public officials. The prosecution has the burden of negating this exception. However, companies may still be liable under the *FCPA*'s accounting provisions if they make facilitation payments but fail to properly record the payments as such. Firms are often unwilling to properly record facilitation payments as they are generally prohibited under the domestic legislation of the foreign public official's home state. The *FCPA* provides a more detailed description of what qualifies as a facilitation

[207] Kubiciel (2009) at 154.
[208] Ophelie Brunelle-Quraishi "Assessing the Relevancy and Efficacy of the United Nations Convention against Corruption: A Comparative Analysis" (2011-2012) 2 Notre Dame J Intl & Comp L 101 at 131-132.

payment than the OECD Convention; however, interestingly, the *FCPA* does not specifically require that the payment be "small."[209]

The facilitation payment exception under the *FCPA* has been called "illusory" by the SEC's former Assistant Director of Enforcement due to enforcement patterns:

> [T]he fact that the FCPA's twin enforcement agencies have treated certain payments as prohibited despite their possible categorization as facilitating payments does not mean federal courts would agree. But because the vast majority of enforcement actions are resolved through DPAs [deferred prosecution agreements] and NPAs [non-prosecution agreements], and other settlement devices, these cases never make it to trial. As a result, the DOJ and the SEC's narrow interpretation of the facilitating payments exception is making that exception ever more illusory, regardless of whether the federal courts – or Congress – would agree.[210]

The following excerpt from the *FCPA*'s *Resource Guide* details the SEC and US DOJ's view on what type of payments qualify for the facilitation payments exemption:[211]

BEGINNING OF EXCERPT

What Are Facilitating or Expediting Payments?

The FCPA's bribery prohibition contains a narrow exception for "facilitating or expediting payments" made in furtherance of routine governmental action. The facilitating payments exception applies only when a payment is made to further "routine governmental action" that involves non-discretionary acts. Examples of "routine governmental action" include processing visas, providing police protection or mail service, and supplying utilities like phone service, power, and water. Routine government action does not include a decision to award new business or to continue business with a particular party. Nor does it include acts that are within an official's discretion or that would constitute misuse of an official's office. Thus, paying an official a small amount to have the power turned on at a factory might be a facilitating payment; paying an inspector to ignore the fact that the company does not have a valid permit to operate the factory would not be a facilitating payment.

[209] OECD Working Group on Bribery, *United States Phase 3 Report* (October, 2010) at para 74.
[210] Richard Grime and Sara Zdeb, "The Illusory Facilitating Payments Exception: Risks Posed by Ongoing FCPA Enforcement Actions and the U.K. Bribery Act" (2011), quoted in Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Edward Elgar, 2014) at 120.
[211] Department of Justice and Security Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012), online: <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>.

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Examples of "Routine Governmental Action"

An action which is ordinarily and commonly performed by a foreign official in—

- obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- processing governmental papers, such as visas and work orders;
- providing police protection, mail pickup and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
- actions of a similar nature.

Whether a payment falls within the exception is not dependent on the size of the payment, though size can be telling, as a large payment is more suggestive of corrupt intent to influence a non-routine governmental action. But, like the FCPA's anti-bribery provisions more generally, the facilitating payments exception focuses on the *purpose* of the payment rather than its value. For instance, an Oklahoma- based corporation violated the FCPA when its subsidiary paid Argentine customs officials approximately $166,000 to secure customs clearance for equipment and materials that lacked required certifications or could not be imported under local law and to pay a lower-than-applicable duty rate. The company's Venezuelan subsidiary had also paid Venezuelan customs officials approximately $7,000 to permit the importation and exportation of equipment and materials not in compliance with local regulations and to avoid a full inspection of the imported goods. In another case, three subsidiaries of a global supplier of oil drilling products and services were criminally charged with authorizing an agent to make at least 378 corrupt payments (totaling approximately $2.1 million) to Nigerian Customs Service officials for preferential treatment during the customs process, including the reduction or elimination of customs duties.

Labeling a bribe as a "facilitating payment" in a company's books and records does not make it one. A Swiss offshore drilling company, for example, recorded payments to its customs agent in the subsidiary's "facilitating payment" account, even though company personnel believed the payments were, in fact, bribes. The company was charged with violating both the FCPA's anti-bribery and accounting provisions.

Although true facilitating payments are not illegal under the FCPA, they may still violate local law in the countries where the company is operating, and the OECD's Working Group on Bribery recommends that all countries encourage companies to prohibit or discourage facilitating payments, which the United States has done

regularly. In addition, other countries' foreign bribery laws, such as the United Kingdom's, may not contain an exception for facilitating payments. Individuals and companies should therefore be aware that although true facilitating payments are permissible under the FCPA, they may still subject a company or individual to sanctions. As with any expenditure, facilitating payments may still violate the FCPA if they are not properly recorded in an issuer's books and records.

Hypothetical: Facilitating Payments

Company A is a large multi-national mining company with operations in Foreign Country, where it recently identified a significant new ore deposit. It has ready buyers for the new ore but has limited capacity to get it to market. In order to increase the size and speed of its ore export, Company A will need to build a new road from its facility to the port that can accommodate larger trucks. Company A retains an agent in Foreign Country to assist it in obtaining the required permits, including an environmental permit, to build the road. The agent informs Company A's vice president for international operations that he plans to make a one-time small cash payment to a clerk in the relevant government office to ensure that the clerk files and stamps the permit applications expeditiously, as the agent has experienced delays of three months when he has not made this "grease" payment. The clerk has no discretion about whether to file and stamp the permit applications once the requisite filing fee has been paid. The vice president authorizes the payment.

A few months later, the agent tells the vice president that he has run into a problem obtaining a necessary environmental permit. It turns out that the planned road construction would adversely impact an environmentally sensitive and protected local wetland. While the problem could be overcome by rerouting the road, such rerouting would cost Company A $1 million more and would slow down construction by six months. It would also increase the transit time for the ore and reduce the number of monthly shipments. The agent tells the vice president that he is good friends with the director of Foreign Country's Department of Natural Resources and that it would only take a modest cash payment to the director and the "problem would go away." The vice president authorizes the payment, and the agent makes it. After receiving the payment, the director issues the permit, and Company A constructs its new road through the wetlands.

Was the payment to the clerk a violation of the FCPA?

No. Under these circumstances, the payment to the clerk would qualify as a facilitating payment, since it is a one-time, small payment to obtain a routine, non-discretionary governmental service that Company A is entitled to receive (i.e., the stamping and filing of the permit application). However, while the payment may qualify as an exception to the FCPA's anti-bribery provisions, it may violate other

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laws, both in Foreign Country and elsewhere. In addition, if the payment is not accurately recorded, it could violate the FCPA's books and records provision.

Was the payment to the director a violation of the FCPA?

Yes. The payment to the director of the Department of Natural Resources was in clear violation of the FCPA, since it was designed to corruptly influence a foreign official into improperly approving a permit. The issuance of the environmental permit was a discretionary act, and indeed, Company A should not have received it. Company A, its vice president, and the local agent may all be prosecuted for authorizing and paying the bribe. [endnotes omitted]

END OF EXCERPT

Strauss argues that as other states intensify enforcement of domestic anti-bribery laws, it is becoming increasingly likely that American corporations will face criminal charges in foreign countries for offering or making facilitation payments. Strauss finds some merit in the argument that, as the chief enforcer of anti-bribery laws, the US must maintain the facilitation payment exemption to "bridge the gap between the aspirational norm of total intolerance for bribery, and the operational code in the field that actually determines how business gets done."[212] However, Strauss concludes that precisely because the US is the predominant enforcer of anti-bribery legislation, "it is even more important that its laws actually align with the aspiration norm it wishes to achieve, or the gap between norm and practice will not narrow."[213]

4.6 UK Law

The UK *Bribery Act* does not contain an exception for facilitation payments. Pursuant to section 6, a person will be found guilty of bribing a foreign public official if that person promises or gives any advantage to a foreign public official with the intention of influencing that person in his or her capacity as a foreign public official. To be convicted, the offender must also intend to obtain or retain business or "an advantage in the conduct of business" (section 6(2)).

In its *Guidance* document, the Ministry of Justice addresses facilitation payments as follows:

> Small bribes paid to facilitate routine Government action – otherwise called 'facilitation payments' – could trigger either the section 6 offence or, where there is an intention to induce improper conduct, including where the

[212] Strauss (2013) at 267.
[213] *Ibid.*

> acceptance of such payments is itself improper, the section 1 offence and therefore potential liability under section 7.
>
> As was the case under the old law, the *Bribery Act* does not (unlike US foreign bribery law) provide any exemption for such payments. The 2009 Recommendation of the Organisation for Economic Co-operation and Development recognises the corrosive effect of facilitation payments and asks adhering countries to discourage companies from making such payments. Exemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing 'culture' of bribery and have the potential to be abused.
>
> The Government does, however, recognise the problems that commercial organisations face in some parts of the world and in certain sectors. The eradication of facilitation payments is recognised at the national and international level as a long term objective that will require economic and social progress and sustained commitment to the rule of law in those parts of the world where the problem is most prevalent. It will also require collaboration between international bodies, governments, the anti-bribery lobby, business representative bodies and sectoral organisations. Businesses themselves also have a role to play and the guidance below offers an indication of how the problem may be addressed through the selection of bribery prevention procedures by commercial organisations.
>
> Issues relating to the prosecution of facilitation payments in England and Wales are referred to in the guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions.[214]

Recognizing the practical difficulties potentially faced by UK businesses operating abroad, the Government reiterated the basic principles of UK prosecution policy, including the concept of proportionality (for example, it may not be in the public interest to prosecute where the payments made were very small) and stated that the outcome in any particular case will depend on the full circumstances of that case.[215] Nicholls et al. describe the factors prosecutors are likely to consider when deciding whether to prosecute:

- The amount of the payment
- Whether the payment was a "one-off"
- Whether the payment was solicited and, if so, whether it resulted from duress or some lesser form of extortion
- The options facing the payer

[214] UK *Bribery Act* Guidance (2010).
[215] Nicholls et al (2011) at paras 4.126-4.127.

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- Whether the payment was reported to the police or a superior
- The likely penalty[216]

The *Joint Prosecution Guidance* from the SFO and Ministry of Justice notes that "[f]acilitation payments that are planned for or accepted as part of a standard way of conducting business may indicate the offence was premeditated," which favours prosecution.[217] On the other hand, if the payer was in a "vulnerable position arising from the circumstances in which the payment was demanded," this militates against prosecution.[218]

Additionally, the common law defence of duress would likely apply where individuals are faced with no alternative but to make a payment to protect against loss of life, limb, or liberty. However, the defence has not been adapted or expanded to include non-physical pressure.[219] On the other hand, the less well recognized defence of necessity in England has no similar restriction and might therefore be a viable defence.

Despite the prosecutorial policies in place and common law defences available, individuals and businesses making facilitation payments do legally face the risk of prosecution. In fact, in 2012, the Director of the SFO issued a letter reiterating in no uncertain terms that "[f]acilitation payments are illegal under the *Bribery Act* 2010 regardless of their size or frequency."[220] Predictably, the prohibition of facilitation payments in the *Bribery Act* has received significant criticisms from the business community, many of whom fear that it will have a negative and chilling effect on small and medium-sized UK firms engaged in the export business. In May 2013, there were reports that the British government planned to review the *Bribery Act* and its position on facilitation payments specifically, but no changes have been made to date.[221] Although organizations such as Transparency International UK remain firmly in support of a zero tolerance position towards facilitation payments, it is clear that the issue remains a divisive one.[222]

4.7 Canadian Law

Section 3(2) of Bill S-14 (2013) eliminates the exception for facilitation payments that previously existed in the *CFPOA*. However, unlike the other amendments to the *CFPOA* prescribed in Bill S-14, section 3(2) did not come into force on the date the Bill received royal

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[216] *Ibid* at para 4.129.
[217] Joint Prosecution Guidance (2010).
[218] *Ibid*.
[219] Nicholls et al (2011) at paras 131, 4.124.
[220] United Kingdom, Serious Fraud Office, "Enforcement of the UK's Bribery Act – Facilitation Payments" (6 December 2012).
[221] Caroline Binham & Elizabeth Rigby, "Relaxation of UK Bribery Law on Government Agenda", *Financial Times* (28 May 2013), online: <https://www.ft.com/content/cab2111c-c6c8-11e2-a861-00144feab7de>.
[222] See for example Robert Barrington, "The Bribery Act Should Not be Watered Down", *Transparency International UK News* (28 May 2013), online: <http://www.transparency.org.uk/the-bribery-act-should-not-be-watered-down/>.

assent. It was finally proclaimed in force as of October 31, 2017. The former facilitation payment exemption reads as follows:

> **Facilitation payments**
>
> (4) For the purpose of subsection (1), a payment is not a loan, reward, advantage or benefit to obtain or retain an advantage in the course of business, if it is made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions, including
>
> (a) the issuance of a permit, licence or other document to qualify a person to do business;
>
> (b) the processing of official documents, such as visas and work permits;
>
> (c) the provision of services normally offered to the public, such as mail pick-up and delivery, telecommunication services and power and water supply; and
>
> (d) the provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods.
>
> **Greater certainty**
>
> (5) For greater certainty, an "act of a routine nature" does not include a decision to award new business or to continue business with a particular party, including a decision on the terms of that business, or encouraging another person to make any such decision.

Although Canada now has a "books and records" provision in the *CFPOA*, it is questionable whether it applies to facilitation payments which occurred prior to October 31, 2017 since facilitation payments remained lawful under the *CFPOA* until that date. Section 4 of the *CFPOA* criminalizes the actions of anyone who, "for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery," misrepresents bribe payments in books and records or takes other steps to misrepresent or hide illicit bribery payments. Since section 3(4) excludes facilitation payments from the ambit of benefits given in order "to obtain or retain an advantage in the course of business," it does not appear that section 4 would apply to a misrepresented or hidden facilitation payments made prior to October 31, 2017. Note that this is in contrast to the accounting provisions in the USA under their *FCPA*, which require accurate records be kept by issuers irrespective of what the payments are actually for.

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4.8 Eliminating Facilitation Payments

Wynn-Williams argues that the removal of the facilitation payments exemption in the *CFPOA* puts charities "between a rock and a hard place."[223] Wynn-Williams also claims that charities will be unable to fulfill their mandates if they are unable to make facilitation payments, since such payments are frequently demanded in countries where charities are attempting to deliver humanitarian aid. For example, if a charity is trying to deliver critically needed food or medication and timely delivery of the goods is dependent on a facilitation payment to a customs official, what is the charity to do? The trouble is largely with provisions of the *Income Tax Act* allowing the Canada Revenue Agency to revoke charitable status to organizations which are not abiding by Canadian law and public policy. This power operates independently of the criminal law and therefore revocation could occur whether or not the charity is successfully prosecuted under the *CFPOA*.

The author offers a number of potential solutions, including a governmental guidance advising against the prosecution of charities (as in the UK), a tying together of the CRA and criminal law such that revocation is only allowed upon conviction (so that charities might have the opportunity to argue necessity, for example), the assignment of an Ombudsperson from whom charities could seek guidance, or, most significantly, an exemption in the *CFPOA* for organizations delivering humanitarian aid.

Since the facilitation payments exemption has been removed from the *CFPOA*, charities will have to comply like any Canadian company. Recognizing the difficulties facing businesses and charities alike, in June 2014 Transparency International UK published a practical guide for companies entitled *Countering Small Bribes: Principles and Good Practice Guidance for Dealing with Small Bribes including Facilitation Payments.*[224] The guidance contains, among other things, a set of ten basic principles for countering small bribes, a model of negotiation steps for resisting demands for bribes and practical examples and case studies.

In the following excerpt from Skinnider's paper *Corruption in Canada: Reviewing Practices from Abroad to Improve Our Response,* Skinnider reviews some measures Canada could adopt in order to discourage or prohibit Canadians from paying facilitation payments to public officials abroad.[225]

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[223] Vanessa Wynn-Williams, "Removing the Exception for Facilitation Payments from the Corruption of Foreign Public Officials Act: Putting Charities Between a Rock and a Hard Place" (20 March 2014), online at: <https://www.oba.org/Sections/International-Law/Articles?author=Wynn-Williams>.

[224] Transparency International UK, *Countering Small Bribes: Principles and Good Practice Guidance for Dealing with Small Bribes Including Facilitation Payments* (June 2014), online: <http://www.transparency.org.uk/publications/countering-small-bribes/>.

[225] Skinnider (2012) at 21–24. See also updated version, Skinnider and Ferguson (2017).

Discussion Question:

As you read this excerpt, consider whether in your view Canada has taken the proper approach to facilitation payments. (Note that at the time Skinnider wrote her paper, the Bill to repeal facilitation payment had not yet been introduced in Parliament.)

BEGINNING OF EXCERPT

Should Canada Prohibit Facilitation Payments?

As noted, although the Fighting Foreign Corruption Act[226] provided for the elimination of the facilitation payments defence by repealing s. 3(4) of the CFPOA, this provision remains unproclaimed and thus Canada remains one of the few countries to continue to permit these payments. If the defence of facilitation payments is eliminated, one helpful suggestion that has been made is to incorporate a scaled penalty system for acts of lower-level bribery.[227] Even without an express scaled-down penalty system, judges in Canada have a wide discretion to select a penalty for offences like bribery where no mandatory minimum penalty is specified. The general sentencing principles state that the penalty is to be "proportionate" to the nature and scope of the harm and to the culpability of the offender. These small facilitation payments would normally result in very small penalties if facilitation payments were criminalized.[228] However, the high maximum penalty of 14 years imprisonment does eliminate the use of some sentencing options such as absolute and conditional discharges and conditional sentences. This elimination of these sentencing options for minor incidents of otherwise serious offences such as bribery occurred under the Conservative government's so-called "law and order" policy. Hopefully those laws will soon be repealed. Enacting a scaled-down version (e.g. a summary conviction offence of bribery) would also necessitate a consideration of whether automatic mandatory debarment from federal procurement contracts is suitable for conviction of small scale bribery offences.

Another alternative that falls short of a total prohibition on all facilitation payments is to amend the CFPOA to provide a clear definition of facilitation payments with a monetary threshold. An American commentator has reviewed the possibilities of amending the FCPA to clarify the facilitation payment exception.[229] He argues for an amendment that refines the exception's current purpose-focused paradigm and adopts a complementary, regionally tailored monetary cap. According to his proposal,

[226] [178] Fighting Foreign Corruption Act, S.C. 2013, c. 26, s. 3(2).
[227] [179] Jacqueline L. Bonneau, supra note 54.
[228] [180] See also s.718.21 of the Criminal Code for additional sentencing factors where the accused is an organization.
[229] [181] Charles B. Weinograd, supra note 173.

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facilitation payments that fall below this monetary threshold will enjoy a rebuttable presumption of legality, while those in excess will presumptively stand outside the exception's shelter.[230] This would allow corporations, prosecutors and courts a manageable and flexible standard to analyze these payments. US Congress has considered and rejected the imposition of a cap in the past. A concern raised regarding this proposal is that a cap would create an environment for abuse.[231]

Ways to Discourage the Use of Facilitation Payments

If the government does not see it as practical to eliminate facilitation payments at this time, they should at least follow the OECD Guidance to "encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments are illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies' book and financial records".[232]

1. A "Books and Records" Provisions in the CFPOA

One way to address the concern of facilitation payments is through a "books and records" provision, an approach enacted into the CFPOA with the 2013 amendments. A company paying a bribe to a foreign public official must accurately record such a payment in its books, and if it does not, then the company violates a "books and records' provision. Representatives from Canadian business who were interviewed by the OECD Working Group noted that it is not uncommon for companies to make a payment to expedite or secure the performance of some act by a foreign public official and that "facilitation payments" are rarely recorded in corporate books and records.[233] Accountants believe these are often not recorded (despite the defence) because of concerns by a company of criminal liability. Auditors also state that they do not pay close attention to "facilitation payments" when auditing a corporation because those payments usually do not materially affect the corporation's financial statements.

With the adoption of a "books and records" offence, the Canadian law now poses the same challenges that commentators have been describing regarding the American system for years. That is, since almost every country outlaws facilitation payments under their respective domestic bribery laws, corporations are hesitant to properly

[230] [182] Legislature should craft a two-pronged conjunctive test, which considers both the subjective purpose of the payment and an objective application of a threshold payment amount. Ibid.
[231] [183] By using a cap to define bribery, Congress might create a floor price for doing business abroad. Corrupt officials would persistently demand the exact amount of the threshold, see Charles B. Weinograd, supra note 173.
[232] [184] OECD Recommendations (2009), supra note 107.
[233] [185] OECD Phase 3 Report, supra note 12.

record such payments as doing so essentially is tantamount to confessing to bribes in violation of a relevant foreign law.[234] But failing to make the proper recording also violates a books and records provision.

2. "Publish What You Pay" Legislation

"Publish what you pay" legislation requires companies to disclose any payments made to a foreign government, including legal payments such as taxes and facilitation payments. The NGO Publish What You Pay, which advocates for increasing transparency in the extractive sector, suggests that because "companies and developed countries profit hugely from the global extractive sector, they have a responsibility to diminish the opportunities for corruption or mismanagement".[235]

In the United States, such a requirement for the extractive industry was introduced as part of the Dodd-Frank Act following the 2008 global financial crisis.[236] In the UK, Reports on Payments to Government Regulations 2014 came into force on December 1, 2014, and apply to any company or partnership that is either a large undertaking or a public interest entity (PIE), and is engaged in extractive industries (mining, oil and gas) or logging.[237] The ESTMA, which came into force in Canada on June 1, 2015, applies to a corporation or a partnership that is engaged in the commercial development of oil, gas or minerals, and (1) is listed on a stock exchange in Canada or (2) has a place of business in Canada, does business in Canada or has assets in Canada and, based on its consolidated financial statements, meets at least two of the following conditions for at least one of its two most recent financial years: (a) it has at least $20 million in assets, (b) it has generated at least $40 million in revenue, and (c) it employs an average of at least 250 employees.[238] The threshold for reporting single or multiple

[234] [186] Jon Jordan, supra note 148.
[235] [187] Publish What You Pay "Mandatory Disclosures", retrieved from http://www.publishwhatyoupay.org/our-work/mandatory-disclosures/.
[236] [188] Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (July 2010) requires issuers in the extractive industry reporting to the US Securities and Exchange Commission (SEC) to disclose any payments made to a foreign government or the US federal government for the purpose of commercial resource development. Legislation is found at http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf. The SEC first adopted the rules implementing this section in August 2012 and a revised version in June 2016. See Securities and Exchange Commission "Disclosure of Payments by Resource Extraction Issuers" 17 CFR Parts 240 and 249b, Release No 34-78167, File No S7-25-15, retrieved from https://www.sec.gov/rules/final/2016/34-78167.pdf and "SEC Adopts Rules for Resource Extraction Issuers Under Dodd-Frank Act" (June 27, 2016), retrieved from https://www.sec.gov/news/pressrelease/2016-132.html
[237] [189] Reports on Payments to Government Regulations 2014, 2014 No. 3209, s. 4.
[238] [190] ESTMA, ss. 2 (entity), 8(1).

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payments made by an entity to any government in Canada or in a foreign state is set at $100,000.[239]

3. Promulgation of Guidelines Defining Permissible Facilitation Payments

The FCPA Resource Guide[240] explains the US DOJ's and SEC's view on what type of payments qualify for this exemption. They are detailed and helpful [and are reproduced in Section 4.5 of this chapter].

The UK Ministry of Justice has addressed the facilitation payments issue[241] [See Section 4.6 of this chapter]

…

The OECD Working Group recommended that Canada "consider issuing some form of guidance in the interpretation" of the defence as there is lack of clarity as to the threshold for facilitation payments and other bribes.[242] However, Canada has noted its long standing practice not to issue guidelines on the interpretation of criminal law provisions. Courts are responsible for interpreting the application of the law in individual cases. But that principle does not preclude Parliament from amending the definition of facilitation by giving it a more precise definition or authorizing an agency to issue regulations in respect to the meaning or scope of facilitation payments.

4. Raise Awareness for Corporate Activism and Institutional Reform

Representatives from the business sector indicated that the government of Canada has not encouraged them to prohibit or discourage the use of facilitation payments.[243] More and more companies are, however, introducing institutional reform. According to TRACE, increasingly companies are adopting a zero-tolerance approach to facilitation payments. For example, the Royal Bank of Canada has banned facilitation payments.[244] Some companies conclude that it is sufficient to stay on the right side of the enforcement agencies in the country in which they are headquartered. Others conclude that the US authorities are the most active internationally, so they work to

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[239] [191] Ibid, s. 2 (payment).
[240] [192] Department of Justice and Security Exchange Commission "A Resource Guide to the U.S. Foreign Corrupt Practices Act" (2012), retrieved from http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf.
[241] [193] UK Minister of Justice "The Bribery Act 2010: Guidance", retrieved from https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.
[242] [194] OECD Phase 3 Report, supra note 12.
[243] [195] OECD Phase 3 Report, supra note 12.
[244] [196] "RBC bans facilitation payments" (The Blog of Canadian Lawyers and Law Times: November 2011), retrieved from http://www.canadianlawyermag.com/legalfeeds/528/RBC-bans-facilitation-payments.html. This news article notes that the RBC is opting to follow the UK Bribery Act and adapts to the highest standard.

comply with the US legal framework. Still others try to comply with the laws of all countries in which they operate.[245]

END OF EXCERPT

5. ACCOUNTING (BOOKS AND RECORDS) OFFENCES RELATED TO CORRUPTION

5.1 UNCAC

Creating criminal offences to punish false, deceptive or incomplete accounting of the payment or receipt and use of money or other assets is seen as an essential and necessary tool in fighting the hiding of corruption payments. Article 12 of UNCAC provides:

1. Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.
2. Measures to achieve these ends may include, inter alia:
   (a) Promoting cooperation between law enforcement agencies and relevant private entities;
   (b) Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State;
   (c) Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities;
   (d) Preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licences granted by public authorities for commercial activities;

[245] [197] A. Wrage "One Destination, Many Paths: The Anti-Bribery Thicket" (Nov 2009).

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(e) Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure;

(f) Ensuring that private enterprises, taking into account their structure and size, have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures.

3. In order to prevent corruption, each State Party shall take such measures as may be necessary, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with this Convention:

(a) The establishment of off-the-books accounts;

(b) The making of off-the-books or inadequately identified transactions;

(c) The recording of non-existent expenditure;

(d) The entry of liabilities with incorrect identification of their objects;

(e) The use of false documents; and

(f) The intentional destruction of bookkeeping documents earlier than foreseen by the law.

4. Each State Party shall disallow the tax deductibility of expenses that constitute bribes, the latter being one of the constituent elements of the offences established in accordance with articles 15 and 16 of this Convention and, where appropriate, other expenses incurred in furtherance of corrupt conduct.

The UNCAC *Legislative Guide* highlights the following features of Article 12:

(1) Paragraph 1 of article 12 requires that States parties take three types of measures in accordance with the fundamental principles of their law. The first is a general commitment to take measures aimed at preventing corruption involving the private sector. The second type of measure mandated by paragraph 1 aims at the enhancement of accounting and auditing standards. Such standards provide

transparency, clarify the operations of private entities, support confidence in the annual and other statements of private entities, and help prevent as well as detect malpractices. The third type of measure States must take relates to the provision, where appropriate, of effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with the accounting and auditing standards mandated above.[246]

(2) Article 12, paragraph 2, outlines in its subparagraphs a number of good practices, which have been shown to be effective in the prevention of corruption in the private sector and in the enhancement of transparency and accountability.[247]

(3) Risks of corruption and vulnerability relative to many kinds of illicit abuses are higher when transactions and the organizational structure of private entities are not transparent. Where appropriate, it is important to enhance transparency with respect to the identities of persons who play important roles in the creation and management or operations of corporate entities.[248]

5.2 OECD Convention

Article 8 of the OECD Convention stipulates that:

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

2. Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

The OECD Convention's implementation has immediate consequences. Commentary 29 states that "one immediate consequence of the implementation of this Convention by the

[246] Legislative Guide (2012).
[247] *Ibid* at para 120.
[248] *Ibid* at para 124.

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Parties will be that companies which are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under this Convention, in particular Articles 3 and 8, as well as other losses which might flow from conviction of the company or its agents for bribery."[249]

Pacini, Swingen and Rogers discuss the impact of the OECD Convention in their article "The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public Officials."[250] In addition to commenting on the contents of Commentary 29, they note that Article 8 has implications for auditors, who "may be liable if they have not detected bribery of a foreign public official by properly examining a company's books and records."[251]

Commentary 29 also points out that "the accounting offences referred to in Article 8 will generally occur in the company's home country, when the bribery offence itself may have been committed in another country, and this can fill gaps in the effective reach of the Convention."

5.3 US Law

5.3.1 Accounting Provisions Offenses

Accounting provisions in the *FCPA* are designed to prohibit off-the-books accounting. Traditionally, enforcement of the provisions has been via civil actions filed by the Securities Exchange Commission.[252] The standard for imposing criminal liability is set out in § 78m(b)(5), which states that no person shall "knowingly" circumvent or fail to implement a system of controls or "knowingly" falsify their records. This full *mens rea* of "knowingly" removes liability for inadvertent errors, while willful blindness would still satisfy the requisite intent.[253] When prosecuted as a crime by the DOJ, the burden of proof is on the prosecutor beyond a reasonable doubt. When dealt with as a civil offense by the SEC, the burden of proof is the lower standard of balance of probabilities. In practice, most of the books and records violations are dealt with as civil offenses by the SEC.

FCPA provisions operate independently of the bribery provisions, and also amend the *Securities Exchange Act,* meaning the accounting provisions apply to far more situations than bribery, including accounting fraud and issuer disclosure cases. Furthermore, companies engaged in bribery may also be violating the anti-fraud and reporting provisions found in

[249] OECD Convention (1997), Commentary 29.
[250] Carl Pacini, Judyth A Swingen & Hudson Rogers, "The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public Officials" (2002) 37 J Bus Ethics 385.
[251] *Ibid.*
[252] James Barta & Julia Chapman, "Foreign Corrupt Practices Act" (2012) 49 Am Crim L Rev 825.
[253] *Ibid* at 832.

the *Securities Exchange Act*. The DOJ and SEC also may turn to accounting offenses when the elements of a bribery offense cannot be made out.[254]

Only one judicial decision directly addresses the accounting provisions. However, the provisions are common in enforcement actions that never make it to trial. As pointed out by Koehler, "the [accounting] provisions, as currently enforced by enforcement agencies, are potent supplements to FCPA's more glamorous anti-bribery provisions."[255] The enthusiastic use of accounting offenses in SEC settlements creates compliance challenges for companies.

There are two general accounting provisions in the *FCPA*: the books and records provision and the internal controls provision. Unlike the *FCPA*'s anti-bribery provisions, the accounting provisions do not apply to private companies. Instead, they apply to publicly held companies that are "issuers" under the *Securities Exchange Act*. An issuer is a company that has a class of securities registered pursuant to § 12 of the *Securities Exchange Act* or that is required to file annual or other periodic reports pursuant to § 15(d) of the *Securities Exchange Act* (244), regardless of whether the company has foreign operations.

The reach of the accounting provisions is quite broad. As the *Resource Guide* emphasizes:

> Although the FCPA's accounting requirements are directed at "issuers," an issuer's books and records include those of its consolidated subsidiaries and affiliates. An issuer's responsibility thus extends to ensuring that subsidiaries or affiliates under its control, including foreign subsidiaries and joint ventures, comply with the accounting provisions.[256]

To be strictly responsible for a subsidiary for the purposes of the accounting provisions, the issuer must own more than 50% of the subsidiary stock. Where the issuer owns 50% or less of the subsidiary, they must only use "good faith efforts" to cause the subsidiary to meet the obligations under the *FCPA* (§ 78m(b)(6)).

For a detailed discussion of the nature, reach and implications of the accounting provisions, see: Stuart H. Deming, "The Potent and Broad-Ranging Implications of the Accounting and Record-Keeping Provisions of the Foreign Corrupt Practices Act."[257]

(i) Books and Records

The books and records provision (§ 78m(b)(2)(A)) states that every issuer shall "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." Section 78m(b)(6) defines "reasonable detail" as a "level of detail and degree of assurance that would satisfy prudent

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[254] Tarun (2013) at 20.
[255] Koehler (2014) at 166.
[256] DJSEC Resource Guide (2012).
[257] Stuart H Deming, "The Potent and Broad-Ranging Implications of the Accounting and Record-Keeping Provisions of the Foreign Corrupt Practices Act" (2006) 96:2 J Crim L & Criminology 465.

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officials in the conduct of their own affairs." The SEC Chairman's 1981 advice provided that a company should not be "enjoined for falsification of which its management, broadly defined, was not aware and reasonably should not have known."[258]

The *Resource Guide* notes that "bribes are often concealed under the guise of legitimate payments."[259] According to a Senate Report, "corporate bribery has been concealed by the falsification of corporate books and records", and the accounting provisions are designed to "remove this avenue of coverup."[260] The books and records provision can provide an avenue for prosecution where improper payments are inaccurately recorded, even if an element of the related anti-bribery provision was not met.

(ii) Internal Controls

The "internal controls" provision at § 78m(b)(2)(B) states that every issuer (as above) shall:

> Devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—
>
> (i) transactions are executed in accordance with management's general or specific authorization;
>
> (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets
>
> (iii) access to assets is permitted only in accordance with management's general or specific authorization; and
>
> (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

Again, "reasonable assurances" is defined in § 78m(b)(7) as a "level of detail and degree of assurance that would satisfy prudent officials in the conduct of their own affairs." The provision allows companies the flexibility to implement a system of controls that suits their particular needs and circumstances. Reflective of the *Guidance* published pursuant to section 9 of the UK *Bribery Act*, the *Resource Guide* points out that "good internal controls can prevent not only *FCPA* violations, but also other illegal or unethical conduct by the company, its subsidiaries, and its employees."[261] Compliance with the provision will therefore depend on the overall reasonableness of the internal controls in the circumstances of the company,

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[258] Koehler (2014) at 149.
[259] DJSEC Resource Guide (2012).
[260] US, Senate Committee on Banking, Housing and Urban Affairs, *Domestic and Foreign Investment: Improved Disclosure Acts of 1977* (95-144) at 6, online: <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/senaterpt-95-114.pdf>.
[261] DJSEC Resource Guide (2012).

including the risks of corruption in the country and sector of operation.[262] In *SEC v World-Wide Coin,*[263] the court indicated that the costs of devising a system of internal controls should not exceed the expected benefits. The court further noted that the occurrence of improper conduct does not necessarily mean internal controls were unsatisfactory.[264]

Koehler argues that enforcement patterns potentially conflict with the reasonableness qualifications built into the books and records and internal control provisions and promoted in the Guidance and in *SEC v World-Wide Coin.*[265] For example, in a 2012 SEC enforcement action, Oracle Corporation was held liable for failing to conduct audits of its subsidiary in India, even though such audits would not have been "practical or cost-effective *absent* red flags suggesting improper conduct. The SEC did not allege any such red flag issues. In fact, the SEC alleged that Oracle's Indian subsidiary 'concealed' ... the conduct from Oracle."[266] Koehler argues that such enforcement actions are edging towards strict liability, in spite of the inclusion of "reasonable detail" and "reasonable assurances" in the accounting provisions. Koehler goes on to state:[267]

> Based on the enforcement theories, it would seem that nearly all issuers doing business in the global marketplace could, upon a thorough investigation of their entire business operations, discover conduct implicating the books and records and internal controls provisions. For instance, the SEC alleged in an FCPA enforcement action against pharmaceutical company Eli Lilly that the company violated the books and records and internal controls provisions because sales representatives at the company's China subsidiary submitted false expense reports for items such as wine, specialty foods, a jade bracelet, visits to bath houses, card games, karaoke bars, door prizes, spa treatments and cigarettes. If the SEC's position is that an issuer violates the FCPA's books and records and internal controls provisions because some employees, anywhere within its world-wide organization, submit false expense reports for such nominal and inconsequential items, then every issuer has violated and will continue to violate the FCPA. [footnotes omitted]

5.3.2 Defenses/Exceptions

There are two exceptions to criminal liability under the accounting provisions. The first (§ 78m(b)(4)) states that criminal liability will not be imposed where the accounting error is merely technical or insignificant. The second (§ 78m(b)(6)) discharges an issuer of their responsibility for a subsidiary's accounting violations when the issuer owns 50% or less of the subsidiary and the issuer "demonstrates good faith efforts" to encourage the subsidiary

[262] Barta & Chapman (2012).
[263] *SEC v World-Wide Coin,* 567 F Supp 724 (ND Ga 1983).
[264] Koehler (2014) at 147.
[265] *Ibid* at 164.
[266] *Ibid* at 166.
[267] *Ibid*.

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to comply with the *FCPA*. However, in practice, Koehler points out that enforcement agencies have eroded this good faith defense for parent companies and essentially created strict (no fault) liability.[268] For example, the SEC charged Dow Chemical with accounting offenses committed by its fifth-tier subsidiary, even though Dow had no knowledge of the improper conduct, and even though the SEC did not allege a lack of good faith on Dow's part.[269]

5.3.3 Limitation Periods for Books and Record Offenses

The limitation periods for *FCPA* books and records offenses are the same as for the offense of bribery, discussed at Section 3.3.3.

5.3.4 Sanctions for Books and Records Offenses

§ 78ff(a) of the *FCPA* mandates that for violation of the accounting provisions, corporations and other business entities are liable for a fine of up to $25 million while individuals (including officers, directors, stockholders and agents of companies) are subject to a fine of up to $5 million and imprisonment for a maximum of 20 years. However, the *Alternative Fines Act* 18 USC. Section 3571(d) provides for the imposition of higher fines at the court's discretion. The increased fine can be up to twice the benefit obtained by the defendant in making the bribe.

Actual penalties are determined by reference to the US Sentencing Guidelines (§ 1A1.1 (2011)).

5.4 UK Law

There are no accounting offences in the UK *Bribery Act*. However, as pointed out by Martin, a compilation of existing UK corporate laws coupled with section 7 of the *Bribery Act* leads to similar requirements as those in *FCPA*.[270] Firstly, the *Companies Act 2006* requires every company in the UK to keep records that can show and explain their transactions, to accurately disclose their financial positions and to implement adequate internal controls. Secondly, the defence to section 7 requires companies have "adequate procedures" in place, which means in part that the companies will need to keep proper records and implement adequate internal controls.[271] Finally, accounting offences facilitating corruption or the hiding of the proceeds of corruption are covered in sections 17-20 of the *Theft Act, 1968*.[272]

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[268] *Ibid* at 161.
[269] *Ibid* at 162.
[270] Martin (2013) at 11.
[271] UK *Bribery Act* Guidance (2010).
[272] For a detailed analysis of these offences see David Ormerod, *Smith & Hogan's Criminal Law*, 13th ed (Oxford University Press, 2011) at 927-938.

Section 17 of the *Theft Act* creates the offence of false accounting. Section 17(1)(a) criminalizes the conduct of a person who intentionally and dishonestly destroys, defaces, conceals or falsifies any account, record or document made or required for any accounting purpose. The falsification, etc., must be done with a view to gain or cause loss to another, but need not actually cause loss or gain. Authorities are inconsistent regarding the meaning of "accounting purpose," but a set of financial accounts is prima facie made for an accounting purpose. The defendant is not required to know that the documents are for an accounting purpose, creating an element of strict liability. Section 17(1)(b) also criminalizes the dishonest use of false or deceptive documents with a view to gain or cause loss.[273]

Section 17 overlaps with both forgery and fraud offences. The fraud offence is broader than section 17, since it is not restricted to documents made for accounting purposes, and also has a higher maximum sentence. As a result, the *Fraud Act* is sometimes used instead of the false accounting provisions.

Section 18 imposes liability on directors, managers, secretaries or other similar officers of a body corporate for an offence committed by the body corporate with their consent or connivance. The purpose of this section is to impose a positive obligation on people in management positions to prevent irregularities, if aware of them. Section 19 is intended to protect investors by making it an offence for directors to publish false prospectuses to members. Section 20 makes it an offence to dishonestly destroy, deface or conceal any valuable security, any will or other testamentary document, or any original document that is belonging to, filed in or deposited in any court of justice or government department.

5.5 Canadian Law

Before 2013, *CFPOA* had no accounting offences. False accounting allegations were dealt with under domestic criminal law or income tax laws in circumstances where Canada had jurisdiction over the commission of those offences.

Amendments to *CFPOA* in 2013 created new accounting offences. The accounting provisions must be proven beyond a reasonable doubt (unlike the similar provisions in the *FCPA*, which need only be proven on a balance of probabilities when used by the SEC). Section 4 of the *CFPOA* provides:

> 4.(1) Every person commits an offence who, for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery,
>
> (a) establishes or maintains accounts which do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards;

[273] *Ibid* at 926–929.

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(b) makes transactions that are not recorded in those books and records or that are inadequately identified in them;

(c) records non-existent expenditures in those books and records;

(d) enters liabilities with incorrect identification of their object in those books and records;

(e) knowingly uses false documents; or

(f) intentionally destroys accounting books and records earlier than permitted by law.

(2) Every person who contravenes subsection (1) is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

Section 4 was brought into force on June 19, 2013. There have been no prosecutions under it. This section was added to the *CFPOA* to bring the *Act* into line with article 8 of the OECD Convention. Other existing *Criminal Code* offences support Canada's implementation of Article 8 of the OECD Convention. These include the offences of making a false pretence or statement (ss. 361 and 362), forgery and the use or possession of forged documents (ss. 366 and 368), fraud affecting public markets (s. 380(2)), falsification of books and documents (s. 397) and issuing a false prospectus (s. 400). Section 155 of the *Canada Business Corporations Act*, which addresses financial disclosure, may also be relevant in cases involving false accounting.

APPENDIX 2.1

Below is an overview table of UNCAC and OECD corruption offences and the equivalent offences in US, UK and Canadian law.

Table 2.1 Corruption Offences (Mandatory and Optional UNCAC and OECD Offences and Equivalent US, UK and Canadian Offences)

UNCAC & OECD OFFENCES	US, UK & CANADIAN EQUIVALENTS	
MANDATORY OFFENCES		
(1) Bribery of National Public Officials UNCAC Article 15 – includes two subsections: 15(1) – giving a bribe – promising, offering or giving a bribe to a public officer 15(2) – accepting a bribe – the solicitation or acceptance of a bribe by a public officer OECD No provisions on bribery of national public officials.	**US**	§201(b)(1) and (2), 18 USC
	UK	Ss. 1 and 2, *Bribery Act* 2010.
	Canada	Ss. 119-125, *Criminal Code*.
(2) Bribing a Foreign Public Official UNCAC Article 16(1) – promising, offering or giving a bribe to a foreign public official OECD Article 1 – promising, offering or giving a bribe to a foreign public official (Both articles only include the briber; but see optional offence in Article 16(2) of UNCAC.)	**US**	§§ 78dd-1, 78dd-2 and 78dd-3 of the *FCPA*, 15 USC.
	UK	S. 6, *Bribery Act 2010*.
	Canada	S. 3, *Corruption of Foreign Public Officials Act (CFPOA)* and s. 18, *Crimes Against Humanity and War Crimes Act*.

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UNCAC & OECD OFFENCES	US, UK & CANADIAN EQUIVALENTS	
(3) Public Embezzlement UNCAC Article 17 – embezzlement, misappropriation or other diversion of property by a public official who has been entrusted with that property OECD No comparable provision	**US**	§§641, 645, 656 and 666, 18 USC.
	UK	No comparable provision in *Bribery Act,* but "fraud by abuse of position of trust", s. 4 *Fraud Act* would apply to public embezzlement.
	Canada	ss. 122 and 322, *Criminal Code.*
(4) Money Laundering UNCAC Articles 14 and 23 – laundering of proceeds of crime (including proceeds of corruption) OECD Article 7 – money laundering	**US**	§§1956 & 1957, *Money Laundering Control Act*, 18 USC.
	UK	Ss. 327-329 and 340(11), *Proceeds of Crime Act 2002.*
	Canada	S. 462.31, *Criminal Code*.
(5) Obstruction UNCAC Article 25 – obstruction of justice in respect to UNCAC offences or procedures OECD No comparable provision	**US**	§§1501, 1503, 1505, 1510, 1511, 1512 and 1519, 18 USC (dealing with obstruction in general).
	UK	A common law offence.
	Canada	Ss. 139(2) & (3) and 423.1(1), *Criminal Code.*
(6) Liability of Legal Entities UNCAC Article 26 – establish liability of legal entities (such as corporations) for UNCAC offences in accordance with each state's legal principles on criminal or civil liability of legal entities OECD Article 2 – responsibility of legal persons, in accordance with each state's legal principles on legal entities	**US**	Criminal liability of corporations is based on common law principles involving acts or omissions of corporate agents or employees acting within the scope of their employment for the benefit of the corporation.
	UK	S. 7, *Bribery Act 2010* creates a special offence of bribery by commercial organizations; for other offences, corporate liability is based on common law principles.
	Canada	Definition of "organization" in s. 2 of the *Criminal Code.* Criminal liability of organizations, ss. 22.1 and 22.2, *Criminal Code.*

UNCAC & OECD OFFENCES	US, UK & CANADIAN EQUIVALENTS	
(7) Accomplices and Attempt UNCAC Article 27 – establish criminal liability for participation (accomplices) in a UNCAC offence and for attempting to commit an UNCAC offence OECD Article 1(2) – establish criminal liability for complicity, and for attempts and conspiracy to the same extent that those concepts apply to domestic law	**US**	§2, 18 USC (aiding, abetting, counselling and procuring); no general provision on attempts of all federal offenses, but the wording of the bribery offense (§201) includes many attempts at bribery, i.e. "offering, authorizing or promising to pay a bribe".
	UK	S. 1, *Criminal Attempts Act 1981* – creates an offence to attempt to commit any indictable offence.
	Canada	Ss. 21 and 22 of the *Criminal Code* includes accomplices in participation of an offence (aiders, abettors, and counselors). S. 24 criminalizes attempting an offence.
(8) Conspiracy UNCAC Conspiracy is not a mandatory or optional offence except Article 23 (conspiracy to commit money laundering). OECD Article 2(1) – creates offence of conspiracy to bribe a foreign official, to the same extent that conspiracy is an offence in a state's domestic penal law.	**US**	§371, 18 USC (conspiracy to commit an offense)
	UK	S. 1(1), *Criminal Law Act 1977*.
	Canada	S. 465(1)(c), *Criminal Code.*

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<table>
<tr><th>UNCAC & OECD OFFENCES</th><th colspan="2">US, UK & CANADIAN EQUIVALENTS</th></tr>
<tr><td rowspan="3">(9) Books and Records Offences
UNCAC
Article 12(3) – does not require state parties to “criminalize” books and records offences, but requires states to take necessary measures to prevent the creation and use of improper and fraudulent books and records for the purpose of assisting in the commission of UNCAC offences. Improper books and records conduct includes making off-the-books accounts, inadequately identifying transactions, creating non-existent transactions, creating or using false documents, or unlawful, intentional destruction of documents
OECD
Article 8 – shall provide effective civil, administrative or criminal penalties for improper books and records offences</td><td>US</td><td>§78(m)(2)(17) (books and records offenses) and §78(m)(b)(2)(B) (accounting/internal control offenses), 15 USC.</td></tr>
<tr><td>UK</td><td>No comparable provision in UK Bribery Act, but ss. 17-20, Theft Act, 1968 criminalizes false accounting.</td></tr>
<tr><td>Canada</td><td>S. 4, CFPOA and other possible offences such as s. 361 (false pretences), s. 380 (fraud) and s. 397 (falsification of books and documents) of the Criminal Code, or s. 155 (financial disclosure) of the Canada Business Corporations Act.</td></tr>
</table>

OPTIONAL OFFENCES		
(1) Foreign Official Taking a Bribe UNCAC Article 16(2) – the solicitation or acceptance of a bribe by a foreign public official OECD No comparable provision.	**US**	The *FCPA* does not criminalize the offense of bribery committed by the foreign public official.
	UK	No comparable provision in *Bribery Act 2010.*
	Canada	No comparable provision in *CFPOA.*
(2) Giving a Bribe for Influence Peddling UNCAC Article 18(1) – promising, offering or giving a bribe to a public official to misuse his or her real or supposed influence for the benefit of the bribe offeror. OECD Article 1(1) & (4) – creates the offence of bribery of a foreign public official.	**US**	This offense would be prosecuted under §78dd-1, 15 USC.
	UK	S. 1, *Bribery Act 2010.*
	Canada	**S.** 121(1)(d) and (3), *Criminal Code.*
(3) Accepting a Bribe for Influence Peddling UNCAC Article 18(2) – the solicitation or acceptance of a bribe by a public official in exchange for promising to misuse his or her real or supposed influence for the benefit of the bribe giver OECD No comparable provision.	**US**	No comparable provision in the *FCPA*, but can be prosecuted under §201(b)(2) of 18 USC.
	UK	S. 2, *Bribery Act 2010.*
	Canada	**S**. 121(1)(d) and (3), *Criminal Code.*
(4) Abuse of Public Function to Obtain a Bribe UNCAC Article 19 – abuse of public functions of the purpose of obtaining an undue advantage OECD No comparable provision.	**US**	No comparable provision in *FCPA*, but can be prosecuted under §201(b)(2) of 18 USC.
	UK	S. 2, *Bribery Act 2010.*
	Canada	S. 122, *Criminal Code.*

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(5) Illicit Enrichment UNCAC Article 20 – illicit enrichment, that is, a significant increase in the assets of a public official that cannot be reasonably explained in regard to the public official's lawful conduct OECD No comparable provision.	**US**	No comparable provision.
	UK	No comparable provision.
	Canada	No comparable provision.
(6) Private Sector Bribery UNCAC Article 21 – bribery in the private sector for both the person making the bribe and the person receiving the bribe OECD No comparable provision.	**US**	Could be prosecuted under the general offense of fraud.
	UK	Could be prosecuted under the general offence of fraud.
	Canada	S. 426 of the *Criminal Code* makes receiving or offering bribes as a company official an offence. Depending on the specific facts, fraud (s. 380) or extortion (s. 346) of the *Criminal Code* might also be applied.
(7) Embezzlement in the Private Sector UNCAC Article 22 – embezzlement of property in the private sector. OECD No comparable provision.	**US**	§§641, 18 USC.
	UK	S. 1 and related provisions, *Theft Act, 1968*, as amended.
	Canada	Theft under s. 322 of the *Criminal Code* or fraud under s. 380 of the *Criminal Code.*
(8) Concealing Bribery Property UNCAC Article 24 – the concealment or continued retention of property knowing such property is the result of an UNCAC offence. OECD No comparable provision.	**US**	§1962, 18 USC.
	UK	Ss. 329 and 340, *Proceeds of Crime Act, 2002.*
	Canada	Ss. 341 (concealing) and 354 (possessing), *Criminal Code.*

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CHAPTER 3

GENERAL PRINCIPLES AFFECTING THE SCOPE OF CORRUPTION OFFENCES: JURISDICTION, CORPORATE LIABILITY, ACCOMPLICES AND INCHOATE OFFENCES

CONTENTS

1. JURISDICTION: TO WHAT EXTENT CAN A STATE PROSECUTE BRIBERY OFFENCES COMMITTED OUTSIDE ITS BORDERS?

2. CRIMINAL LIABILITY OF CORPORATIONS AND OTHER COLLECTIVE ENTITIES

3. PARTY OR ACCOMPLICE LIABILITY

4. INCHOATE OFFENCES

1. JURISDICTION: TO WHAT EXTENT CAN A STATE PROSECUTE BRIBERY OFFENCES COMMITTED OUTSIDE ITS BORDERS?

1.1 Overview

In today's globalized world, bribery and other forms of corruption are often transnational. Instances of bribery may involve a number of individuals or legal entities and encompass actions in multiple states. Large corporations are often multi-national, and carrying on business in numerous states. Acts of bribery by one corporation may disadvantage other foreign firms who lose business as a result. Since anti-corruption laws and their enforcement are not consistent across states, the way in which states determine jurisdiction—to whom their anti-corruption laws apply and who can be prosecuted by their courts or tribunals—has important implications for determining how effective anti-corruption laws will be in detecting, investigating, prosecuting, and punishing corruption.

There are three general forms of jurisdiction: prescriptive, enforcement and adjudicative. These were briefly described by the Supreme Court of Canada in *R v Hape*:

> Prescriptive jurisdiction (also called legislative or substantive jurisdiction) is the power to make rules, issue commands or grant authorizations that are binding upon persons and entities. The legislature exercises prescriptive jurisdiction in enacting legislation. Enforcement jurisdiction is the power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld. … Adjudicative jurisdiction is the power of a state's courts to resolve disputes or interpret the law through decisions that carry binding force [citations omitted].[1]

[1] *R v Hape,* [2007] 2 SCR 292 at para 58.

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As the Supreme Court noted, these forms of jurisdiction overlap in certain cases. Even if there is prescriptive jurisdiction, there may be no enforcement jurisdiction (i.e., the power to compel extradition by reason of an extradition treaty or agreement).

The rules governing extra-territorial jurisdiction must be balanced with the concept of state sovereignty. The principles of state sovereignty, including equality and territorial integrity, are reaffirmed in Article 4 of UNCAC. A state is under an international obligation to not enforce its legislative powers within the territorial limits of another state without that state's consent. However, under international law, the limits of a state's prescriptive or legislative jurisdiction (in other words the limits of how a state may determine to whom its laws apply) are less clear. See generally the International Bar Association's *Report of the Task Force on Extraterritorial Jurisdiction*.[2]

When engaged in international business transactions, it is essential for the company and its legal advisors to be aware which countries' laws apply to its activities. In that sense, jurisdiction is the most important issue in international business transactions. Brown describes six theories that states may rely upon to assert prescriptive jurisdiction (i.e., determine to whom their law applies).[3] The two most accepted of these are **territoriality**, whereby jurisdiction is determined on the basis of where the criminal acts occurred, and **nationality** (sometimes termed the active personality principle), whereby a state's jurisdiction extends to the actions of its nationals no matter where the acts constituting the offence occur. Historically, common law countries have been much more reluctant to assert jurisdiction based on nationality while civil law and socialist law countries were more likely to have embraced this theory. The third theory is **universality**, where a state may charge any person present in its territory under its own domestic laws no matter where the acts constituting the offence occurred. This principle was traditionally reserved for piracy and has been extended more recently to crimes universally regarded as heinous, such as war crimes. The fourth theory is the **protective** principle, which determines jurisdiction with reference to which state's national interests were harmed by the offending act, and the fifth theory is the **passive personality** principle, which determines jurisdiction based on the nationality of the crime's victim or victims. Finally, there is also the "**flag**" principle, which is sometimes classified under the principle of territoriality and extends a state's domestic laws to acts occurring at sea on a ship flying that state's flag.

With bribery of a foreign public official, it is common for the actual act of bribery to take place within the foreign official's home country while some preparation, or perhaps just the authorization to offer a bribe, may take place in the briber's home state. Therefore, in respect to statutes that operate based on the territoriality principle alone, a home state's jurisdiction over a briber will depend on the connection required by the home state's law between the briber's conduct and the home state. A law that requires the *whole or majority* of the act of

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[2] The International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction* (2009) online: <http://www.ibanet.org/Document/Default.aspx?DocumentUid=ECF39839-A217-4B3D-8106-DAB716B34F1E>.

[3] H Lowell Brown, "The Extraterritorial Reach of the US Government's Campaign against International Bribery" (1998-1999) 22 Hastings Intl & Comp L Rev 407 at 419.

bribery take place within the home state will have significantly less jurisdictional reach than a law like the US *FCPA*, which applies (among other ways) when *any or virtually any* act or communication in furtherance of a corrupt payment occurs within the US.

Territoriality may be asserted under the principles of either subjective territoriality or objective territoriality. Zerk reviews the different ways in which states may assert jurisdiction based on territoriality:

> The principle of subjective territoriality gives State X the right to take jurisdiction over a course of conduct that commenced in State X and was completed in another state. A terrorist plot that was hatched in State X and executed in State Y could fall into this category. The principle of objective territoriality gives State X the right to take jurisdiction over a course of conduct that began in another state and [was] completed in State X. A conspiracy in State Y to defraud investors in State X could give rise to jurisdiction based on this principle. A further refinement of the principle of objective territoriality appears to be gaining acceptance, in the antitrust field at least. This doctrine, known as the *effects doctrine*, argues that states have jurisdiction over foreign actors and conduct on the basis of "effects" (usually economic effects) produced within their own territorial boundaries, provided those effects are substantial, and a direct result of that foreign conduct. Jurisdiction taken on the basis of the effects doctrine is often classed as "extraterritorial jurisdiction" on the grounds that jurisdiction is asserted over foreign conduct. It is important, though, not to lose sight of the territorial connections that do exist (i.e. in terms of "effects") over which the regulating state arguably does have territorial jurisdiction. Nevertheless, while this doctrine has become increasingly accepted in principle as more states adopt it, its scope remains controversial, especially in relation to purely economic (as opposed to physical) effects.[4]

1.2 UNCAC

Article 42(1) of UNCAC requires State Parties to assert jurisdiction when an offence is committed within their territory or on board a vessel flying their flag. Article 42(3) of the Convention also requires State Parties to exercise jurisdiction when the offender is present in their territory and extradition is refused on the basis that the offender is a national. Some commentators have noted that unlike the OECD Convention, UNCAC does not appear to mandate that a state assert jurisdiction in instances where the act occurred only partially within its territory.

[4] Jennifer Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas* (2010) Harvard Corporate Social Responsibility Initiative Working Paper No 59 at 19, online: <https://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf>.

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Article 42(2) *permits* states to establish jurisdiction in the following circumstances:

> 2. Subject to Article 4 of this Convention [State Sovereignty], a State Party may also establish its jurisdiction over any such offence when:
>
> (a) The offence is committed against a national of that State Party; or
>
> (b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or
>
> (c) The offence is one of those established in accordance with article 23, paragraph 1*(b)* (ii) [conspiracy or other forms of participation in a plan to commit money laundering offences], of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 *(a)* (i) or (ii) or *(b)* (i) [money laundering offences], of this Convention within its territory; or
>
> (d) The offence is committed against the State Party.[5]

Article 42(2) is limited by Article 4, which is meant to protect state sovereignty by discouraging the exercise of extraterritorial jurisdiction within the territory of another state if the laws of that state mandate exclusive territorial jurisdiction. Some commentators, such as Lestelle, have questioned whether UNCAC permits jurisdiction to be established on the basis of other theories of jurisdiction, such as the protective principle, which is notably absent from Article 42(2).[6] Lestelle states:[7]

> Despite the extensive list of extraterritorial circumstances contemplated by article 42, the limitation in article 4 denudes much of the potency from the grant. Furthermore, a final theory of extraterritorial jurisdiction, the "protective" principle, is notably absent from the list in article 42. The "protective" principle provides jurisdiction if the effect or possible effect of the offense is to occur in the forum state and for offenses that threaten the "specific national interests" of the forum state. As discussed in Part I, global efforts at combating foreign public bribery would be aided by an amendment to the UNCAC that removes the limitations of article 4 and adds the "protective" principle as a basis for jurisdiction. [footnotes omitted]

It could be argued, however, that the list of permitted bases of jurisdiction provided in Article 42(2) is non-exhaustive. Article 42(6) provides that:

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[5] *Ibid*.

[6] Evan Lestelle, "The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction" (2008-2009) 83 Tul L Rev 527.

[7] *Ibid* at 541.

> Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

In addition, the *Legislative Guide* for UNCAC, produced by UNODC, states that UNCAC does not aim to alter general international rules regarding jurisdiction and that the list of jurisdictional bases in 42(2) is not meant to be exhaustive. Rather, the purpose of Article 42 is to permit the exercise of jurisdiction in such a way that ensures that corruption offences do not go unpunished because of jurisdictional gaps.[8] As noted above, there are differing views concerning the degree of latitude afforded to states under international law when determining the basis of criminal jurisdiction.

Lestelle argues that UNCAC should be amended to expressly allow for further extraterritorial application of domestic laws, potentially based on the protective or passive personality principles. In his view, corruption is a humanitarian concern of sufficient gravity to merit the application of laws with significant extraterritorial jurisdiction. Lestelle compares corruption to piracy, the earliest crime for which states commonly asserted jurisdiction based on the universality principle. He argues that both are "crimes against the global market," and therefore far-reaching state-level laws are necessary in order to avoid the possibility that perpetrators will be able to evade prosecution. Otherwise, Lestelle warns that some states motivated by self-interest will refrain from taking legal action against perpetrators, thus creating "safe harbour" refuges where those engaged in bribery or corruption will not be prosecuted.[9]

1.3 OECD Convention

Article 4 of the OECD Convention addresses jurisdiction. It requires that each State Party take steps to ensure it has jurisdiction over bribery offences that occur wholly or partially within its territory. This is a narrow conception of extra-territorial jurisdiction. The word "partial" is not defined. The Commentary accompanying the Convention text states that this provision should be interpreted broadly in a way that does not require "extensive physical connection to the *bribery act*." In addition, a State Party with "jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles" (Article 4(2)). Article 4(4) also requires states to review whether their basis for jurisdiction is sufficient to effectively fight against the bribery of foreign public officials.

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[8] United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption* [Legislative Guide (2012)], 2nd ed (United Nations, 2012), at 134 online: <https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf>.

[9] Lestelle (2008-2009) at 552.

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At the time the OECD Convention was negotiated (during the 1990s), many common law countries (including Canada) were opposed to including a requirement that signatory states assert jurisdiction based on nationality. Article 4(4) therefore represented a compromise.[10] However, since that time most of the common law OECD states have incorporated the principle of jurisdiction based on nationality into their domestic anti-bribery legislation (Canada did so in 2013).

1.4 Other International Anti-Corruption Instruments

In addition to mandating that states assert jurisdiction based on the territorial principle, *The Council of Europe Criminal Law Convention*, the *European Union Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States* and the *African Union Convention on Preventing and Combating Corruption* all require State Parties to exercise jurisdiction on the basis of nationality. Interestingly, the African Union Convention is the only multilateral anti-corruption convention to expressly provide for jurisdiction based on the protective principle (see Article 13(1)(d)).

1.5 Corporate Entities

A corporation or other collective legal entity can be subject to a state's corruption laws (1) based on territorial jurisdiction if the company commits the offence (in whole or in part) in that state or (2) based on nationality jurisdiction if the company is incorporated or otherwise legally created or registered in that state. A company from one state can commit an offence in a foreign state either as the primary offender or as a secondary party offender (i.e. aid, abet or counsel another person to commit the offence).

In countries that base corporate criminal liability on the identification (i.e., "directing minds") theory, the actions and state of mind of certain employees and officers becomes in law "the actions and state of mind" of the corporation. In those instances, the corporation is the principal offender. Alternatively, a company can be liable for a corruption offence committed in a foreign state by means of secondary party liability. If the parent company aids, abets or counsels a subsidiary company or a third party agent to commit a corruption offence, the parent company is guilty of that offence as a secondary party to that offence. For example, if SNC-Lavalin Group, the Canadian parent company, were prosecuted for corruption in the Padma Bridge case, its criminal liability would be based on the claim that it aided, abetted or encouraged its subsidiary company and its third party agent (not an employee of SNC-Lavalin) to commit the offence as principal offenders.

The requisite mental element for the parent company as an aider, abettor or counsellor can vary depending on the particular offence and the state's laws for establishing corporate

[10] For further information on the negotiation and development of Article 4, see Mark Pieth, "Article 4 - Jurisdiction" in Mark Pieth, Lucinda A Low & Peter J Cullen, eds, *The OECD Convention on Bribery: A Commentary* (Cambridge University Press, 2007).

criminal liability. Generally speaking, the parent company's required level of fault will be (1) subjective fault (intentionally aided), (2) strict liability (aided by failing to take reasonable steps to prevent the offence), or (3) absolute liability (no mental fault element to aid, abet or counsel the offence is required).

The ability of state parties to exercise jurisdiction over foreign corporate entities, as addressed in the UNCAC and the OECD Convention, is summarized by Zerk as follows:[11]

> While all of the treaties either authorise or require the use of nationality jurisdiction in relation to the extraterritorial activities of their corporate nationals, they do not impose specific requirements vis-à-vis the regulation of the foreign activities of foreign companies and no treaties require the regulation of such activities directly. This will be because of the acknowledged legal limitations in relation to the regulation of foreign nationals in foreign territory. However, a number of treaty provisions are potentially relevant to the situation where a foreign subsidiary or agent is primarily responsible for a bribe. For instance, the UN Convention contains provisions relating to "accessory" or "secondary liability", under which a parent company could be held responsible for a foreign bribe on the basis that it was the "instigator" of that bribe. The OECD Convention mandates liability for complicity in the bribery of a foreign public official, including "incitement, aiding and abetting, or authorization" of such an act. The "Good Practice Guideline" annexed to a recent OECD Recommendation on implementation of the OECD Convention asks state parties to ensure that "a legal person cannot avoid responsibility by using intermediaries, *including related legal persons*, to offer, promise or give a bribe to a foreign public official on its behalf."
>
> There is little guidance in the treaty provisions themselves as to the extent to which accounting controls must cover the transactions of foreign subsidiaries. However, to the extent that the treaty covers foreign bribery, it would appear to be the intention that consolidated reporting (covering the transactions of foreign subsidiaries as well as the parent company) is indeed required. [footnotes omitted]

1.6 Overview of OECD Countries Jurisdiction

The 2016 OECD *Liability of Legal Persons for Foreign Bribery: A Stocktaking Report* provides the following summary of the types of jurisdiction each OECD country has:[12]

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[11] Zerk (2010) at 55-56.

[12] OECD, *Liability of Legal Persons for Foreign Bribery: A Stocktaking Report* [OECD Stocktaking (2016)], (OECD, 2016) at 112-13, online: <https://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf>.

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Some of the key findings in relation to jurisdiction are:

- All the Parties to the Convention (except Argentina) establish some form of territorial jurisdiction over legal persons for the offence of foreign bribery. In some Parties, this jurisdiction is a collateral effect of having jurisdiction over the acts of a natural person who commits foreign bribery in its territory.
- At least 23 Parties (56%) are able, in at least some circumstances, to assert jurisdiction over foreign companies that commit foreign bribery in their territory. One country—Colombia—reported to the Secretariat that its Superintendency of Corporations cannot sanction foreign legal persons for acts committed on its territory. For the other Parties, it could not be determined from the WGB reports whether such jurisdiction exists over foreign legal persons.
- At least 23 Parties (56%) can hold a domestic legal person liable for foreign bribery committed entirely abroad. In line with the WGB's 2006 Mid-Term Study of Phase 2 Reports, the Phase 3 evaluations have indicated that some Parties still cannot assert jurisdiction over a domestic legal person for an offence committed abroad unless the Party also has jurisdiction over the natural person who actually committed the offence. In several cases, the Party may not be able to assert jurisdiction over the legal person unless the natural person who committed the act was a national (e.g. Austria, Bulgaria, Chile, Estonia, Germany, Italy, Latvia, Japan and Sweden). For 16 Parties (39%), no determination was made in the WGB reports.
- At least 8 Parties (20%) seemingly can hold a foreign legal person liable for foreign bribery committed entirely abroad, provided that some condition links the foreign legal person to the country for purpose of applying its foreign bribery offence. Mailbox companies in the Netherlands are also identified as a source of concern. The Phase 3 report for the Netherlands describes varying views within the Netherlands' legal profession about whether it has effective jurisdiction over mailbox companies. The report also states that the Netherlands' approach to "mailbox companies appears to be a potentially significant loophole in the Dutch framework" and urges it "to take all necessary measures to ensure that such companies are considered legal entities under the Dutch Criminal Code, and can be effectively prosecuted and sanctioned."

Finally, although the Convention does not create obligations for Parties to assert jurisdiction over acts of foreign legal persons for offences that take place entirely outside its territory, the WGB has identified some interesting arrangements among the Parties for asserting such jurisdiction. These include:

- ***Universal jurisdiction.*** According to Iceland authorities, Iceland asserts universal jurisdiction for foreign bribery offences falling under the Anti-Bribery Convention. Likewise, the Phase 3 report for Norway states: "Norway has extremely broad jurisdiction over foreign bribery offences, and could, in theory, prosecute any person committing a foreign bribery offence, regardless whether the offence was committed in Norway, and regardless whether the person involved is a Norwegian national. In practice, Norway explained that the universal jurisdiction was in fact rarely relied on, and only used in exceptional cases (twice between 1975 and 2004, and never in corruption cases). At any rate, this broad jurisdiction allows Norway to exercise both territorial and nationality jurisdiction over foreign bribery offences." Estonia reports that it might be able to exercise universal jurisdiction over bribery offenses punishable by a "binding international agreement", but in the absence of case law supporting this theory, the WGB has not been able to reach a definitive conclusion.
- ***Foreign legal person conducts business in, or owns property, in the territory.*** The Czech Republic can assert jurisdiction over a foreign legal person for acts committed outside of its territory when that legal person "conducts . . . activities . . . or owns property" inside the Czech Republic. Similarly, the United Kingdom can apply its Section 7 offence under the Bribery Act to any "commercial organisation" that "carries on a business, or part of a business" inside the United Kingdom. In such a case, the foreign legal person would be liable for the acts of any "associated person" even if the associated person commits the offence outside of the United Kingdom.
- ***Foreign legal person committed offence for the benefit of a domestic legal person***. The Czech Republic can assert jurisdiction over a foreign legal person for acts committed outside of its territory when the "criminal act was committed for the benefit of a Czech legal person."
- ***Foreign legal person is closely connected to a domestic legal person or natural person.*** Greek authorities maintain that Greek law would apply to a foreign subsidiary having a "sufficient connection" with a parent company located in Greece. Israeli authorities believed that they could likely assert jurisdiction over a foreign legal person, "if the crime was committed by an Israeli citizen or resident who was the controlling owner of the legal person." [footnotes omitted]

END OF EXCERPT

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In regard to the nationality requirements for legal persons, the report states the following:[13]

> Of the 41 Convention Parties, at least 16 countries (39%) will consider any legal person incorporated or formed in accordance with their laws to have their nationality. At least eight countries (20%) will look to the legal person's headquarters or seat of operations to determine its nationality, and at least another three countries (7%) will look at either the place of incorporation or the seat. Only 1 country, Brazil, restricts the application of its nationality jurisdiction to legal persons that are both incorporated in and headquartered in the country's territory.
>
> Finally, at least 11 countries (27%) will assert nationality jurisdiction over legal entities based on "other" factors, primarily whether the company is "registered" under the country's laws or has a "registered office" on its territory. Depending on the country, these other factors may be exclusive or operate alongside the place of incorporation or the seat of the company.
>
> [footnotes omitted]

1.7 US Law

1.7.1 The Expansive Extraterritorial Reach of the US *FCPA*

The US *FCPA* has significant extraterritorial reach. Not only does it apply in instances where any act in furtherance of the offense occurs within the territory of the US, but it also exercises jurisdiction based on nationality. As part of its territorial jurisdiction, foreign companies that are listed on a US stock exchange are subject to the *FCPA*. For a detailed description of jurisdiction under the *FCPA*, including a discussion of due process and relevant cases, see Tarun's *Foreign Corrupt Practices Handbook*.[14] The following excerpt from the US DOJ and SEC's *Resource Guide to the Foreign Corrupt Practices Act* (*Resource Guide*) details how these two *FCPA* enforcement agencies interpret the *FCPA*'s jurisdiction:[15]

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[13] *Ibid* at 124.

[14] Robert W Tarun, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 3rd ed (American Bar Association, 2013) at 57-63.

[15] Department of Justice and Security Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012), [DJSEC Resource Guide (2012)], online: <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>.

BEGINNING OF EXCERPT

Who Is Covered by the Anti-Bribery Provisions?

The FCPA's anti-bribery provisions apply broadly to three categories of persons and entities: (1) "issuers" and their officers, directors, employees, agents, and shareholders; (2) "domestic concerns" and their officers, directors, employees, agents, and shareholders; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States.

Issuers—15 USC. § 78dd-1

Section 30A of the Securities Exchange Act of 1934 (the Exchange Act), which can be found at 15 USC. Section 78dd-1, contains the anti-bribery provision governing issuers. A company is an "issuer" under the FCPA if it has a class of securities registered under Section 12 of the Exchange Act or is required to file periodic and other reports with SEC under Section 15(d) of the Exchange Act. In practice, this means that any company with a class of securities listed on a national securities exchange in the United States, or any company with a class of securities quoted in the over-the-counter market in the United States and required to file periodic reports with SEC, is an issuer. A company thus need not be a US company to be an issuer. Foreign companies with American Depository Receipts that are listed on a US exchange are also issuers. As of December 31, 2011, 965 foreign companies were registered with SEC. Officers, directors, employees, agents, or stockholders acting on behalf of an issuer (whether US or foreign nationals), and any co-conspirators, also can be prosecuted under the FCPA.

Domestic Concerns—15 USC. § 78dd-2

The FCPA also applies to "domestic concerns." A domestic concern is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the laws of the United States or its states, territories, possessions, or commonwealths or that has its principal place of business in the United States. [Note that "domestic concern" includes non-profit organizations such as aid groups.] Officers, directors, employees, agents, or stockholders acting on behalf of a domestic concern, including foreign nationals or companies, are also covered.

Territorial Jurisdiction—15 USC. § 78dd-3

The FCPA also applies to certain foreign nationals or entities that are not issuers or domestic concerns. Since 1998, the FCPA's anti-bribery provisions have applied to foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in any act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States. Also, officers,

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directors, employees, agents, or stockholders acting on behalf of such persons or entities may be subject to the FCPA's anti-bribery prohibitions.

[According to Deming, "[w]ith the critical role that facilities of the US play in international commerce, such as the internet, banking, and air travel, a broad interpretation of what constitutes 'while in the territory of the US' could have dramatic implications."[16]]

What Jurisdictional Conduct Triggers the Anti-Bribery Provisions?

The FCPA's anti-bribery provisions can apply to conduct both inside and outside the United States. Issuers and domestic concerns—as well as their officers, directors, employees, agents, or stockholders—may be prosecuted for using the US mails or any means or instrumentality of interstate commerce in furtherance of a corrupt payment to a foreign official. The Act defines "interstate commerce" as "trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof…." The term also includes the intrastate use of any interstate means of communication, or any other interstate instrumentality. Thus, placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce—as does sending a wire transfer from or to a US bank or otherwise using the US banking system, or traveling across state borders or internationally to or from the United States.

Those who are not issuers or domestic concerns may be prosecuted under the FCPA if they directly, or through an agent, engage in any act in furtherance of a corrupt payment while in the territory of the United States, regardless of whether they utilize the US mails or a means or instrumentality of interstate commerce. Thus, for example, a foreign national who attends a meeting in the United States that furthers a foreign bribery scheme may be subject to prosecution, as may any co-conspirators, even if they did not themselves attend the meeting. A foreign national or company may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States.

In addition, under the "alternative jurisdiction" provision of the FCPA enacted in 1998, US companies or persons may be subject to the anti-bribery provisions even if they act outside the United States. The 1998 amendments to the FCPA expanded the jurisdictional coverage of the Act by establishing an alternative basis for jurisdiction, that is, jurisdiction based on the nationality principle. In particular, the 1998 amendments removed the requirement that there be a use of interstate commerce (e.g.,

[16] Stuart H Deming, *Anti-Bribery Laws in Common Law Jurisdictions* (Oxford University Press, 2014) at 181.

wire, email, telephone call) for acts in furtherance of a corrupt payment to a foreign official by US companies and persons occurring wholly outside of the United States. [footnotes omitted]

END OF EXCERPT

Jurisdiction of US courts under the *FCPA* can be limited by due process requirements. In civil cases, the defendant must have "minimum contacts" with the court's jurisdiction, and the exercise of jurisdiction must be reasonable. If a defendant's actions have no effect in the US and the defendant has negligible contact with the US, these requirements might not be met. For example, in *SEC v Steffen*, the defendant's role in falsified records was too "tangential," and the defendant had no geographic ties to the US. The US forum had little continuing interest in pursuing the particular defendant, who also spoke little English. As a result, the court found that exercising jurisdiction over the defendant would exceed the limits of due process.[17]

In criminal cases, personal jurisdiction arises from a defendant's arrest in the US, voluntary appearance in court or lawful extradition to the US.[18]

Foreign individuals or legal entities that would otherwise be outside the jurisdictional reach of the *FCPA* may be held criminally liable pursuant to the *FCPA* if they aided, abetted, counselled or induced another person or entity to commit a *FCPA* offense or if they conspired to violate the *FCPA*. The following excerpt from the *Resource Guide* explains the SEC's and DOJ's interpretation of the scope of secondary liability provisions of the *FCPA*:

BEGINNING OF EXCERPT

Additional Principles of Criminal Liability for Anti-Bribery Violations: Aiding and Abetting and Conspiracy

Under federal law, individuals or companies that aid or abet a crime, including an FCPA violation, are as guilty as if they had directly committed the offense themselves. The aiding and abetting statute provides that whoever "commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission," or "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States," is punishable as a principal. Aiding and abetting is not an independent crime, and the government must prove that an underlying FCPA violation was committed.

[17] Tarun (2013) at 58–59.
[18] *Ibid* at 63.

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Individuals and companies, including foreign nationals and companies, may also be liable for conspiring to violate the FCPA—i.e., for agreeing to commit an FCPA violation—even if they are not, or could not be, independently charged with a substantive FCPA violation. For instance, a foreign, non-issuer company could be convicted of conspiring with a domestic concern to violate the FCPA. Under certain circumstances, it could also be held liable for the domestic concern's substantive FCPA violations under *Pinkerton v. United States*, which imposes liability on a defendant for reasonably foreseeable crimes committed by a co-conspirator in furtherance of a conspiracy that the defendant joined.

A foreign company or individual may be held liable for aiding and abetting an FCPA violation or for conspiring to violate the FCPA, even if the foreign company or individual did not take any act in furtherance of the corrupt payment while in the territory of the United States. In conspiracy cases, the United States generally has jurisdiction over all the conspirators where at least one conspirator is an issuer, domestic concern, or commits a reasonably foreseeable overt act within the United States. For example, if a foreign company or individual conspires to violate the FCPA with someone who commits an overt act within the United States, the United States can prosecute the foreign company or individual for the conspiracy. The same principle applies to aiding and abetting violations. For instance, even though they took no action in the United States, Japanese and European companies were charged with conspiring with and aiding and abetting a domestic concern's FCPA violations [endnotes omitted].

[Note: While the US may claim jurisdiction over the offence, they may have difficulty prosecuting foreign persons or entities if they have no extradition treaty with the foreign state or if the foreign state rejects the US claim of jurisdiction.]

Additional Principles of Civil Liability for Anti-Bribery Violations: Aiding and Abetting and Causing

Both companies and individuals can be held civilly liable for aiding and abetting FCPA anti-bribery violations if they knowingly or recklessly provide substantial assistance to a violator. Similarly, in the administrative proceeding context, companies and individuals may be held liable for causing FCPA violations. This liability extends to the subsidiaries and agents of US issuers.

In one case, the US subsidiary of a Swiss freight forwarding company was held civilly liable for paying bribes on behalf of its customers in several countries. Although the US subsidiary was not an issuer for purposes of the FCPA, it was an "agent" of several

US issuers. By paying bribes on behalf of its issuers' customers, the subsidiary both directly violated and aided and abetted the issuers' FCPA violations.[19]

END OF EXCERPT

1.7.2 Questioning the DOJ and SEC's Broad View of Territorial Jurisdiction under the *FCPA*

As noted in the above excerpts, the DOJ and the SEC take a very broad view of the territorial jurisdiction of the *FCPA*. Some commentators refer to US jurisdiction over bribery as "potentially quasi-universal."[20] It is also possible to understand the *FCPA*'s jurisdiction over issuers as being based on the effects doctrine of territoriality, as the corrupt acts on behalf of foreign corporations listed on the US markets have the potential to negatively affect the American competitors of the offending corporations.

Hecker and Laporte address the implications of the DOJ and SEC's broad interpretation of territorial jurisdiction.[21] They state that "[a]lthough not explicitly set forth in the joint *FCPA* guidance, the DOJ, in particular, through its public statements and in settled cases, has taken the position that even fleeting contact with the US territory may constitute a sufficient US nexus to assert territorial jurisdiction over foreign entities and individuals for conduct that occurred outside the United States."[22] Laporte and Hecker also note that companies are often under pressure to settle *FCPA* enforcement actions and are reluctant to risk challenging the DOJ and SEC's broad interpretation of the *FCPA*. They cite as an example a settled action against JGC Corp., a Japanese firm charged with making corrupt payments to Nigerian public officials. In this case, the DOJ asserted that the *FCPA*'s territorial jurisdiction was established on the basis of wire transfers routed through US bank accounts.

The DOJ and SEC's expansive interpretation of territorial jurisdiction in corruption cases is reflected by the recent assertion of jurisdiction over FIFA officials by the US, although the *FCPA* was not used. Since the *FCPA* only covers bribes to government officials, the DOJ used non-bribery charges under different legislation to reach the indicted officials, namely the *Racketeer Influenced and Corrupt Organizations Act* (*RICO*) and the *Travel Act*, which prohibits the use of interstate travel and commerce to further an illegal activity. This assertion of jurisdiction has been criticized in relation to the officials who barely have tangential connections to the US. The DOJ claims jurisdiction because several of the FIFA officials and

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[19] DJSEC Resource Guide (2012) at 34.

[20] Jan Wouters, Cedric Ryngaert & Ann Sofie Cloots, "The International Legal Framework against Corruption: Achievements and Challenges" (2013) 14 Melbourne J Intl L 1 at 49, online: <http://law.unimelb.edu.au/__data/assets/pdf_file/0008/1687445/08Wouters,-Ryngaert-and-Cloots1.pdf>.

[21] Sean Hecker & Margot Laporte, "Should FCPA 'Territorial' Jurisdiction Reach Extraterritorial Proportions?" (2013) 42 Intl Law News 7.

[22] *Ibid* at 8.

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marketing executives were allegedly involved in palm-greasing-related activities on American soil and some of the involved marketing companies and associations have offices in the US.[23]

Hecker and Laporte note that there is case law to suggest that the *FCPA*'s territorial jurisdiction is not inexhaustible. Koehler also makes this observation and criticizes the DOJ guidance (quoted above) for basing its advice on settled enforcement actions lacking in judicial scrutiny rather than case law.[24] Hecker and LaPorte cite a district court decision, *US v Patel*,[25] in which the Court rejected the DOJ's argument that the act of mailing a corrupt purchase agreement from the UK to the US was sufficient to establish a territorial nexus with the US. The Court held that, in order for the *FCPA* to apply to foreign entities that are not considered "issuers," the act in furtherance of a corrupt payment must have taken place within US territory. Hecker and Laporte add, however, that until more US courts consider the issue, the DOJ and SEC are unlikely to retreat from their expansive interpretation of the territorial jurisdiction of the *FCPA*.

Hecker and Laporte also go on to state that a number of enforcement challenges arise when attempting to prosecute foreign entities with little territorial nexus with the US under the *FCPA*. Although mutual legal assistance agreements and cooperation with foreign states are on the rise, there nonetheless may be prolonged delays or difficulties when attempting to extradite accused persons or to obtain evidence from abroad. As a result, the DOJ and SEC rely heavily on the cooperation of the entities under investigation. In instances where evidence must be sought in foreign countries, the five-year statute of limitations period for *FCPA* violations may be suspended in some circumstances for up to three years. Lengthy delays in bringing matters to court may present further challenges, as witnesses may become unavailable or their memories may grow stale and evidence may be lost or destroyed. Given the difficulties in investigation and enforcement, the authors question whether it is prudent for the US to pursue enforcement actions in cases where there is only a weak territorial link to the US.

Leibold criticizes the broad extraterritorial application of the *FCPA* and argues that the extension of *FCPA* jurisdiction to foreign non-issuers may be contrary to principles of customary international law.[26] Leibold analyzes the discrepancy in the amount of fines paid by foreign businesses versus domestic businesses and suggests that these statistics may be explained either by the fact that foreign corporations are more corrupt than the US firms, foreign corporations do not cooperate with the US law enforcement authorities, or the SEC and DOJ are unfairly targeting foreign businesses with higher penalties for *FCPA* violations.[27] Finally, given the ease with which the DOJ and the SEC can bring charges

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[23] "The World's Lawyer: Why America, and Not Another Country, Is Going after FIFA", *The Economist* (6 June 2015).
[24] Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Edward Elgar, 2014) at 114.
[25] *US v Patel*, No l:09-cr-00335, Trial Tr 5:11-14, 7:17-8:2 (DDC June 6, 2011).
[26] Annalisa Leibold, "Extraterritorial Application of the FCPA under International Law" (2015) 51 Willamette L Rev 225 at 253-259, online: <https://ssrn.com/abstract=2489675>.
[27] *Ibid* at 238.

against a foreign company, and the fact that most foreign corruption charges are settled rather than litigated, the *FCPA* may be closer to an international anti-corruption business tax than to a domestic criminal law with limited extraterritorial application.[28] Leibold suggests that, to minimize potential foreign policy concerns and violations of international law, the SEC and DOJ should focus the enforcement of the *FCPA* on cases of bribery that have a close connection or substantial effect on the United States.[29]

Similarly, Mateo de la Torre poses the question whether vigorous enforcement of the *FCPA* in cases where there is only a tangential link to the United States is "a valid regulatory effort or, alternatively, an act of legal imperialism."[30] He argues that courts should place limitations on the extraterritorial reach of the *FCPA* in the interest of foreign jurisdictions, businesses and foreign relations. He suggests that, in determining whether extraterritorial application of the *FCPA* would be unreasonable, courts may look at the list of factors enumerated in section 403 of the *Restatement (Third) of Foreign Relations Law*, the following six of which are of particular importance:

1) the link of the activity to the territory of the regulating state;
2) the connections between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
3) the existence of justified expectations that might be protected or hurt by the regulation;
4) the importance of the regulation to the international political, legal, or economic system;
5) the extent to which another state may have an interest in regulating the activity; and
6) the likelihood of conflict with regulation by another state.[31]

Torre concludes that successful challenges to the extraterritorial application of the *FCPA* in courts would allow foreign jurisdictions to develop regulatory regimes that take into account their cultural, political and economic specifics while continuing to provide cross-border assistance when necessary. Simultaneously, it would free prosecutorial resources of the SEC and DOJ that would otherwise be used in prosecuting cases with only remote connections to the United States.[32]

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[28] *Ibid* at 227, 259-260.
[29] *Ibid* at 262.
[30] Mateo J de la Torre, "The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets" (2016) 49 Cornell Intl LJ 469 at 470.
[31] *Ibid* at 481.
[32] *Ibid* at 494-495.

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1.8 UK Law

For offences under sections 1, 2 and 6 (active and passive bribery and bribing a foreign public official), the *Bribery Act* asserts jurisdiction based on both the territoriality principle and the nationality principle:

> 12. Offences under this Act: territorial application
>
> (1) An offence is committed under section 1, 2 or 6 in England and Wales, Scotland or Northern Ireland if any act or omission which forms part of the offence takes place in that part of the United Kingdom.
>
> (2) Subsection (3) applies if—
>
> (a) no act or omission which forms part of an offence under section 1, 2 or 6 takes place in the United Kingdom,
>
> (b) a person's acts or omissions done or made outside the United Kingdom would form part of such an offence if done or made in the United Kingdom, and
>
> (c) that person has a close connection with the United Kingdom.
>
> (3) In such a case—
>
> (a) the acts or omissions form part of the offence referred to in subsection (2)(a), and
>
> (b) proceedings for the offence may be taken at any place in the United Kingdom.
>
> (4) For the purposes of subsection (2)(c) a person has a close connection with the United Kingdom if, and only if, the person was one of the following at the time the acts or omissions concerned were done or made—
>
> (a) a British citizen,
>
> (b) a British overseas territories citizen,
>
> (c) a British National (Overseas),
>
> (d) a British Overseas citizen,
>
> (e) a person who under the British Nationality Act 1981 was a British subject,
>
> (f) a British protected person within the meaning of that Act,
>
> (g) an individual ordinarily resident in the United Kingdom,
>
> (h) a body incorporated under the law of any part of the United Kingdom,
>
> (i) a Scottish partnership.

> (5) An offence is committed under section 7 irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere.
>
> (6) Where no act or omission which forms part of an offence under section 7 takes place in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom.
>
> (7) Subsection (8) applies if, by virtue of this section, proceedings for an offence are to be taken in Scotland against a person.
>
> (8) Such proceedings may be taken—
>
> (a) in any sheriff court district in which the person is apprehended or in custody, or
>
> (b) in such sheriff court district as the Lord Advocate may determine.
>
> (9) In subsection (8) "sheriff court district" is to be read in accordance with section 307(1) of the Criminal Procedure (Scotland) Act 1995.

In summary, the *Bribery Act* will apply if "any act or omission which forms part of the offence" occurs within the UK (section 12(1)). In addition, the *Bribery Act* applies to conduct occurring wholly outside the UK by persons with a "close connection" to the UK. Section 12(4) lists those considered to have a close connection to the UK, including British citizens, British nationals living overseas and all individuals ordinarily resident in the UK. Companies incorporated under UK law are also deemed to have a close connection with the UK. Foreign subsidiaries of UK parent companies are not subject to UK jurisdiction, even if wholly owned by UK parent companies. But, if a foreign subsidiary acts as an agent for a UK company, the agent's conduct can be attributed to the parent company. Pursuant to section 14, senior officers or directors of a UK corporation who were convicted of a section 1, 2 or 6 offence are also guilty of the offence if they consented or connived in the commission of the offence.

The offence of failing to prevent bribery under section 7 of the *Bribery Act* has much broader extraterritorial application. As Painter explains:

> Section 7 stands in stark contrast to the much narrower jurisdictional provisions of Sections 1, 2, and 6 of the *Bribery Act*, and it is this provision that is so striking in its extraterritoriality and scope of potential criminal liability. Three separate provisions embedded within Section 7 lead to this expansive jurisdictional reach and scope. First, the Section applies to "relevant commercial organizations". This term is defined in Section 7(5) of the *Bribery Act* to include both entities organized under UK law as well as entities organized under the laws of any other jurisdiction if the entity "carries on a business, or part of a business, in any part of the United Kingdom". Second, unlike the Section 1, 2, and 6 offenses that require either an act or omission in the UK or at least a "close connection", a relevant commercial organization can be exposed under Section 7 of the Act for

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> failing to prevent bribery "irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere." Third, the predicate offenses for an organization to be criminally liable under Section 7 are triggered by the acts or omissions of a person "associated with" the relevant commercial organization. Under Section 8 of the Act, an "associated person" is a person who performs services for or on behalf of the organization. The term includes employees, agents and subsidiaries, and the capacity in which the associated person performs services does not matter. These three concepts work to create an extraordinarily broad statute.[33]

As Lordi notes, it is likely that the words "carry on a business" are intended to capture all commercial organizations doing business in the UK, not just those with a physical office in the UK.[34] In effect, section 7 appears to extend its reach to "virtually all major multinational corporations."[35]

The *Guidance* document to the UK *Bribery Act*, produced by the Ministry of Justice, attempts to assuage concerns about the extraterritorial scope of section 7 by anticipating that a "common sense approach" will be employed when determining whether an organization carries on a business in the UK.[36] According to the *Guidance,* the mere fact that a company is listed for trading on the London Stock Exchange would not be sufficient to bring it under the jurisdiction of section 7 of the *Bribery Act* without further evidence of a "demonstrable business presence" in the UK. The *Guidance* also states that "having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies."[37]

Lordi is skeptical, however, as there is no existing UK case law that gives meaning to the "common sense approach." Other commentators question whether the *Guidance* document has capitulated to business interests that objected to the reach of the *Bribery Act*. According to Bonneau, the Ministry of Justice's *Guidance* "has created loopholes that simply do not exist on the face of the *Bribery Act* text, risking the resurrection of some of the most infamous problems of the old common law bribery regime."[38] It remains to be seen how the Serious

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[33] James D Painter, "The New UK *Bribery Act*—What US Lawyers Need to Know" (2011) 82 Pennsylvania Bar Association Quarterly 173 at 174.
[34] Jessica Lordi, "The UK *Bribery Act*: Endless Jurisdictional Liability on Corporate Violators" (2012) 44 Case W Res J Intl L 955 at 972.
[35] J Warin, C Falconer & M Diamant, "The British are Coming!: Britain Changes its Law on Foreign Bribery and Joins the International Fight Against Corruption" (2010-2011) 46 Tex Intl LJ 1 at 28.
[36] United Kingdom, Minister of Justice, *The Bribery Act 2010: Guidance*, online: <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.
[37] *Ibid* at 16.
[38] Jaqueline Bonneau, "Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement" (2010-2011) 49 Colum J Transnat'l L 365.

Fraud Office, the agency charged with investigating offences under the *Bribery Act*, and the courts will interpret the jurisdiction of the *Bribery Act*.

In any case, a "relevant commercial organization" is liable to be convicted of an offence if persons associated with that organization commit a bribery offence, even if the bribery is committed abroad and the persons and organization have no close connection with the UK. For example, suppose an agent of Sri Lankan nationality was working for the Sri Lankan-based branch of a company incorporated in India. The Sri Lankan agent offers a bribe to an official in Sri Lanka. Importantly, the Indian company has an active branch in the UK. Under the *Bribery Act,* the Indian company could be prosecuted for failure to prevent bribery. Note, however, that to be personally prosecuted, the person committing the offence requires a close connection to the UK.

1.9 Canadian Law

Until 2013, the *CFPOA* determined jurisdiction based exclusively on the principle of territoriality. Territoriality is the jurisdictional principle which governs most criminal offences under Canadian law (*Criminal Code*, section 6), including the secret commissions offence in section 426. However, Canada has asserted jurisdiction based on nationality for a few crimes, such as offences under the *CFPOA* (since 2013), offences involving child sex tourism and certain terrorism offences committed outside of Canada. See *Criminal Code*, sections 7 (3.73) (3.74) (3.75) (4.1), and (4.11).[39]

Since the *Criminal Code* does not define "territorial jurisdiction," its meaning has been determined by case law. The leading case was decided 30 years ago by the Supreme Court of Canada, but its definition is now outdated in the context of bribery and other transnational offences. In *Libman v The Queen* (1985), the Supreme Court of Canada held that in order for a Canadian criminal statute to apply, "a significant portion of the activities constituting that offence" must take place in Canada.[40] If a significant portion of the criminal conduct occurs in Canada and other parts occur in a foreign state, then Canada and that foreign state have concurrent jurisdiction (or qualified territorial jurisdiction). In *Libman,* the Court went on to state that there must be a "real and substantial link" between the offence and Canada. In addition, the court must be satisfied that prosecution does not offend the principle of international comity. The term "comity" refers to the principle of legal reciprocity and consideration for the interests of other states. Under this principle, a state displays civility towards other nations by respecting the validity of their laws and other executive or judicial actions.

Libman sets a fairly high test for territorial jurisdiction. While Canada requires "significant portions" of the offence to occur within Canada, the US and UK assert territorial jurisdiction if "any act or omission," which constitutes an element of the offence occurs, within their

[39] For a fuller list and a discussion of extraterritoriality, see S Penney, V Rondinelli and J Stribopolous, *Criminal Procedure in Canada* (LexisNexis, 2011) at 601-605.
[40] *Libman v the Queen,* [1985] 2 SCR 178.

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borders. Prior to the 2013 amendments adding nationality jurisdiction to *CFPOA*, it appears that the *Libman* test would have excluded Canadian prosecution of bribery by Canadian individuals or companies engaged in foreign bribery, if the conduct constituting bribery occurred largely in other countries without any significant conduct in or substantial link to Canada. As noted, such a demanding test for territorial jurisdiction is not well suited to the modern realities of global business, in which the transfer of information, contracts and money between countries can occur instantaneously.

The OECD Working Group expressed concerns that Canada's standard of a "real and substantial link" failed to comply with the OECD Convention, which mandates that even a minor territorial link should be sufficient. However, the *Libman* standard has been relaxed somewhat in practice. For example, in *R v Karigar*, the first conviction of an individual under *CFPOA*, the accused was a Canadian acting on behalf of a Canadian company while in India.[41] Even though the actual financial element of the offence (i.e., approval or funding of the bribe) did not occur in Canada, the court found there was still a real and substantial connection because the accused was acting on behalf of a Canadian company and the unfair advantage would have flowed to that Canadian company. The substantial link seems to be that the accused was a Canadian citizen working for a Canadian company (compare with *Chowdhury* noted below).

Canada's failure to expressly assert jurisdiction based on nationality was repeatedly criticized by commentators prior to the 2013 amendments. In the 2011 Phase 3 Report, the OECD Working Group called *CFPOA*'s lack of extraterritorial jurisdiction based on nationality "a serious obstacle to enforcement," and urged Canada to rectify this as a "matter of urgency."[42] Prior to the 2013 amendments, Canada responded to such criticisms by arguing that the establishment of nationality jurisdiction was not explicitly mandated under its treaty obligations.

In June 2013, the *CFPOA* was amended by Bill S-14 to extend the Act's prescriptive jurisdiction to Canadian citizens, permanent residents and any public body or entity formed under Canadian law. These individuals or legal persons are subject to Canadian criminal liability in respect of acts of bribing a foreign public official, irrespective of whether any part of the act constituting the offence takes place in Canada. With these amendments, a Canadian accused (such as Mr. Karigar) would clearly fall within Canada's jurisdiction.

However, the *CFPOA*'s reach is not without limits. In *Chowdhury v HMQ*, the accused was a citizen and resident of Bangladesh acting as an agent for a Canadian corporation, SNC-Lavalin.[43] The accused had never been to Canada. In his capacity as agent for SNC-Lavalin,

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[41] *R v Karigar*, 2013 ONSC 2199.
[42] OECD, "The OECD Anti-Bribery Convention and the Working Group on Bribery", online: <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Anti-Bribery_Convention_and_Working_Group_Brief_ENG.pdf>.
[43] *Chowdhury v HMQ*, 2014 ONSC 2635.

he allegedly facilitated the offer of bribes to foreign officials in Bangladesh in an attempt to secure for SNC-Lavalin an engineering contract for the Padma Bridge proposal.

Chowdhury launched an application claiming Canada had no jurisdiction to prosecute him for an offence of bribery under section 3(1)(b) of the *CFPOA*. The application was successful, and the bribery charge against Chowdhury was stayed. The Court gave a very helpful analysis of the complexity of the various concepts of jurisdiction. As the Court noted:

> [10] The different forms of jurisdiction often overlap in real world legal problems. In this case the interplay is between prescriptive jurisdiction and adjudicative jurisdiction. Specifically, whether Parliament's legislation concerning the bribery of foreign officials brings a foreign national, whose acts in respect of the alleged offence were undertaken wholly outside of Canada, within the jurisdiction of this court.
>
> …
>
> [17] The problem in this case, of course, is that the applicant is not now, nor has he ever been, within Canada. He is not a Canadian citizen. He is a citizen of Bangladesh and his actions in relation to this alleged offence were all undertaken within Bangladesh. The question is whether a charge under the *CFPOA* gives this court jurisdiction over the applicant.

In other words, did Parliament intend section 3(1)(b) of *CFPOA* to apply to non-Canadians who had never been in Canada, and whose acts of bribery (for the benefit of a Canadian company) occurred entirely in a foreign state? The Court held that Parliament did not, stating the following:

> [20] In this regard, the general rule when interpreting a statute is that Parliament is presumed to have intended to pass legislation that will accord with the principles of international law. This point is made clear in *Hape* where LeBel J. said, at para. 53:
>
> > It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law.
>
> It is, of course, open to Parliament to pass legislation that conflicts with international law but if it wishes that result, it must do so clearly and expressly.
>
> [21] The decision in *Hape* dealt with the issue of the "extraterritorial application" of Canadian law. It noted the general prohibition in s. 6(2) of the *Criminal Code* that I have set out above. The court went on to find that Parliament has "clear constitutional authority" to pass legislation governing conduct by non-Canadians outside of Canada. However, in exercising that authority, the court noted certain parameters that will generally apply. LeBel J. said, at para. 68:

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> [Parliament's] ability to pass extraterritorial legislation is informed by the binding customary principles of territorial sovereign equality and non-intervention, by the comity of nations, and by the limits of international law to the extent that they are not incompatible with domestic law.

[22] A basic part of international law is the principle of sovereign equality. Countries generally respect each other's borders and will not attempt to adjudicate matters that occurred within the borders of another sovereign country. Similarly, countries will exercise jurisdiction over their own nationals but not over another country's nationals except, of course, where that country's nationals commit an offence within another country's borders.

[23] Nevertheless, there are situations where a country will reach beyond its borders to prosecute individuals who commit an offence in another country. This normally only occurs where the offence committed in the other country is committed by the first country's own nationals or where the harm arising from the criminal acts in the other country is visited upon the citizens of the first country. In the former case, the basis for jurisdiction is nationality. At common law, we recognize that Canada may have a legitimate interest in prosecuting an offence involving the actions of Canadians outside of our borders. In the latter case, the basis for jurisdiction is qualified territoriality, which extends the notion of territorial jurisdiction beyond our strict borders. Under the "objective territorial principle", Canada will have a legitimate interest in prosecuting non-Canadians for criminal actions that cause harm in Canada provided a real and substantial link between the offence and Canada is established and international comity is not offended.: *Libman*; *Hape* at para. 59; Robert J. Currie, *International & Transnational Criminal Law* (Toronto: Irwin Law, 2010) at pp. 63-65.

. . .

[35] There is a last point to be taken from *Hape* and that is with respect to the issue that arises here, namely, the assumption of jurisdiction over foreign nationals. The court in *Hape* held that it was open to Parliament to pass legislation that sought to govern conduct by non-Canadians outside of Canada. The court pointed out, however, that if Parliament chose to do so, Parliament would likely be violating international law and would also likely offend the comity of nations. Again, LeBel J. said, at para. 68:

> Parliament has clear constitutional authority to pass legislation governing conduct by non-Canadians outside Canada. Its ability to pass extraterritorial legislation is informed by the binding customary principles of territorial sovereign equality and non-intervention, by the comity of nations, and by the limits of international law to the extent that they are not incompatible with domestic law. By virtue

> of parliamentary sovereignty, it is open to Parliament to enact legislation that is inconsistent with those principles, but in so doing it would violate international law and offend the comity of nations.
>
> [36] As a consequence of that reality, courts will approach the interpretation of any legislation with the presumption that Parliament did not intend to violate international law and offend the comity of nations. Thus, absent clear language compelling such an interpretation, courts will adopt an interpretation that leads to the opposite outcome.

The Court also emphasized the importance of the distinction between jurisdiction over the offence and jurisdiction over the person:

> [13] Where adjudicative jurisdiction is asserted over an alleged offence, a court must have jurisdiction over both the offence and the person accused of the offence. The two are separate and discrete issues. As Doherty J.A. succinctly said in *United States v. Kavaratzis* (2006), 208 C.C.C. (3d) 139 (Ont. C.A.), at para. 18:
>
> > Jurisdiction over an accused is distinct from jurisdiction over an offence. This dimension of jurisdiction is less commented upon but it is crucial to the resolution of this application.
>
> . . .
>
> [37] At the risk of being repetitive, but so that it is clear, there is a distinction between Canada extending its jurisdiction over the offence, because the offence has some extraterritorial aspects, and Canada extending its jurisdiction over a person who is outside of Canada's territorial jurisdiction. Jurisdiction over the former is governed by the "real and substantial link" test set out in *Libman*. The latter is governed by the legislative language used in the offence creating statute. This point is made by Robert J. Currie in *International & Transnational Criminal Law* where the author observes, at p. 421:
>
> > When Parliament wishes the courts to take extraterritorial jurisdiction over persons or conduct completely outside Canadian borders, it must instruct the courts to this effect by making it explicit or necessarily implied in the legislation. Otherwise, territorial jurisdiction — as expanded by the *Libman* criteria — is the default.

The Court held that neither section 3(1)(b) nor other provisions of *CFPOA* contained such clear language, rejecting the position that jurisdiction over the offence establishes jurisdiction over all parties to the offence and noting that jurisdiction over Chowdhury would depend on his physical presence in Canada:

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> [54] In the end result, the position of the Crown appears to be that once Canada has jurisdiction over the offence, it has jurisdiction over all of the parties to that offence. I do not accept that proposition because it conflates the question of jurisdiction over the offence with the question of jurisdiction over the person. The existing authorities make it clear that these are two separate and distinct questions. Canada can achieve an affirmative answer to the first question but that does not lead inexorably to an affirmative answer to the second question. The mere fact that the applicant is a party to the offence is not sufficient, in my view, to give Canada jurisdiction over him unless and until the applicant either physically attends in Canada or Bangladesh offers to surrender him to Canada.
>
> [55] This latter point is made out in some of the cases to which I have already referred. For example, in *Treacy*, Lord Diplock twice alludes to the fact that the English courts could gain jurisdiction over a foreign national if that person comes into the United Kingdom. Lord Diplock said, at p. 562:
>
> > Nor, as the converse of this, can I see any reason in comity to prevent Parliament from rendering liable to punishment, if they subsequently come to England, persons who have done outside the United Kingdom physical acts which have had harmful consequences upon victims in England. [...] It may be under no obligation in comity to punish those acts itself, but it has no ground for complaint in international law if the state in which the harmful consequences had their effect punishes, when they do enter its territories, persons who did such acts.
>
> [56] The same point is made in *Liangsiriprasert* where Lord Griffiths said, at p. 250:
>
> > If the inchoate crime is aimed at England with the consequent injury to English society why should the English courts not accept jurisdiction to try it if the authorities can lay hands on the offenders, either because they come within the jurisdiction or through extradition procedures?
>
> [57] I accept, therefore, that if Canada was able to "lay hands" on the applicant, Canada would then have the jurisdiction to try the applicant for an offence under the *CFPOA* over which Canada also has jurisdiction. Until that should happen to occur, the *CFPOA* does not extend Canada's jurisdiction to the applicant for the purposes of prosecuting him under that statute.

Since Canada has no extradition treaty with Bangladesh, Canada cannot "lay hands" on Chowdhury. The Court also rejected the Crown's argument that Chowdhury would get away with impunity unless Canada claimed jurisdiction over him. The Court stated:

> [49] It appears that it was the Minister's view that foreign nationals were not caught by the *CFPOA*, that Canada would not have jurisdiction over them and that it would be up to their host country to decide on any prosecution of them.
>
> [50] The Crown submits that such an interpretation would allow the applicant to get away with his activities "with impunity". Indeed, that may well be the result but, if it is, it is because the authorities in Bangladesh will have decided not to prosecute the applicant for any involvement he had in these matters and not to surrender him to Canada for prosecution here. Those are both decisions that a sovereign country is entitled to make in respect of one of its citizens. I can think of few greater infringements on the sovereignty of a foreign state than for Canada to say that it will pre-empt or overrule those conclusions by purporting to prosecute the applicant in this country where his own country has declined to do so.
>
> [51] In addition to those considerations, the principle of international comity argues against an interpretation of s. 3 that would bring foreign nationals within its ambit. A state's sovereignty is at its peak when it is dealing with its own citizens and their actions within that state's own borders.

The 2013 amendments to *CFPOA* (adding nationality jurisdiction) would not give Canada jurisdiction over a person like Chowdhury.

On June 4, 2014, the RCMP charged US nationals Robert Barra and Dario Berini (former CEOs of Cryptometrics), and UK national Shailesh Govindia (an agent for Cryptometrics) with an offence under section 3 of *CFPOA*. Canada-wide warrants were issued for all three (extradition proceedings in US and UK are an option). Based on *Chowdhury*, prosecutors will no doubt argue that Canada has a legitimate interest in prosecuting these foreign nationals in Canada because the bribery scheme had its genesis in Canada.

For more on Canada's jurisdiction over transnational criminal offences, see Robert J. Currie & Dr. Joseph Rikhof, *International & Transnational Criminal Law*, 2nd ed (Irwin Law, 2013).

1.10 Concerns with Expanded Jurisdiction

Skinnider, in *Corruption in Canada: Reviewing Practices from Abroad to Improve Our Response*, reviews some of the major arguments as well as some of the concerns associated with expanding jurisdiction:[44]

[44] Eileen Skinnider, *Corruption in Canada: Reviewing Practices from Abroad to Improve Our Response* (International Centre for Criminal Law Reform and Criminal Justice Policy, University of British Columbia, 2012) at 12–13. See also updated version by Skinnider and Ferguson (2017), online: <https://icclr.law.ubc.ca/publication/test-publication/>.

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BEGINNING OF EXCERPT

The broadening of jurisdiction beyond the principle of [strict] territoriality will likely result in higher incidences of concurrent jurisdiction. This could give rise to conflicting assertions of civil or criminal jurisdiction, conflicts of laws and concerns of dual criminality and double jeopardy. Companies have raised concerns as to how they are to do business and respond to investigations and prosecutions in multiple jurisdictions that have different substantive laws, enforcement procedures, penalties and available resources.[45] Companies have also expressed concern regarding the "legalization of compliance codes" and the multiplicity of possible compliance codes found in different States.[46]

Some commentators counter these concerns by pointing out that the reality is there is an appalling lack of enforcement, and not to waste time worrying about multiple jurisdictional issues.[47] However, the IBA Legal Practice Division Task Force on Extraterritorial Jurisdiction has studied this issue and calls for harmonizing guidelines to alleviate this potential challenge.[48] The Task Force also calls for States to consider adopting a "soft" form of double jeopardy or *ne bis in idem* that takes into account not just criminal liability, but "functional equivalent" civil liability for corporations and individuals.[49] The lack of harmonization of corruption statutes in terms of corporate and individual liability, penalties, major elements of offences and defences, needs to be considered in devising any double jeopardy rule.

Whether a corporation may be regarded as national differs amongst States. Some States regard a corporation as national if it has been founded according to the national law or if the corporation resides in the territory. Other States relate the question of jurisdiction to the nationality of the acting natural person, not to the nationality of the legal person. Thus, States would require that the person who has acted corruptly within the structure or in favor of the legal person is one of its citizens. However, this may cause "serious legal loopholes since in the crucial cases of corporate liability

[45] [79] Working Group on Bribery Consultation with the Private Sector and Civil Society (OECD, October 2011), retrieved from http://www.oecd.org/dataoecd/2/31/49040760.pdf.
[46] [80] *Ibid*.
[47] [81] International Bar Association "Report of the Task Force on Extra-Territorial Jurisdiction" Chapter 4: Bribery and Corruption, February 6, 2009 at p. 202.
[48] [82] The Task Force recommends consideration of the development of a protocol to the OECD Convention that would spell out the relevant factors that countries should take into account in their consultations regarding the most efficient jurisdiction as well as putting forth the possibility of developing a concept of single jurisdiction: Report on the Task Force on Extra-territorial Jurisdiction. Others call for harmonization, such as Thomas Snider and Won Kidane "Combating Corruption through International Law in Africa: A Comparative Analysis" (2007) 40 Cornell Int'l L.J. 714.
[49] [83] International Bar Association "Report of the Task Force on Extra-Territorial Jurisdiction" Chapter 4: Bribery and Corruption, February 6, 2009 at p. 202.

investigative agencies may not be able to identify the individual instigator or perpetrator".[50]

Moreover States "may consider that the principle of liability of legal persons links legal consequences to the legal entity itself, hence abstracting from individual persons and their nationality".[51] The application of nationality jurisdiction to legal persons remains untested. Whether the authorities in a parent company's country can take action against the parent company where one of its foreign subsidiaries bribes a foreign public official is a priority issue for OECD.[52]

END OF EXCERPT

For a discussion of risks of parallel proceedings, see Chapter 6, Section 7.2 of this book.

2. CRIMINAL LIABILITY OF CORPORATIONS AND OTHER COLLECTIVE ENTITIES

2.1 Introduction

It is well recognized among commentators that in order to effectively combat transnational corruption, mechanisms must be in place to hold corporations and other collective entities liable when they engage in bribery. For convenience, I will generally use the expression "corporate liability," but when doing so I intend to include other legally recognized collective entities. In many cases, particularly when dealing with large, decentralized multinationals, it may be impossible for an enforcement agency to determine who made the actual decision to offer a bribe.[53]Often the decision to offer a bribe by a frontline employee is either supported or tolerated by the upper echelons of management.[54] In such a case, punishing only the frontline employee would not sufficiently punish the corporate culture

[50] [84] UNODC, Technical Guide to the United Nations Convention Against Corruption (UN, 2009), retrieved from http://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf.
[51] [85] *Ibid.*
[52] [86] 2 OECD Working Group on Bribery in International Business Transactions "Consultation Paper: Review of the OECD Instruments Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years after Adoption" (OECD, Jan 2008), retrieved from http://www.oecd.org/dataoecd/18/25/39882963.pdf.
[53] In a 2007 study of international business organizations, almost 70,000 multinational parent companies operated through nearly 700,000 foreign affiliates and the largest 100 companies had an average of 187 subsidiaries per group: PI Blumgerg et al, *The Law of Corporate Groups: Jurisdiction, Practice and Procedure* (Aspen Publishers Online, 2007), cited in OECD Stocktaking (2016) at 11, n 4.
[54] Mark Pieth, "Article 2. The Responsibility of Legal Persons" in Mark Pieth, Lucinda A Low & Nicola Bonucci, eds, *The OECD Convention: A Commentary*, 2nd ed (Cambridge University Press, 2014) at 212-51.

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that facilitated the wrongdoing, nor would it effectively deter other corporations from allowing this culture to persist. There is therefore a need to hold corporations liable in these instances.

For many years, both common law and civil law jurisdictions resisted the idea that a corporation could be found guilty of a "crime." This reluctance was based on the traditional notion that "crimes" required proof of "personal mental fault" (also referred to as subjective fault), which usually took the form of acting intentionally or recklessly (i.e., the *accused foresees* that his/her conduct may cause a criminal harm, but engages in that conduct, thereby knowingly taking the risk that the criminal harm may occur). It was thought that corporations, as non-human legal fictions, could not form personal states of mind such as intention or subjective recklessness. As industrialization spread in the 18th and 19th centuries, many new offences were created to prevent or regulate industrial activities and industrialization's harmful ancillary effects. These offences were generally considered to be regulatory or administrative offences, as opposed to criminal offences. Since they were not crimes, they did not require proof of "personal fault." They were strict or absolute liability and, therefore, corporations could be and were convicted of these types of offences.

The pressure to also hold corporations liable for criminal offences began to build in the early 20th century. Common law countries slowly adopted corporate *criminal* liability in the first half of the 20th century. How? Generally speaking, courts in common law countries began to hold that the "personal fault" of the "directing minds" of a corporation was deemed to also be the corporation's personal fault. The critical question then became "which officers of a corporation are that corporation's 'directing minds'?"

Civil law countries were less willing to accept the fiction that a corporation can have a guilty intent or mind. However, since the mid-20th century, many, but not all, civil law countries began to embrace corporate criminal liability (an issue further discussed in Section 2.4 below).

There are currently three main legal mechanisms for imputing criminal liability to corporations. These mechanisms are significantly different. In addition, within each mechanism there can be variations in terms of broad or narrow attribution of criminal liability to corporations. The three mechanisms are:

1. strict liability (used in general for US federal laws);
2. directing mind or identification doctrine (used by countries such as England and Canada and by many states in the US and Australia); and
3. corporate culture (used in Australian federal laws).

Pieth and Ivory briefly summarize these three mechanisms:

- by imputing to the corporation offences committed by any corporate agent or employee – no matter what steps others in the corporation had taken to prevent and respond to the misconduct (strict vicarious liability), or if

others had not done enough to prevent the wrongdoing (qualified vicarious liability);

- by identifying the corporation with its executive bodies and managers and holding the corporation liable for their acts, omissions, and states of mind of those executives (identification); and
- by treating the collective entity as capable of offending in its own right, either through the aggregated thoughts and deeds of its senior stakeholders (aggregation) or though inadequate organizational systems and cultures (corporate culture, corporate (dis)organization).[55]

Countries such as France, Austria, Italy and Switzerland have all enacted statutes that impose corporate criminal liability. Some jurisdictions, such as Germany, do not recognize corporate *criminal* liability, but instead impose quasi-criminal regulatory sanctions on collective entities. Outside of Europe, countries such as Korea, Japan and China recognize at least some form of corporate criminal liability. There remain, however, some countries, such as Greece and Uruguay that do not recognize criminal or quasi-criminal sanctions for companies.[56] In these countries, it is only possible to convict the employees, agents or executives of a company, but not the company itself. For a recent overview of corporate liability in Europe see: Chance's, *Corporate Liability in Europe*.[57] The OECD Working Group on Bribery's 2016 review of corporate liability of the 41 countries that are parties to the OECD Anti-Bribery Convention, is also now available.[58]

Among countries that do recognize corporate criminal liability, there are significant variations regarding the offences for which criminal liability may be imposed and the way in which that liability is triggered. Most common law jurisdictions now accept that a corporation may be found to have *mens rea* through its human actors. Among civil law countries, some countries accept this proposition and impose corporate criminal liability for all crimes. Other civil law countries only accept this proposition for certain listed offences. The countries that employ this "list-based" approach generally restrict corporate criminal liability to economic and other types of offences generally associated with corporations as well as offences established pursuant to international and regional conventions. A more detailed review of the ways in which various common law and civil law countries address corporate criminal liability can be found in Pieth and Ivory's chapter "Emergence and

[55] Mark Pieth & Radha Ivory "Emergence and Convergence: Corporate Criminal Liability Principles in Overview" in M Pieth & R Ivory, eds, *Corporate Criminal Liability Emergence, Convergence and Risk* (Springer, 2011) at 21–22.
[56] *Ibid.*
[57] Clifford Chance LLP, *Corporate Liability in Europe* (Clifford Chance, 2012), online: <http://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf>.
[58] OECD Stocktaking (2016).

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Convergence: Corporate Criminal Liability Principles in Overview"[59] and in the 2016 OECD report *Liability of Legal Persons for Foreign Bribery: A Stocktaking Report*.[60]

The attribution of criminal intent or fault to corporations also raises the possibility of a due diligence or compliance defence. The possible existence of that defence in the context of bribery and anti-corruption offences in the US, UK and Canada will be discussed in further detail below.

2.2 UNCAC

UNCAC does not mandate that State Parties establish *criminal* sanctions for corporations involved in corruption offences. However, Article 26 does require State Parties to ensure that legal entities are liable (criminally *or otherwise*) for their participation in offences established under UNCAC. Article 26 states:

> **Article 26. Liability of legal persons**
>
> 1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.
> 2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.
> 3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.
> 4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

The *Legislative Guide* to UNCAC addresses corporate liability under Article 26 as follows:[61]

> Article 26, paragraph 1, requires that States parties adopt such measures as may be necessary, consistent with their legal principles, to establish the liability of legal persons for participation in the offences established in accordance with the Convention.
>
> The obligation to provide for the liability of legal entities is mandatory, to the extent that this is consistent with each State's legal principles. Subject to these legal principles, the liability of legal persons may be criminal, civil or administrative (art. 26, para. 2), which is consistent with other international

[59] Mark Pieth & Radha Ivory "Emergence and Convergence: Corporate Criminal Liability Principles in Overview" in Pieth & Ivory, eds, (2011).
[60] OECD Stocktaking (2016).
[61] Legislative Guide (2012), at paras 333-339. Reprinted with the permission of the United Nations.

initiatives that acknowledge and accommodate the diversity of approaches adopted by different legal systems. Thus, there is no obligation to establish criminal liability, if that is inconsistent with a State's legal principles. In those cases, a form of civil or administrative liability will be sufficient to meet the requirement.

Article 26, paragraph 3, provides that this liability of legal entities must be established without prejudice to the criminal liability of the natural persons who have committed the offences. The liability of natural persons who perpetrated the acts, therefore, is in addition to any corporate liability and must not be affected in any way by the latter. When an individual commits crimes on behalf of a legal entity, it must be possible to prosecute and sanction them both ….

The Convention requires States to ensure that legal persons held liable in accordance with article 26 are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions (art. 26, para. 4).

This specific provision complements the more general requirement of article 30, paragraph 1, that sanctions must take into account the gravity of the offence. Given that the investigation and prosecution of crimes of corruption can be quite lengthy, States with a legal system providing for statutes of limitation must ensure that the limitation periods for the offences covered by the Convention are comparatively long (see also art. 29).

The most frequently used sanction is a fine, which is sometimes characterized as criminal, sometimes as non-criminal and sometimes as a hybrid. Other sanctions include exclusion from contracting with the Government (for example public procurement, aid procurement and export credit financing), forfeiture, confiscation, restitution, debarment or closing down of legal entities. In addition, States may wish to consider non-monetary sanctions available in some jurisdictions, such as withdrawal of certain advantages, suspension of certain rights, prohibition of certain activities, publication of the judgment, the appointment of a trustee, the requirement to establish an effective internal compliance programme and the direct regulation of corporate structures.

The obligation to ensure that legal persons are subject to appropriate sanctions requires that these be provided for by legislation and should not limit or infringe on existing judicial independence or discretion with respect to sentencing.

[footnotes omitted]

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2.3 OECD Convention

Article 2 of the OECD Convention states:

> Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

The clause "in accordance with its legal principles" reflects the Convention's goal of functional equivalency, meaning that State Parties are required to sanction the bribery of foreign public officials in the same manner that they would sanction other offences committed by corporations, without mandating changes in the fundamental principles of their respective legal systems.[62] In this regard, the *Commentaries on the Convention* state that if the concept of *criminal* responsibility of legal persons is not recognized in a nation's legal system, that nation is not required to establish it. Furthermore, Article 3(2) requires that if criminal liability for legal persons is not available, State Parties *shall ensure* that legal persons are subject to "effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials." This wording is very similar to the requirements regarding the sanctioning of legal persons later adopted in UNCAC. Pursuant to Article 3(4), State Parties shall also consider the imposition of additional civil or administrative sanctions, such as exclusion from participation in public procurement processes, exclusion from entitlement to certain benefits or a judicial winding-up order. These and other civil remedies are discussed in Chapter 7, Sections 7 to 10.

In 2009, the OECD Council adopted the 2009 Recommendation for Further Combatting Bribery and Annex I, which stated that member parties to the convention should not treat prosecution of natural persons as a prerequisite to also prosecuting the corporation, and secondly it provided guidance on different methods for attributing liability to the company based on the actions or inactions of natural persons associated with the company.

Pieth notes that the OECD Working Group on Bribery has been reluctant to give directives on which sanctions it feels meet the standard of "effective, proportionate and dissuasive."[63] Upon reviewing the Working Group on Bribery's Phase One evaluation of Japan (where it considered the sanctions available in Japan to be insufficient), Pieth argues that two principles are discernible:

> By virtue of this finding, the WGB [Working Group on Bribery] established two principles: first, that sanctions against corporations must be sufficiently 'tough' to have an impact on large multinational corporations, second, that according to the concept of functional equivalence a trade-off is possible between two theoretically quite different instruments, i.e. the corporate fine

[62] Mark Pieth, "Article 2. The Responsibility of Legal Persons" in Pieth, Low & Bonucci, eds, (2014).
[63] *Ibid* at 199.

> and the forfeiture/confiscation of illicit profits (Article 3(3) of the Convention).[64]

Pieth goes on to address how the different concepts of corporate criminal liability compare to the standard of effective, proportionate and dissuasive sanctions:

> With respect to those countries which have implemented corporate criminal liability, the application of a mere identification model, imputing only offences of the most senior management to corporations and also frequently refusing a concept of 'aggregate knowledge', would in our view fail to meet the requirements of 'effective, proportionate and dissuasive sanctions'.[65]

As will be noted below, the above comments are relevant to the UK. They were also applicable to Canada before the 2004 legislative changes which provided a broader definition of corporate liability. Pieth then adds:

> On the other hand, the terms of Articles 2 and 3 of the Convention would be met by countries whose liability concept includes lack of due diligence by senior management, allowing junior agents to engage in bribery.[66]

According to this view, the many State Parties that rely on the identification theory to trigger liability of corporate entities are failing to meet their full OECD Convention obligations.

2.4 Overview of Corporate Liability in the 41 State Parties to the OECD Anti-Bribery Convention

The OECD's Working Group on Bribery (WGB) has conducted a comparative study on liability of legal persons in the 41 Parties to the OECD Anti-Bribery Convention. In December 2016, the WGB released its final stocktaking report.[67]

The report notes the vast global expansion of liability for "legal persons" that has taken place since the Convention's adoption in 1997:[68]

- After the adoption of the Convention, many Parties initiated law-making events relevant for LP [legal person] liability and foreign bribery. These included:
  - ***Creation of LP liability frameworks for foreign bribery in the absence of prior legal traditions.*** Based on information provided in the WGB's monitoring reports, it appears that 16

[64] *Ibid.*
[65] *Ibid* at 202.
[66] *Ibid.*
[67] OECD Stocktaking (2016).
[68] *Ibid* at 14-15.

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Parties (39%) took steps to create LP liability systems apparently without any previous experience before the adoption of the Convention: Austria, Belgium, Bulgaria, Chile, Colombia, Czech Republic, Estonia, Greece, Hungary, Italy, Latvia, Luxembourg, Russian Federation, Slovenia, Spain, and Switzerland.

— ***Adaptation or application of LP liability systems that existed in some form before the Convention to cover foreign bribery.*** In addition, 24 Parties (59%) adapted or applied pre-existing systems for LP liability to foreign bribery while implementing the Convention: Australia, Brazil, Canada, Denmark, Finland, France, Germany, Iceland, Ireland, Israel, Japan, Korea, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, South Africa, Sweden, Turkey, United Kingdom and the United States.

- ***A multi-stage process of refining legal approaches to LP liability.*** Twenty-one countries (51%) have two or more entries in the timeline after the 1997 adoption of the Convention: Australia, Brazil, Canada, Colombia, Estonia, France, Germany, Greece, Hungary, Latvia, Mexico, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey and the United States. These multiple entries suggest that the creation of an LP liability regime may be, for many countries, an ongoing search for an appropriate fit with the local legal system through experimentation and adaptation as they apply their laws. [footnotes omitted]

In regard to each OECD country, the report examines nine distinct aspects of the legal test or standard for liability of legal persons as well as three aspects of sanctions for legal persons found liable. Some of these features of legal person liability from the report are summarized below. As might be expected, there is significant variance in these features of legal person liability.

2.4.1 Sources of Liability for Legal Persons

According to the report:

- 73% of Parties have liability for legal persons in statutes, while 27% have liability in case law (e.g., common law).
- 48% have legal liability in statutes other than their general penal law (whether or not there are also provisions in their general penal law).
- 24% have bribery-specific legislation dealing with liability for legal persons.[69]

[69] *Ibid* at 27-28.

2.4.2 Three Standards for Imputing Legal Liability

The report states:

> Based on WGB reports, it would appear that at least 38 countries (93%) can hold legal persons liable when a person with the highest level of managerial authority commits the offence. At least 31 countries (76%) can also hold them liable if a person with such authority directs or authorises the offence. Finally, at least 29 Parties (71%) can hold companies liable if an officer or other manager fails to prevent the offence "through a failure to supervise … or … a failure to implement adequate controls."[70]

2.4.3 Circumstances under Which a Natural Person's Acts Will Be Attributed to a Legal Person

Some countries require multiple circumstances (i.e., a cumulative approach) while other countries only require one of several factors (an alternative approach). The report notes in part:[71]

> A second complexity shown in Table 5 is that some countries impose different conditions as a function of the level of authority or role that the natural person offender has in relation to the legal person. At least ten Parties (24%) have conditions that depend on whether or not the natural person who engages in bribery has managerial authority within the legal person. In contrast, 29 Parties (71%) appear to apply the same conditions to attribute the acts of any relevant natural person to the legal person, without regard to the level of authority that the relevant person has.

In footnotes 38 and 39, the report states:

> It should be noted, however, that this number may simply reflect the fact that it is not yet clear how a legal person would be held liable for an offence committed by a lower-level employee given the absence of case law in some jurisdictions. … As shown in Table 5 below, some of the countries that require that the offence has been committed with the intent to benefit the legal person include: Austria (offence committed "for the benefit of entity"); Canada ("with the intent … to benefit" the LP); Chile ("for the benefit" of the LP); Germany (offence must have violated the "duties incumbent on the legal person" or either "enriched"—or have been "intended" to enrich—the LP); Mexico (the offence for the "benefit" of the LP); and the United States ("for the benefit" of the LP).

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[70] *Ibid* at 46-47.

[71] *Ibid* at 53-54.

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…

For the more detailed conditions (e.g., benefit or interest, within the scope of duties), the frequency is as follows:

- Twenty-seven Parties (66%) will consider whether the acts of a relevant natural person were committed for the legal person's *benefit or interest*;
- Twenty-one Parties (51%) will consider whether the acts of a relevant natural person were committed as a result of a *failure to* supervise;
- Fourteen (34%) will consider whether the acts of a relevant natural person were committed *in the legal person's name or on its behalf*;
- Twelve (29%) will consider whether the acts of a relevant natural person were committed *within the scope of the natural person's duties or authority*; and
- Twelve Parties (29%) will consider whether the acts of a relevant natural person were *related to the legal person's activity*. [footnotes omitted]

2.4.4 Liability of Legal Persons for Acts of Intermediaries

Intermediaries can be "related" (i.e., subsidiaries or individual entities within a corporate group) or unrelated (i.e., third-party agents, consultants or contractors). The law on liability of legal persons for acts of intermediaries varies significantly depending on the existence of various circumstances. The report studies each country on the basis of various circumstances. In respect to related intermediaries, the report states:[72]

Some of the more noteworthy models of liability for related entities are:

- ***In the spirit of the organisation.*** According to the WGB report, Dutch law enforcement officials indicated that the Netherlands can prosecute a parent company for an offence committed by its subsidiary if the parent entity "knew about the illegal acts of the subsidiary or if the act was carried out 'in the spirit of the legal entity'". According to Dutch authorities, an act performed "in the spirit of the entity" could include acts "useful for the legal person in the business conducted by the legal person" as well as acts resulting from behaviours that were either "accepted or used to be accepted … by the legal person".
- ***"On behalf of".*** In some countries, a parent company can be liable for the acts of its subsidiary, if the subsidiary is an "agent" or otherwise acting on its behalf. According to Norwegian officials

[72] *Ibid* at 80-81.

> and other panellists at the WGB's on-site visit, Norway can hold the parent liable whenever the subsidiary acts "on behalf of" the parent. In the United States, "a parent may be liable for its subsidiary's conduct under traditional agency principles", whenever it has sufficient "control", whether formally or in fact, over the subsidiary's operations or conduct. Whenever such an "agency relationship" arises, the "subsidiary's actions and knowledge" can trigger criminal or other liability for the parent company.
>
> - ***"For the benefit of".*** According to Slovenia, a parent company can be held liable if it "benefited from the bribe given by subsidiary". Such approaches potentially go beyond the "agency" model to encompass wrongdoing that objectively benefits a parent company, even though the subsidiary that committed the offence may not be controlled by, or otherwise acting for, the parent company at the time of the offence.
> - ***Corporate Groups***. Brazil's corporate liability regime notably holds "parent, controlled or affiliated companies … jointly liable for the perpetration of acts" covered by the law. Perhaps in recognition of the broad scope of this liability, Brazil limits such liability to "applicable fines" and the "full compensation" for damages caused. [footnotes omitted]

In regard to unrelated intermediaries the report notes:[73]

> Table 9 explores whether and how the Parties can hold legal persons liable for the acts of unaffiliated business partners or other third parties. It shows that at least 31 countries (76%) have laws that would allow them to hold companies liable for the unlawful acts of unrelated intermediaries under certain conditions.
>
> …
>
> The most common reason identified by the WGB for holding a legal person liable for an offence committed by an unrelated entity or third party agent is that the legal person in fact participated in, or directed, the unlawful act. Based on WGB findings and supplemental information provided by the Parties, this was true in 27 countries (66%).
>
> …
>
> Agency principles provided the second most frequent ground for imposing liability on a legal person for the acts of its unrelated business partners. At least seven countries (17%) can hold a legal person liable for bribery

[73] *Ibid* at 91-92.

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committed by a third party authorised to act on the legal person's behalf. These are Denmark, Estonia, Iceland, Korea, Slovenia, Turkey and the United States.

…

At least 10 countries (24%) can hold a legal person liable on a theory other than complicity or agency. For example, the WGB found that at least one country, Portugal, can impose liability on a legal person that ratifies or approves the unlawful conduct of an unrelated intermediary after the fact. One other country, Canada, provided supplemental information indicating that it can also hold an LP liable on this basis. Examples of other techniques for holding legal persons liable for the unlawful acts of their business partners, include:

- ***Associated persons.*** The Section 7 of the United Kingdom's Bribery Act 2010 makes certain companies liable for the acts of any "associated" person who "performs services" for them. Section 8(2) of the UK Bribery Act specifies that "the capacity in which [the associated person] performs services for or on behalf of [the legal person] does not matter".
- ***Consortium or Joint Venture Members.*** Brazil's corporate liability regime holds companies that are members of a consortium liable for the unlawful acts committed by other consortium member "within the scope of their respective consortium agreement". As with its rules for attributing liability within corporate groups, Brazil limits liability for consortium members to "applicable fines" and the "full compensation" for damages caused. Poland has a similar provision holding a legal person liable for the acts of its joint venture partners, provided that the legal person had "knowledge" of the act or "consents" to it.
- ***Negligence offence.*** Parties have widely different approaches to determining whether the requisite "fault" or "intent" (often referred to as *dol* in civil law traditions or as the *mens rea* element in the common law world) has been established within the company-intermediary relationship. Some countries have attempted to side-step the difficulty of proving intent by holding legal persons liable for negligence. For example, Sweden has enacted a "negligent financing" offence, whereby a legal person can be sanctioned for providing money in a "grossly negligent" manner to an intermediary who then uses it for bribery. [footnotes omitted]

2.4.5 Successor Liability

The report explains the importance of robust successor liability principles to the effective enforcement and sanctioning of corruption offences:[74]

> In a corporate law context, when a legal person merges with or acquires another entity, the successor or acquiring legal person can, in certain circumstances, assume the predecessor entity's liabilities. Successor liability in the context of foreign bribery refers to whether and under what conditions LP liability for the offence is affected by changes in company identity and ownership. Without it, a legal person may avoid liability by reorganising or otherwise altering its corporate identity. In some legal systems, however, successor liability is viewed as problematic in the criminal law context because it is viewed as conflicting with the fundamental notion that no one can be punished for the act of another. [footnotes omitted]

Neither the OECD Anti-Bribery Convention, nor the 2009 Recommendation, specifically refer to successor liability. The report also notes:[75]

> Among the Parties, at least 18 countries (44%) have some form of successor liability for foreign bribery or other criminal offences.
>
> Table 10 also reports the types of transactions or reorganizations that can trigger successor liability, including name change or reincorporation (at least 12 countries, or 29%), merger/acquisition (at least 16 countries, or 39%), division or divestiture (at least 11 countries, or 27%) and dissolution (7 countries, or 17%).
>
> A striking feature of Table 10 is the large number of unknowns indicated by question marks.
>
> …
>
> Although the issue has not been fully explored in the WGB reports, some of the Parties' legal frameworks and practices concerning successor liability deserve special attention:
>
> - ***Comprehensive statutory frameworks.*** In some countries, the legislature has clearly adopted a set of provisions that comprehensively address successor liability. … Other countries, such as the United States rely on well-established jurisprudence or other legal principles to ensure successor liability.
> - ***Limits on sanctions.*** Brazil limits the type sanctions that may be imposed on successor companies to the payment of fines and

[74] *Ibid* at 101.
[75] *Ibid* at 102-103.

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> compensation for damage. … The WGB expressed concern that limiting the ability to confiscate the profits of foreign bribery from successor companies "deprives the administration of one of the most serious deterrents to foreign bribery".
>
> - ***Mechanisms to prevent the extinction of a legal person***. … For instance, under Belgium's 1999 Act establishing LP liability, a judge may, after finding "serious indications of guilt on the part of a legal person", impose a provisional measure to suspend "any proceedings to dissolve or wind up the legal entity" or block any transfers of assets that "could result in the legal entity becoming insolvent." [footnotes omitted]

2.4.6 Jurisdiction over Legal Persons and their Nationality

Both of these topics are analyzed in the report. That analysis is included in Chapter 3, Section 1.

2.5 US Law

Under the US common law doctrine of *respondeat superior*, a corporation will be vicariously liable for acts of its employees that violate the *FCPA* if the employee was acting within the scope of his or her authority and, at least in part, for the benefit of the company. Under this principle, even low-level employees acting in contravention of an express direction not to bribe a foreign official may still trigger liability for the corporation.[76] The term "scope of authority" means within the course of the employee's ordinary duties. Tarun explains:[77]

> For example, an international salesman agreeing to bribe a foreign official in order to obtain or retain business will be deemed to be acting within the scope of his authority. The focus is on the function delegated to the agent or employee and whether the conduct falls within that general function. So long as the agent or employee's acts are consistent with his general employment function, his employer may be held liable for those acts, even if they were contrary to express corporate policy. [footnotes omitted]

In addition, "the benefit of the corporation" need not be the sole motivating factor behind the employee's decision to offer a bribe: "So long as the motive includes a direct or ancillary benefit to the corporation—either realized or unrealized—a corporation will be accountable for the agent or employee's acts."[78]

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[76] Tarun (2013) at 48.

[77] *Ibid*.

[78] *Ibid* at 49.

2.5.1 Corporate Criminal Liability under the *FCPA* Arising from the Acts of Foreign Subsidiaries

According to Tarun, whether US corporations are directly liable for the acts of their foreign subsidiaries is somewhat uncertain. He states:[79]

> While the legislative history and one case indicate that foreign subsidiaries of US companies acting on their own and not as agents of a US parent are not subject to the anti-bribery provisions … the Resource Guide to the US FCPA states that there are two ways in which a parent company can be liable for bribes paid by a subsidiary:
>
> > First, a parent may have participated sufficiently in the activity to be directly liable for the conduct – as, for example when it directed its subsidiary's misconduct or otherwise directly participated in the bribe scheme. Second, a parent may be held liable for its subsidiary's conduct under traditional agency principles.

According to the *Resource Guide*, control over the subsidiary, both general and in terms of the specific transaction, is the key factor in determining whether an agency relationship exists. If the relationship exists, the subsidiary's actions and knowledge are imputed to the parent.

Tarun states that although the *FCPA* does not specifically address liability arising from the behaviour of foreign subsidiaries, there are "at least five" bases in American law under which a parent corporation could be liable for acts of bribery undertaken by its foreign subsidiaries:

> First, a US company may be liable for bribery under agency principles if it had knowledge of or was willfully blind to the misconduct of its subsidiary. Second, a US parent corporation that authorizes, directs, or controls the wayward acts of a foreign subsidiary may be liable. Third a US company may be held liable under principles of respondeat superior where its corporate veil can be pierced. Fourth, a US Company that takes actions abroad in furtherance of a bribery scheme may be found liable under the Act's 1998 alternative theory of nationality jurisdiction. Fifth, foreign subsidiaries may be liable if any act in furtherance of an illegal bribe took place in the United States territory.[80]

In addition, under the accounting provisions of the *FCPA*, if the records of the parent and the subsidiary are consolidated for the purposes of filing documents pursuant to the SEC's

[79] *Ibid.*

[80] *Ibid*.

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mandatory reporting requirements, a parent company may be liable for the accounting violations of a foreign subsidiary.

2.5.2 Successor Liability

After a merger or acquisition, the successor company assumes the predecessor company's liabilities, including those arising under the *FCPA*. No liability will be created where there was none before, however; for example, if the predecessor was outside *FCPA* jurisdiction, it will not be retroactively subject to the *FCPA* after acquisition. Generally, the DOJ will only pursue *FCPA* actions against successor companies in extreme, egregious scenarios, such as the continuation of violations by the successor company.[81]

2.6 UK Law

According to the traditional principles of corporate criminal liability in the UK, corporations, partnerships and unincorporated bodies may be held criminally liable for offences under section 1, 2 and 6 of the *Bribery Act*.[82] Under UK law, a corporation is its own legal entity with its own legal personality. This means that the corporation, separately from the natural persons who perform the activities of the corporation, can be involved in a corrupt transaction. The corporation may be involved in corrupt transactions either as an offender or as a victim. A corporation can be convicted of common law and statutory offences, including offences which require *mens rea.*[83]

There are a few ways in which a corporation may be held criminally liable in the UK. If the offence is strict liability and requires no *mens rea*, there is no problem attributing liability to a corporation. A corporation can also be held vicariously liable for the acts of its employees or agents in situations where a natural person would also be vicariously liable, for example, where a statute imposes vicarious liability. This means that the acts and state of mind of employees or agents are attributed to the corporate body.[84]

For offences that require *mens rea* and do not allow vicarious liability, corporate liability depends on the identification principle. If the offence is committed by an officer who is senior enough to be part of the directing mind and will of the company, and if the offence was committed within the scope of the offender's authority as a corporate officer, the offender's acts and state of mind will be deemed those of the company itself. The corporation can be convicted of an offence without a natural person being prosecuted for that offence. The

[81] DJSEC Resource Guide (2012) at 28-29.
[82] For further detail concerning corporate criminal liability in the UK see: A Pinto and M Evans, *Corporate Criminal Liability*, 3rd ed (Sweet & Maxwell, 2013) and Celia Wells, "Corporate Criminal Liability in England and Wales: Past, Present, and Future" in Pieth & Ivory, eds, (2011) at 91.
[83] Nicholls et al, *Corruption and Misuse of Public Office*, 2nd ed (Oxford University Press, 2011) at 39.
[84] David Ormerod, *Smith and Hogan's Criminal Law*, 13th ed (Oxford University Press, 2011) at 258–260.

identification principle is used to determine corporate liability for offences under sections 1, 2 and 6 of the *Bribery Act* as well as the false accounting offences under the *Theft Act*.

Because of the need to find subjective fault (*mens rea*) in one of the company's directing minds, the identification doctrine is often ineffective in establishing corporate liability. Firstly, identifying the directing minds of a large multinational corporation can be a challenge. Even when the directing minds can be identified, attributing fault to senior officers presents difficulties. Ashworth explains that the doctrine "allows large companies to disassociate themselves from the conduct of their local managers, and thus to avoid criminal liability. Moreover, where a large national or multi-national company is prosecuted, the identification principle requires the prosecution to establish that one of the directors or top managers had the required knowledge or culpability. Managers at such a high level tend to focus on broader policy issues, not working practices."[85] As a result, in cases of bribery committed by a foreign agent in a foreign country to secure business for a company, it can be very difficult to prove that a senior officer of that company was the directing mind behind the bribery offence. The identification doctrine also fails to establish liability for corporate culture, which can develop independently from senior officers at the highest levels. Further, English law does not allow aggregation of the states of mind of more than one person in the corporation in order to satisfy *mens rea* requirements. Thus, historically it was very difficult for corporations to be convicted of bribery offences. Indeed, Maton says "there has never been a successful prosecution in England of a company for bribery."[86]

The difficulty of attributing liability to corporations, especially large multinational corporations, prompted criticism in Phase 1 and Phase 2 Evaluations of the UK by the OECD Working Group. The UK has addressed the difficulties of the identification doctrine by creating offences that impose a duty on companies, for example, in the *Corporate Manslaughter and Corporate Homicide Act* of 2007. The imposition of a corporate duty bypasses the difficulty of establishing culpability on the part of a controlling mind in the company. Section 7 of the *Bribery Act* is another example of this form of corporate liability.

2.6.1 *Bribery Act* Section 7

Section 7 creates a new strict liability offence of failure of a commercial organization to prevent bribery. It is triggered when a person associated with a "relevant commercial organization" (bodies corporate or partnerships) bribes another person for the benefit of the commercial organization. A conviction under section 7 does not require a conviction for a

[85] Andrew Ashworth, *Principles of Criminal Law*, 6th ed (Oxford University Press, 2009) at 150.
[86] James Maton, "The UK *Bribery Act 2010*" (2010) 36:3 Employee Rel LJ 37 at 40. Furthermore, English case law has generally defined "directing mind" quite narrowly: See *Tesco Supermarkets Ltd v Nattras*, [1972] AC 153 (HL); *Director General of Fair Trading v Pioneer Concrete (UK) Ltd*, [1995] 1 AC 456; and *Meridian Global Funds Management Asia Ltd v Securities Commission*, [1995] 2 AC 500. While M Jefferson, "Corporate Criminal Liability in the 1990s" (2000) 64 J Crim L 106 argues that there has been some expansion of the directing mind test, E Ferran, "Corporate Attribution and the Directing Mind and Will" (2011) 127 Law Q Rev 239 suggests the wider *Meridian* test is not always applied.

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section 1, 2 or 6 offence, but there must be sufficient evidence that the act of bribery did occur.

A codified defence to the charge exists. The organization is exonerated if it can prove, on a balance of probabilities, that notwithstanding the actions of the associated person, it had adequate procedures in place to prevent such persons from engaging in bribery.

Section 7 defines the scope of this new offence in the following words:

> (1) A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—
>
> (a) to obtain or retain business for C, or
>
> (b) to obtain or retain an advantage in the conduct of business for C.[87]

Under section 7, a commercial organization may be found guilty of an offence if anyone associated with the company's business participates in bribery, unless the organization has adequate procedures in place to prevent the bribery. The offence can be made out even if the controlling minds of the organization were completely unaware of the bribery. To be "associated" with the organization, person A must be a "person who performs services for or on behalf of" the organization. The capacity in which he or she performs these services does not matter; for example, person A may be an employee, agent or subsidiary, and there need not be a formal contract or in fact any degree of control. Person A does not need to have a close connection with the UK and may be an individual, a body corporate or a partnership. If person A is a subsidiary, the parent company will only be liable if the subsidiary acts in the parent's interest. If the subsidiary bribes in its own interests, the parent will not be liable, even if the subsidiary is wholly owned by that parent.[88]

The phrase "bribes another person" means that person A is or would be guilty of an offence under sections 1 or 6, whether prosecuted or not, or would be guilty of such an offence if section 12(2)(c) and (4) dealing with jurisdiction to prosecute were omitted.[89] Furthermore,

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[87] Interestingly, there is no corresponding offence of failure to prevent the taking of a bribe.

[88] Bob Sullivan, "Reformulating Bribery: A Legal Critique of the Bribery Act 2010" in Jeremy Horder and Peter Alldridge, eds, *Modern Bribery Law* (Cambridge University Press, 2013) 13 at 30.

[89] Section 12 deals with the territorial application of the *Bribery Act*. If the offence takes place outside the UK but would constitute an offence if committed within the UK, and the individual in question has a close connection with the UK, the person may still be charged under sections 1, 2 and 6. Sections 12(2)(c) and 12(4) deal with the "close connection to the UK"; therefore persons associated with commercial organisations can be found to be "bribing another person" for the purposes of the organisation failing to prevent bribery, even if the activity took place outside of the UK and the individual had no close connection with the UK, so long as the organisation fell within the definition of a commercial organisation.

the person will be deemed to have committed the offence if his or her conduct amounted to aiding, abetting, counselling or procuring the offence.[90]

Section 7 applies to "relevant commercial organisations," that is, companies incorporated in the UK or partnerships formed in the UK, as well as to bodies corporate and partnerships incorporated or formed anywhere and carrying on a business or part of a business in the UK. As Gentle notes, the careful drafting of "carries on a business," rather than simply "carries on business", is reflective of the wide jurisdiction of the offence. The mere business presence of an overseas entity in the UK, irrespective of whether business is actually carried out in the UK, is enough to fulfill the jurisdictional requirements of the offence.[91] That being said, the Government intends a "common sense approach" and has suggested that organizations without a "demonstrable business presence in the United Kingdom" will not be caught by this section.[92]

It should be noted that the *Bribery Act* contains no provision specifically insulating person A from secondary liability in respect to the offence under section 7 (in contrast to, for example, the offence in the UK of corporate manslaughter).[93] However, person A is already guilty of the intentional offence of bribery under sections 1 or 6, so it would be somewhat pointless to also charge or convict person A of the strict liability offence under section 7 where person A's conduct of aiding and abetting the section 7 offence is exactly the same conduct that constitutes the section 1 or section 6 offence.

Section 7(2) states that a full defence to the charge is available if the company can prove on a balance of probabilities that it had adequate procedures in place and followed those procedures at the time the bribery occurred in order to prevent associated persons from engaging in bribery. For more information on the adequate procedures defence, refer to Section 2.4.3(i) of Chapter 2.

According to Wells, the significance of this new offence to UK law "cannot be over emphasized."[94] The provision places important obligations on companies to proactively prevent corruption within their organization. Wells views the provision as key to ensuring corporate accountability for bribery. However, the OECD Working Group on Bribery's *Phase 3 Report* (March 2012) notes that the section 7 offence does not completely eliminate the limitations of the UK's narrow identification doctrine.[95] If the "associated person" is a

[90] Nicholls et al (2011) at para 4.110.
[91] Stephen Gentle, "The *Bribery Act* 2010: (2) The Corporate Offence" (2011) 2 Crim L Rev 101 at 105.
[92] United Kingdom, Minister of Justice, *The Bribery Act 2010: Guidance* (2011) at para 36, online: <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.
[93] GR Sullivan, "The *Bribery Act* 2010: (1) An Overview" (2011) 2 Crim L Rev 87 at 95.
[94] Celia Wells, "Corporate Criminal Liability in England and Wales: Past, Present, and Future" in *Corporate Criminal Liability: Emergence, Convergence and Risk* (Springer Netherlands, 2011) at 107.
[95] OECD, *United Kingdom - OECD Anti-Bribery Convention*, online: <http://www.oecd.org/daf/anti-bribery/unitedkingdom-oecdanti-briberyconvention.htm>.

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subsidiary or another company, the identification doctrine is still necessary to determine whether the associated person committed bribery.

The provision has also received criticism for being overly broad. Jordan, a Senior Investigations Counsel with the Foreign Corrupt Practices Unit of the US SEC, believes the "provision is both revolutionary and dangerous."[96] Bean and MacGuidwin refer to it as "by far the most outrageously overreaching aspect of the Act."[97] They question the usefulness of the "adequate procedures" defence, since the occurrence of bribery indicates that the procedures in place were not sufficient to prevent the instance of bribery. In the Ministry of Justice's *Guidance* document, the Ministry listed six principles that should inform a corporate compliance program, but these principles are fairly general and are not binding on a court. These principles of good corporate compliance programs are discussed in Chapter 8 of this book.

In December 2016, Sweett Group PLC pleaded guilty to failing to prevent an act of bribery committed by its subsidiary, Cyril Sweett Interntional Limited, in order to secure a contract with Al Ain Ahlia Insurance Company (AAAI) for the building of the Rotana Hotel in Abu Dhabi.[98] In February 2016, Sweett Group PLC was sentenced and ordered to pay £2.25 million, thus becoming the first company to be fined under section 7 of the *Bribery Act*.[99] The SFO's successful prosecution of Sweett Group speaks to the importance of implementing an adequate anti-corruption compliance program.

Notably, the US also considered codifying this type of compliance defence but ultimately rejected this approach. Instead, the US *FCPA* places positive obligations on companies to make and keep accurate books and records and to maintain a system of internal accounting controls. In Skinnider's paper, "Corruption in Canada: Reviewing Practices from Abroad to Improve Our Response," the compliance defence is described as follows:[100]

> 3. The Affirmative Compliance Defences
>
> The compliance defence provides that corporations will not be held vicariously liable for a violation of the foreign corruption act by its employees or agents if the company established procedures reasonably designed to prevent and detect such violations by employees and

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[96] Jon Jordan, "Recent Developments in the *Foreign Corrupt Practices Act* and the New UK *Bribery Act*: A Global Trend Towards Greater Accountability in the Prevention of Foreign Bribery" (2011) 7 NYU Journal of Law & Business 845 at 865.

[97] Bruce Bean & Emma MacGuidwin, "Expansive Reach, Useless Guidance: An Introduction to the UK *Bribery Act 2010*" (2012) 18 ILSA J Intl & Comp L 323 at 339.

[98] UK Serious Fraud Office, "Sweett Group PLC Pleads Guilty to Bribery Offence" (18 December 2015), online: <https://www.sfo.gov.uk/2015/12/18/sweett-group-plc-pleads-guilty-to-bribery-offence/>.

[99] UK Serious Fraud Office, "Sweett Group PLC Sentenced and Ordered to Pay £2.25 million after Bribery Act Conviction" (19 February 2016), online: <https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/>.

[100] Skinnider (2012) at 15–17. See also updated version by Skinnider and Ferguson (2017).

> agents. Generally this refers to employees and not officers or directors. Such a defence is an affirmative defence for corporations faced with possible criminal charges if the corporation can present "good faith efforts" to achieve compliance with the laws, usually demonstrated by corporate compliance programmes. This defence recognises that despite best efforts and with the utmost diligence, corporations can still find themselves the subject of criminal prosecutions. [footnotes omitted]

2.7 Canadian Law

Pursuant to section 2 of *CFPOA*, the offence provisions *apply* to "persons," as defined in section 2 of the *Criminal Code*. Section 2 of the *Criminal Code* states that "person" includes an organization, which is defined as:

> (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
>
> (b) an association of persons that
>
> (i) is created for a common purpose,
>
> (ii) has an operational structure, and
>
> (iii) holds itself out to the public as an association of persons.

Therefore, companies and other organizations are considered "persons" under *CFPOA* and the *Criminal Code* and may be prosecuted for *CFPOA* and *Criminal Code* offences. It should also be noted that by knowingly engaging in corruption offences on three or more occasions, companies meet the definition of "criminal organization" under section 467.1, and can therefore be prosecuted for the additional criminal organization offences in the *Criminal Code*. Notably, the broad definition of "organization" extends liability to types of organizations that do not have the status of legal persons in the same way that corporations do.

Prior to 2004, corporate criminal liability was based on the common law principle of the directing mind. In 2003, the Canadian Government amended the *Criminal Code* and replaced the common law "directing minds" doctrine with a statutory scheme for corporate criminal liability. This new statutory scheme uses a much broader and more flexible definition of which officials in a corporation are to be "identified" as the corporation in respect to their acts, omissions and states of mind. Via section 34(2) of the federal *Interpretation Act*, the new *Criminal Code* corporate liability scheme also applies to *CFPOA* offences. Section 22.1 of the *Criminal Code* widens the scope of corporate criminal liability in the context of criminal and penal negligence offences, and section 22.2 provides the test for other *mens rea*-based offences. Section 22.2 is the relevant section of the *Criminal Code* for determining corporate liability for offences under the *CFPOA* since those offences require the prosecutor to prove subjective fault. It reads as follows:

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> 22.2 In respect of an offence that requires the prosecution to prove fault—other than negligence—an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers
>
> (a) acting within the scope of their authority, is a party to the offence;
>
> (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
>
> (c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

This statutory scheme for corporate liability for crimes which require subjective fault still relies on the identification theory. However, the common law concept of "directing minds" has been replaced with the broader concept of "senior officers." A "senior officer" is defined in the *Criminal Code* as follows:

> a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer.

"Representative" is defined to mean "a director, partner, employee, member, agent or contractor of the organization."

The term "senior officer" is broader than the common law directing minds concept as it includes persons who are responsible for managing an important aspect of the company's activities. Under the old test, in order for a person to be considered a directing mind, he or she had to be more than a manager of an important aspect of the company's activities; he or she also had to have the authority to design or implement corporate policy. In practice, this made establishing corporate criminal liability very difficult.[101]

In the new definition of "senior officer," the terms "managing" and "an important aspect of the organization's activities" require further definition. So far, there have been very few cases

[101] See Gerry Ferguson, "The Basis for Criminal Responsibility of Collective Entities in Canada" in A Eser, G Heine & B Huber, eds, *Criminal Responsibility of Legal and Collective Entities* (Max-Planck Institute, 1999) at 153-180. See also Kent Roach, *Criminal Law*, 6th ed (Irwin Law, 2015) at 237-238. More recently, see Paul Blyschak, "Corporate Liability for Foreign Corrupt Practices under Canadian Law" (2014) 59:3 McGill LJ 655.

that have interpreted these key parts of the definition of "senior officer.[102] In *R v Metron Construction Corporation*, the Ontario Court of Appeal imposed a fine of $750,000 on the accused corporation for criminal negligence causing death contrary to section 221 of the *Criminal Code*.[103] The negligence charge arose out of a workplace accident caused primarily by serious negligence on the part of the site supervisor and the foreman. The foreman died in the accident along with three other workers. Metron Construction plead guilty to one count of criminal negligence causing death under section 221 of the *Criminal Code*. No doubt the guilty plea was premised on the conclusion that if they disputed criminal liability at trial, they would be convicted on the basis of the new test for criminal liability under section 22.1 and the new duty in section 217.1 of the *Criminal Code*, which requires persons who have the authority to direct the work of others "to take all reasonable steps to prevent bodily harm" to those persons. In a subsequent trial, the site supervisor was found guilty of four counts of criminal negligence causing death.[104] As noted, had Metron plead not guilty, undoubtedly the court would have held that the site supervisor was a "senior officer" and therefore the senior officer's criminal negligence was also Metron's criminal negligence. Under the narrower "directing minds" test applied in Canada before the 2004 amendments, it is highly unlikely that the site supervisor would have been held to be a directing mind of Metron since he had not been delegated "governing executive authority" over a part of the company business.[105] As Warning, Edwards and Todd note, the case demonstrates how sections 22.1 and 22.2 of the *Criminal Code* expand the criminal liability of corporations in Canada to include criminal conduct by employees who are not in an executive management position but nevertheless hold a significant amount of "localized responsibility" within the corporation.[106] As a result, if a company delegates responsibility to a foreign agent to engage in an important aspect of the company's business, the agent is likely to be deemed a senior officer and his or her bribery could be imputed to the company, even if no one else in the company knew the foreign agent was bribing officials.[107]

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[102] In *R v Ontario Power Generation*, [2006] OJ No 4659 (Ont CJ), *R v Tri-Tex Sales & Services Ltd*, [2006] NJ No 230 (NL Prov Ct), and *R v ACS Public Sector Solutions Inc*, [2007] AJ No 1310 (Alta Prov Ct), the courts did not apply sections 22.1 or 22.2 since the alleged offences occurred before Bill C-45 came into force on April 1, 2004. In *R v Watts and Hydro Kleen Services*, [2005] AJ No 568, *R v Niko Resources Ltd*, 2011 CarswellAlta 2521 (Alta QB), and *R v Griffiths Energy International*, 2013 AJ No 412 (QB), all three companies plead guilty. The acts of bribery in those three cases all came from the very top officers of the companies, and therefore the companies would have been convicted on the basis of section 22.1 of the *Criminal Code* had the companies not plead guilty.

[103] *R v Metron Construction Corporation*, 2013 ONCA 541.

[104] *R v Kazenelson*, 2015 ONSC 3639.

[105] The directing mind test in *Canadian Dredge & Dock Co*, [1985] 1 SCR 662, was narrowly interpreted in the subsequent cases of *The Rhône v The Peter AB Widener*, [1993] 1 SCR 497, and *R v Safety Kleen Canada Inc.* (1997), 16 CR (5th) 90 (Ont CA), where the concept of "executive governing authority" was emphasized as an essential requirement for holding an employee, agent or manager to be a "directing mind" of the corporation.

[106] Jeremy Warning, Cheryl Edwards & Shane D Todd, "Canada: After Metron: The Corporate Criminal Liability Landscape in Canada", *Mondaq* (20 August 2012).

[107] Todd L Archibald, Kenneth E Jull & Kent W Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Thomson Reuters Canada, 2017) at 17-35.

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In *R c Pétroles Global Inc.*,[108] the accused company was convicted of price-fixing under the federal *Competition Act*.[109] The company operated 317 gas stations in Ontario, Quebec and New Brunswick. A regional manager (Payette) managed over 200 gas stations in Quebec and New Brunswick and six subordinate territory managers who were responsible for their portion of those 200 stations. The regional manager and two of the territorial managers were involved in the price fixing. At the preliminary inquiry, the judge held that all three were "senior officers" on the ground that each of them managed an "important aspect of the company's activities."[110] At trial, Justice Toth found that the regional manager was definitely a senior officer and therefore his actions and state of mind were the actions and state of mind of the company. Justice Toth held that it was therefore unnecessary to decide whether the two territorial managers were also "senior officers" and he expressly declined to rule on that issue. Justice Toth did note that the definition of senior officer involves a functional analysis that goes beyond the mere title "manager." The management under consideration must involve an important aspect of the company's activities.

Under section 22.2(a), quoted above, a corporation may be criminally liable if a senior officer acting within the scope of his or her authority is a party to a *CFPOA* offence (this would include situations where the senior officer is a party to an offence by virtue of aiding or abetting another in the commission of an offence). In addition, the acts of the senior officer must have been done with the intention, at least in part, of benefiting the corporation. Section

[108] *R c Pétroles Global inc.*, 2012 QCCQ 5749 (QC) (preliminary inquiry), 2013 QCCS 4262 (trial decision).

[109] SC 2009, c 2, s 45(1). It is a "true crime", and therefore the presumption of full subjective *mens rea* applies to it (i.e. intent, recklessness or wilful blindness): *R v H (AD)*, 2013 SCC 28. See also Blyschak, (2014).

[110] The case is only reported in French. This summary is based on a summary of the case in Archibald, Jull & Roach, (2017) at 5:40:50.

22.2(b), quoted above, does not appear to expand the liability of corporations beyond the combined effect of section 22.2(a) and the common law doctrine of innocent agents.[111]

Section 22.2(c), however, does significantly expand the law. Under the common law directing minds doctrine, it was not clear to what extent, if any, a company could be held liable for its omission to take action to prevent bribery. However, this is no longer the case under section 22.2(c). A senior officer's failure to take reasonable steps to stop an employee's offence can now attach liability to the corporation for that offence. Under the Canadian criminal law, citizens are not guilty of an offence for failing to try to stop it or failing to report it, unless the law places a specific duty on specific people in specific circumstances to take reasonable steps to stop the commission of the crime. Section 22.2(c) places obligations on company managers and other senior officers to take all reasonable measures to stop others connected with the organization from being parties to an offence when they are aware that an offence is occurring or is about to occur. This requires a significant level of cooperation among senior officers and encourages timely reporting of any violations. As Macpherson notes, if a senior officer of one department became aware that a representative reporting to another department intended to offer a bribe to a foreign public official, the fact that the senior officer might have no managerial powers within that department is irrelevant; the corporation will be criminally liable unless the senior officer takes all reasonable measures to stop the bribery.[112] Macpherson suggests that reporting up the chain of command, rather than requiring outside reporting to police, should satisfy the "all reasonable measures" requirement; otherwise some senior officers may be placed in conflicts of interest. However, whether the law requires external reporting is not clear.[113] When determining whether a

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[111] This same point is made in Darcy Macpherson, "Extending Corporate Criminal Liability: Some Thoughts on Bill C-45" (2004) 30 Man LJ 253 at 262. He explains the redundant nature of section 22.2(b) as follows:

> In the end, I believe that paragraph 22.2(b) is redundant. If the senior officer directs another representative to commit the *actus reus*, and the other representative does so with the requisite fault element, then the other representative commits the offence and the senior officer abets the other representative. Both are parties to the offence and are thus liable. As long as the senior officer acts within the scope of his or her authority, paragraph 22.2(a) is satisfied and there is no need to resort to paragraph 22.2(b). If, on the other hand, the senior officer directs another representative to commit the *actus reus* and the other representative does so *without* the requisite fault element, then the other representative is an "innocent agent". The innocent agent is ignored for the purposes of the *actus reus*, and the senior officer would commit the offence. In either case, subsection 21(1) of the *Code* would make the senior officer a party to the offence (by virtue of paragraph 21(1)(c) in the former case, or by virtue of paragraph 21(1)(a) in the latter). In my view, paragraph 22.2(b) does not expand the conditions for corporate criminal liability.

[112] *Ibid* at 263.

[113] *Ibid* at 264-265.

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senior officer took all reasonable measures, courts will also likely consider factors relevant to the due diligence defence, such as industry standards and risk management techniques.[114]

Unlike section 7 of the UK *Bribery Act*, section 22.2(c) stops short of prescribing positive obligations to prevent wrongdoing on behalf of company representatives. Section 22.2(c) is only implicated when a senior officer "knows" the representative is or is about to become a party to an offence or when the senior officer is willfully blind to this. It does not include instances when a senior officer is recklessly or negligently unaware that bribery or false accounting is taking place within the corporation.

3. PARTY OR ACCOMPLICE LIABILITY

In most legal systems, the person who gives a bribe and the person who receives a bribe are referred to as the principal offenders. But most legal systems also criminalize the conduct of persons who aid (assist), abet (encourage) or counsel (solicit, incite or procure) the principal offender in the commission of the offence. These persons are referred to as parties, accomplices or secondary parties to an offence. In the US, the UK and Canada, these secondary parties are deemed guilty of the same offence as the principal offender. They are also liable for the same punishments as the principal offender. The actual sentence imposed will depend on the degree of involvement and the degree of responsibility of each offender. Some civil law countries treat secondary parties differently. German law, for instance, punishes a person who incites an offence (a solicitor) in the same way as it punishes a perpetrator of the offence if he or she intentionally induces the perpetrator to commit the offence. A person who intentionally assists the principal (a facilitator) in the commission of the offence is criminally liable, but his or her sentence will be less severe than that of a principal.[115] While virtually all countries criminalize some form of accomplice liability, there are both significant and subtle differences between legal systems with respect to accomplice liability.

3.1 UNCAC

UNCAC requires State Parties to criminalize acts of secondary participation in the offences set out in UNCAC in accordance with the State Party's domestic criminal law. Party liability is addressed in Article 27(1), which states:

> Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic

[114] Archibald, Jull & Roach (2017) at 17-25.

[115] For a comparison of the criminalization of secondary liability in the German and American legal systems, see Markus Dubber, *Criminalizing Complicity: a Comparative Analysis* (2007) 5 Journal of International Criminal Justice 977.

> law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.

Note that Article 27(1) is a mandatory requirement for state parties and that it requires criminalization of "participation in any capacity."

3.2 OECD Convention

Similarly, the OECD Convention mandates that those who are complicit in the act of bribing a foreign public official must be held liable. Article 1(2) requires that each State Party take necessary measures "to establish that complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official shall be a criminal offence."

3.3 US Law

Under section 2 of US Federal Criminal Law (18 USC. § 2), an individual, corporation or other legal entity who "aids, abets, counsels, commands, induces or procures" the commission of an offense or "willfully causes an act to be done which if directly performed by him or another would be an offense" is guilty of that offence and "is punishable as a principal." In this sense, the liability of the aider, abettor, etc., is derivative—it is based on the offense committed by the principal offender. The aider, abettor, etc., is sometimes referred to as a secondary party to distinguish him or her from the principal offender; but, in law the principal offender and the secondary offender are guilty of the same offence. Section 2 of the US Code applies to all federal offenses including the bribery offences in the *FCPA*. For further discussion of corporations as principal offender or aider, abettor or counsellor, see Section 2.5.

While accomplice liability is usually based on *acts*, an *omission* to act may actually assist or encourage the commission of an offence. In the US, there is generally no accomplice liability for omissions to act (e.g., failure to report or stop an act of bribery) unless the law has placed a specific legal duty on that person to act. Accomplice liability in the US also extends in general to ancillary offenses which are a natural and probable consequence of committing the principal offense. If A agrees to assist P to commit bribery and as part of the bribery scheme P threatens V with violence, then A is also liable for the offense of making threats of violence, if such threats were a natural and probable consequence of carrying out the bribery scheme. For a detailed analysis of party liability in the US, see LaFave's book *Substantive Criminal Law*.[116]

[116] Wayne R LaFave, *Substantive Criminal Law,* vol 2, 2nd ed (Thomson/West, 2003) at 325-413.

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3.4 UK Law

Section 8 of the *Accessories and Abettors Act 1861*, as amended by the *Criminal Law Act 1977*, provides that anyone "who aids, abets, counsels or procures" the commission of any indictable UK offence is liable and punishable for that offence as a principal offender. Therefore, anyone who, by an act or omission of a legal duty, assists or encourages the commission of an offence under the *Bribery Act* will be punished in the same way as the principal offender. The accessory must intend to assist the principal offender and must have knowledge of the essential elements of the principal offender's offence. Voluntary attendance at the scene of the crime and a failure to stop the crime are not necessarily sufficient to constitute an act of assistance.[117]

English criminal law also extends liability to all persons who belong to a common unlawful purpose (sometimes called a joint venture) for further offences that are committed by one member of that group in carrying out the common unlawful purpose, provided these further offences are a reasonably foreseeable consequence of carrying out the unlawful purpose. Thus if A, B and C have a common unlawful purpose to bribe a foreign minister in hopes of obtaining a government contract and A, in carrying out the common purpose, forges an official document, then B and C are guilty of forgery if that forgery was a reasonably foreseeable consequence of carrying out the bribery scheme. This form of liability is sometimes referred to as joint enterprise liability or parasitic liability.[118]

A secondary party can be convicted even if the principal is acquitted, provided there is admissible evidence at the secondary party's trial to establish that the offence was committed and that the accused assisted or encouraged the commission of the offence. However, if the secondary party withdraws unequivocally from the common purpose and communicates this in time, he or she will have a defence (in contrast to conspiracy, which offers no defence for withdrawal from an agreement) to any offences committed after the withdrawal by other members of the common purpose.[119]

Pursuant to section 14, the *Bribery Act* also establishes liability for senior company officers, such as directors, managers, company secretaries or those purporting to act in such a capacity, who "consent or connive" in the commission of a *Bribery Act* offence under sections 1, 2 or 6 by a legal entity (see Chapter 2, Section 2.4.2(iv)). It has been suggested that the concept of "consent and connivance" is wider and more flexible than accomplice liability.[120] The concept does not necessarily require that aid be given intentionally; it could also criminalize reckless behaviour. It likely also captures instances where a senior officer knows the bribery offence is occurring, but does nothing to stop it even if the senior officer did not actually aid or encourage the offence's commission. Senior officers can also face party

[117] Ashworth (2009) at 409.
[118] Ormerod (2011) at 213–218.
[119] *Ibid* at 231.
[120] Tarun (2013) at 562-564, quoting from M Raphael, *Blackstone's Guide to the Bribery Act*, 2010 Oxford University Press, 2010).

liability if they consent or connive in the commission of false accounting provisions under the *Theft Act*.

3.5 Canadian Law

The *CFPOA* does not explicitly mention secondary parties to the indictable offence of bribery of foreign public officials. However, via section 34(2) of the federal *Interpretation Act*,[121] all the provisions of the *Criminal Code* that relate to indictable offences also apply to bribery of foreign public officials.[122] Sections 21 and 22 of the *Criminal Code* address secondary party liability. Section 21(1) of the *Criminal Code* criminalizes the actions (or omissions of legal duties) of anyone who aids in the commission of an offence or abets any person in committing an offence. Pursuant to section 21(1), aiders, abettors and principal offenders who actually commit the offence are all guilty of the same offence and subject to the same penalties set out for that offence. As well, pursuant to section 21(2), when two or more people form a common unlawful purpose to commit an offence and during the course of that unlawful purpose one of them commits an ancillary offence, they are all parties to that offence if they knew or ought to have known that the commission of the ancillary offence was a probable consequence of carrying out the common unlawful purpose. A corporation or other organization can also be a member of a conspiracy if the requirements of sections 22.1 or 22.2 of the *Criminal Code* are met (further discussed in Section 2.7 above).

Section 22(1) of the *Criminal Code* makes those who counsel an offence liable for that offence if that offence is committed. If the offence is counselled but not committed, the counsellor is liable for a separate inchoate offence of incitement under section 464 of the *Criminal Code*; that offence is subject to the same punishment as an attempt to commit the offence that was counselled. Section 22(2) creates party liability for the counsellor for all reasonably foreseeable ancillary offences committed by the person counselled. For a more detailed analysis of party liability, see a standard Canadian criminal law textbook.[123]

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[121] *Interpretation Act*, RSC 1985, c I-21.

[122] Despite some contrary views, this includes the *Criminal Code* provisions that criminalize complicity in the committal of an indictable offence. In *Naglingam v Canada (Minister of Citizenship & Immigration)*, 2008 FCA 153, the Court reasoned that pursuant to section 34(2) of the federal *Interpretation Act*, a refugee can be removed from Canada if he or she was a secondary party to one of the serious offences set out in the *Immigration and Refugee Protection Act* (see Fanny Lafontaine, "Parties to Offences under the Canadian *Crimes against Humanity and War Crimes Act*: An Analysis of Principal Liability and Complicity" (2009) C de D 967 at 982).

[123] Don Stuart, *Canadian Criminal Law, Student Edition*, 7th ed (Carswell, 2014) at 751-765; E Colvin & S Anand, *Principles of Criminal Law*, 3rd ed (Carswell, 2007) at 553-584; and M Manning & P Sankoff, *Criminal Law*, 5th ed (LexisNexis, 2015) at 306-332.

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4. INCHOATE OFFENCES

Certain offences are described as inchoate (or uncompleted) crimes, as opposed to "full or complete crimes." The major inchoate crimes are attempt and conspiracy. Many common law legal systems (including the UK and Canada) also criminalize the inchoate offence of counselling an offence which is not committed (sometimes termed incitement). Although referred to as inchoate or incomplete, these offences are nonetheless distinct crimes on their own. Generally, common law states are more willing to punish inchoate crimes than civil law countries. Sweden, for example only punishes attempts for certain crimes, attempted bribery not being one of them.[124] In this section, the UNCAC and OECD provisions on each of these three forms of inchoate offences will be examined, followed by a description of how the law in the US, UK and Canada deals with each offence.

4.1 Attempts

Countries around the world treat attempts to commit an offence in different ways. Some countries, such as Japan and Korea, do not criminalize attempts at all. In countries that do punish attempts, there is general agreement that the criminal law should not punish criminal thoughts alone; attempts are not committed until the offender engages in *some acts* for the purpose of committing the crime. But do *all* acts engaged in for the purpose of committing the offence in question constitute the offence of an attempt? In some countries, certain preliminary acts are classified as mere acts of preparation rather than an attempt, but at a certain point, acts will cross the line from preparation to attempt. Most common and civil law countries do not punish preparatory acts until they have reached the threshold of an "attempt." However, there are some European states that do consider preparatory acts in respect to at least some criminal offences to be a crime. These countries include the Czech Republic (section 8 of the *Criminal Code*), Poland (Article 16 of the *Criminal Code*) and Russia (section 66 of the *Criminal Code*).

In practice, the distinction between mere preparatory acts and actual attempts is often difficult to draw, and the line between them is unclear in many states. Germany, France and a number of other European countries consider the point at which preparation becomes an attempt to be "with the act which immediately precedes the execution of the full offence."[125] In other words, attempted offences are not committed until the offender is very close to executing or completing the full offence. On the other hand, in many common law countries, including the UK, the US and Canada, the threshold of an attempt is reached earlier, before the perpetrator has reached the "last act" stage. Matis characterizes the English criminal law approach as a "midway course" between the point of mere preparation and the last act

[124] Ingeborg Zerbes, "Article 1–The Offence of Bribery of Foreign Public Officials" in Pieth, Low & Bonucci, eds, (2014) 59 at 205.
[125] *Ibid* at 167.

stage.[126] In the US, the Model Penal Code suggests that an attempt begins when the offender has taken "a substantial step" towards the commission of the substantive offence. The point at which countries draw the line between an act of preparation and an attempt is often influenced by the rationale which that country relies upon in criminalizing an attempt. There are three possible rationales:

a) *Prevention*: If there is no offence until the crime is committed (therefore removing police power to intervene before the crime is committed), crime prevention would be thwarted and harm would unnecessarily be caused to victims.
b) *Moral fault*: People who attempt to commit crimes demonstrate a criminal disposition and deserve to be punished. Their state of mind is as morally blameworthy as persons who are successful in completing the crime.
c) *Deterrence*: Punishing attempts may be necessary to deter others who may be contemplating the commission of a similar crime.

The law of attempts also raises the issue of whether voluntary withdrawal from an attempt forms a defence. Withdrawal, or voluntary desistance, refers to instances where the perpetrator has reached the stage of attempt, but has a change of heart before the full offence is completed. France, Germany and Norway accept a defence of voluntary withdrawal, while other countries like Australia have rejected this notion.[127]

4.1.1 UNCAC

In consideration of the different approaches to the criminalization of attempts among the international community, UNCAC does not impose mandatory obligations on states to criminalize attempts or other types of preparatory actions in regard to most corruption-related offences. Article 27(2) provides a State Party "may" create an offence of attempted bribery. Article 27(3) provides that a State Party "may" create an offence for engaging in preparatory acts to commit bribery. Articles 27(2) and (3) state:

> 2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.
> 3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.

It is interesting to note that UNCAC is more prescriptive with regard to money laundering. Article 23(1) provides that State Parties "shall, subject to the basic concepts of its legal system

[126] Stephen Matis, "Criminal Attempts and the Subjectivism/Objectivism Debate" (2004) 17 Ratio Juris 328 at 333.
[127] Stuart (2014) at 712–713.

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… establish criminal offences" in respect to "attempts to commit" any of the money laundering offences listed in Article 23.

4.1.2 OECD Convention

The OECD Convention also respects the fact that countries take different approaches to the criminalization of inchoate offences. Article 1(2) states that an "[a]ttempt ... to bribe a foreign public official shall be a criminal offence to the same extent as an attempt ... to bribe a public official is an offence" in one's own country. The *Commentaries on the OECD Convention* accompanying the Convention clarify that:

> The offences set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorisation, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party's legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.[128]

Consequently, the OECD Working Group on Bribery does not look unfavourably on the legal systems of states that do not punish attempted bribery, such as Sweden, Japan and Korea.[129] It is also worth noting that the offence of attempted bribery of a foreign official would likely only cover a narrow ambit of behaviour, since offering or promising a bribe to a foreign public official is treated as part of the offence of bribery under the OECD Convention. Zerbes notes that in some countries the offer to bribe is considered complete before the offer reaches the foreign public official: "A mere attempt to commit bribery is not envisaged by the *FCPA*, nor by Belgian, Finnish, French, Hungarian, or Spanish law, given the fact that they all regard the full offence as having been committed when someone seeks to induce a public servant."[130]

The Convention also does not address other points of difference among states, such as how severely attempts are punished or whether attempts to commit offences that are factually impossible are criminalized.[131]

4.1.3 US Law

Most state penal codes and the US Model Penal Code have a provision in their general part which makes it an offense to attempt any offense. Some state penal codes and the US Code

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[128] *Commentaries on the OECD Convention* (1997), appended to the Convention at 15, para 11.
[129] Zerbes, in Pieth, Low & Bonucci, eds. (2014) 59 at 205.
[130] *Ibid.* While the US Code, which includes offences of bribery, does not have a general provision on attempts, the Code does penalize attempts of some offences, as discussed below, including attempts to commit bribery through the mails.
[131] *Ibid* at 170.

only penalize attempts within the context of specific offenses.[132] In US law, a key point is whether the conduct of the accused has gone beyond mere acts of preparation and entered the realm of attempts. The details of the US law of attempts can be found in any standard American textbook of criminal law.[133] Voluntary abandonment of an attempt (i.e., the plan to commit an offense) is recognized as a defense under the Model Penal Code and under many state penal codes.[134] Because the offense of bribery is broadly stated in section 78dd-1, it is not generally necessary to resort to attempted bribery. In section 78dd-1, bribery includes not only the completed offense "of paying the bribe and receiving the benefit," but also the "uncompleted" offenses of "offering, authorizing or promising" to pay a bribe, even if nothing further happens in regard to the actual payment of the bribe. Thus, attempts to bribe a foreign official will be caught in the full offense of bribery as defined in section 78dd-1.

4.1.4 UK Law

Under section 1 of the *Criminal Attempts Act 1981*, it is an offence to attempt to commit any offences that are indictable in England and Wales. Section 1(4) stipulates that it is not an offence to attempt to commit conspiracy or to attempt to aid, abet or counsel a substantive offence. Under section 1(1), a person is guilty of attempting to commit an offence if, with the intention of committing an applicable offence, "a person does an act which is more than merely preparatory to the commission of the offence." Once a person's actions have reached the stage of attempting an offence, the attempt is complete. It is not a defence if the perpetrator voluntarily withdraws from the attempt, although voluntary desistance may be evidence that the accused never really had the requisite intent to commit the substantive offence to begin with.[135] Historically, UK courts applied the "last step" test (i.e., to be classified as an attempt the accused's conduct must have reached the last step before completion of the full offence). More recent case law suggests that the offender does not need to have commenced the last act before the completion of the substantive offence, but the precise line between merely preparatory acts and actual attempts is still unclear. As with US law, the law of attempts is not frequently resorted to for *Bribery Act* offences since the offences of bribery in that *Act* involve not only giving or receiving a bribe, but also offering to give or promising to give, or requesting or agreeing to receive, a bribe.

4.1.5 Canadian Law

Section 34(2) of the federal *Interpretation Act* states that all the provisions of the *Criminal Code* that relate to indictable offences also apply to the offence provisions of other federal statutes.[136] Therefore, although not explicitly noted in *CFPOA*, the three major inchoate offences in Canada (counselling a crime not committed, attempt and conspiracy) apply to *CFPOA* offences of bribing a foreign public official and falsifying books and records. These

[132] See e.g. the offences of attempts and conspiracy to commit bribery through the use of the mail, § 1349, 18 USC.
[133] See, e.g. LaFave, (2003) at 204-252.
[134] *Ibid* at 242-249.
[135] D Baker and G Williams, *Textbook on Criminal Law*, 3 ed (Sweet & Maxwell, 2012) at 547.
[136] RSC, 1985 c I-21.

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inchoate offences also apply to domestic corruption offences, which are found in the *Criminal Code*.

Pursuant to section 24(1) of the Canadian *Criminal Code*, anyone who, with the intention to commit an offence, "does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence." However, section 24(2) clarifies that mere preparation to commit an offence is not considered an attempt.

Like other legal systems, Canadian courts have struggled with the distinction between preparatory acts and attempts. In the 1986 Supreme Court of Canada decision in *R v Deutsch*, the Court held that there is no general rule for distinguishing between preparation and an attempt and that the distinction should be left to the common sense of the trial judge.[137] Writing for the majority, Justice Le Dain went on to state:

> In my opinion the distinction between preparation and attempt is essentially a qualitative one, involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must necessarily be given, in making that qualitative distinction, to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused remaining to be accomplished.[138]

The Court's failure to express a clear test to determine whether particular acts fulfill the *actus reus* requirement of an attempt offence remains troubling to some commentators, who argue that criminal law principles demand that a more clear formulation of the *actus reus* of attempt offences be available to the public.[139] The issue of whether voluntary withdrawal is a defence to an attempt charge has not been fully considered in Canada.[140]

The maximum penalty under section 463 of the *Criminal Code* for attempts to commit indictable offences other than those punishable by life in prison is half the maximum penalty that would have been available had the attempt succeeded.

4.2 Conspiracy

The offence of conspiracy involves at its core an agreement between two or more persons to commit an offence. Many civil law countries only criminalize conspiracy to commit a limited number of very serious crimes, which generally do not include bribery. Most common law countries criminalize conspiracy to commit a broader range of offences, including the offence

[137] *R v Deutsch*, [1986] 2 SCR 2.
[138] *Ibid* at para 30.
[139] Stuart (2014) at 707.
[140] *Ibid* at 706.

of bribery.[141] Unlike the law of attempts, conspirators may be convicted when no concrete steps beyond reaching the agreement have been taken. The criminalization of conspiracy is more controversial than the criminalization of attempts. Conspiracy occurs well before an attempt to commit an offence, and its criminalization can lead to a form of collective guilt that may unfairly punish individuals for the wrongdoing of others. In the past, the criminalization of conspiracy has also been used to suppress political dissent. However, the availability of an offence of conspiracy to commit corruption offences allows enforcement agencies to arrest perpetrators before harm has occurred and can be an effective weapon against organized crime.[142]

4.2.1 UNCAC

While Article 27 of UNCAC specifically references the adoption of provisions criminalizing parties to bribery and attempts to commit bribery, UNCAC is silent on conspiracy to commit bribery. However, Article 23 states that "subject to the basic concepts of its legal system, State Parties shall establish a criminal offence for conspiracy to commit" any of the money laundering offences in Article 23.

4.2.2 OECD Convention

As with attempts, rather than mandating a globally consistent approach, Article 1(2) focuses on consistency within the domestic context when dealing with criminalization of conspiracy. A conspiracy or an attempt to bribe a *foreign* official must be penalized in the same way (if any) as conspiracies or attempts to bribe *domestic* public officials.

4.2.3 US Law

The US criminalizes conspiracies to bribe foreign public officials. Charges under the *FCPA* will often be accompanied by a charge under the federal general conspiracy statute (18 USC § 371), which makes it a crime to conspire to commit an offense against the US or to conspire to defraud the US. The applicable punishment is either a fine or a prison term of up to five years (unless the object of the conspiracy is a misdemeanor offense, in which case the punishment shall not exceed the maximum punishment for that offense). The elements of the offense of conspiracy to commit bribery can be found in Tarun's book *The Foreign Corrupt Practices Act Handbook*.[143] He lists the four elements of a federal conspiracy as follows:

a. An agreement by two or more persons,
b. To commit the unlawful object of the conspiracy,

[141] Ingeborg Zerbes, "Article 1 – The Offence of Bribery of Foreign Public Officials" in Pieth, Low & Bonucci, eds, (2014) 59 at 208.
[142] For a discussion of the arguments for and against the criminalization of conspiracy see Aaron Fichtelberg, "Conspiracy and International Criminal Justice" (2006) 17 Crim LF 149.
[143] Tarun (2013) at 26-27.

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c. With knowledge of the conspiracy and with actual participation in the conspiracy, and

d. The commission of an overt act in furtherance of the conspiracy by at least one co-conspirator.

It is important to note that the conspiracy offense is not complete until one of the co-conspirators commits an overt act in furtherance of the conspiracy. This does not have to be a criminal act in its own right, but can be a non-criminal preparatory act, such as opening a bank account that is to be used as a part of the bribery scheme. By contrast, the offence of conspiracy in the UK and Canada does not require any overt acts in furtherance of the conspiracy. The law of conspiracy in the US is set out in detail in LaFave's book *Substantive Criminal Law.*[144]

Tarun notes that charging individuals or corporations with both a general conspiracy offence and a substantive *FCPA* offence offers several advantages to the prosecution. In this regard, he states:[145]

> First, the ongoing nature of conspiracy lends itself to expansive drafting, particularly in temporal terms. Conspiracies frequently are alleged to have continued for years and occasionally decades. Second, the breadth and vagueness of a conspiracy count allow the admission of much proof that might otherwise be inadmissible. Third, a conspiracy count enables the government to broadly join persons and allegations. A conspiracy can allege an agreement to defraud multiple entities, individuals, and companies or both the government (e.g., the Securities and Exchange Commission) and private entities and individuals. Fourth evidentiary rules with respect to co-conspirator declarations enlarge the admissibility of often-damaging statements in conspiracy trials [Under the US Federal Rules of Evidence, out of court statements made by a co-conspirator in furtherance of the conspiracy may be admitted against the accused]. Fifth, because the conspiracy is a continuing crime, its five-year statute of limitations does not begin to run until either the conspiracy's objectives are met, the conspiracy is abandoned, its members affirmatively withdraw, or the last overt act committed in furtherance of the conspiracy occurs. [footnotes omitted]

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[144] LaFave (2003) at 253-324. For more details concerning the law of conspiracy in the United States, see Neal Kumar Katyal, "Conspiracy Theory" (2003) 112 Yale LJ 1307, online: <http://www.yalelawjournal.org/article/conspiracy-theory>, and Paul Marcus, "The Crime of Conspiracy Thrives in Decisions of the United States Supreme Court" (2015) 64 U Kan L Rev 373, online: <http://scholarship.law.wm.edu/facpubs/1797/>.

[145] Tarun (2013) at 26.

4.2.4 UK Law

For the purposes of most corruption-related offences, the old common law offence of conspiracy has been replaced with the *Criminal Law Act 1977*.[146] Section 1(1) of the *Act* provides that a person is liable for conspiring to commit an offence if that person agrees with at least one other person to pursue a course of conduct that, if carried out according to plan, would necessarily involve the commission of any offence. The key element is the agreement. Evidence of negotiations without proof of an agreement is insufficient.[147] To be convicted, the defendant must have intended to enter the agreement, intended that the purpose of the agreement be carried out, and had knowledge of the relevant circumstances.[148] Recklessness rather than actual knowledge of these circumstances is insufficient.[149] If a defendant withdraws from a conspiracy immediately after entering the agreement, this does not provide a defence, but may be used to mitigate the sentence.[150] A company may be a party to a conspiracy if an officer forming part of its directing mind enters the agreement on the company's behalf.[151]

The courts discourage the charging of both conspiracy and the substantive crime that the parties conspired to commit due to the length and complexity of resulting trials and the unfairness of convicting accused persons for two separate crimes for what constitutes one continuous transaction. However, charging both offences can provide the prosecution with evidentiary advantages.[152]

English courts will have jurisdiction over a conspiracy offence if the agreement is made in England or Wales to commit an offence abroad or if an agreement was made abroad to commit an offence in England or Wales, regardless of an absence of acts done in furtherance of the agreement in England or Wales.[153]

4.2.5 Canadian Law

In *R v Karigar*, the court noted that section 3 of the *CPFOA* incorporates the idea of conspiracy. As stated by the court, "a conspiracy or agreement to bribe foreign public officials is a violation of the *Act*. … the use of the term 'agrees' imports the concept of conspiracy."[154] The court further elaborated that the agreement need not be between the giver and receiver of the bribe. Even if the word "agrees" in section 3 of the *CFPOA* does not

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[146] Note that the common law offence of conspiracy to defraud remains in force: Baker & Williams, (2012) at 568. For more on common law conspiracy, see Ormerod (2011) at 447–456.
[147] Baker & Williams, (2012) at 570.
[148] *Ibid* at 580.
[149] *Ibid* at 586.
[150] Ormerod (2011) at 424.
[151] AP Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 4th ed (Oxford: Hart, 2010) at 324.
[152] Ormerod (2011) at 445.
[153] *Ibid* at 446–447.
[154] *R v Karigar*, 2013 ONSC 5199 at para 28.

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import the concept of conspiracy, the *Criminal Code* provisions on conspiracy also apply to the bribery offences in the *CFPOA*.[155] Conspiracy to commit an indictable offence is set out under section 465(1)(c) of the *Criminal Code* as follows:

> every one who conspires with any one to commit an indictable offence ... is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable.

The essence of the offence consists of an agreement between two or more persons to commit an indictable offence. There must be a common agreement between the parties to work together to commit the offence(s). Unlike the US conspiracy offence, there is no requirement that one of the co-conspirators take any action in furtherance of the conspiracy. The offence is complete the moment the agreement is reached. Like in the US, hearsay evidence spoken by a co-conspirator is admissible against the other conspirators, although there must be independent evidence of a conspiracy before this information may be used in court. Because of this permissive evidence rule, the conspiracy charge is sometimes referred to as "the prosecutor's darling."[156] The criminalization of conspiracy is generally justified by the principle that two people with a plan to commit an offence are more dangerous than one person plotting alone. This justification has been questioned, and numerous commentators and organizations have called on the Canadian government to narrow the offence of conspiracy.[157]

Canadian courts have territorial jurisdiction over defendants who conspire in Canada to commit an act abroad that constitutes an offence both in Canada and the foreign country. Further, Canada will have jurisdiction if the defendant conspires elsewhere to commit any act in Canada that is an offence in Canada.[158]

4.3 Incitement (or Solicitation)

Inciting or counselling an offence that is later committed by the person who was counselled makes the incitor or counsellor a party to, and therefore guilty of, the offence committed. But suppose a person incites or counsels another person to commit an offence, but that other person does not commit it. The incitor or counsellor cannot be a party to the offence counselled because that offence was never committed and his or her acts of counselling or inciting are too preliminary to convict the person of an attempt to commit the offence. Some countries have created a separate inchoate offence for counselling an offence that is not committed, which is called incitement in the UK and Canada and solicitation in the US.

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[155] Section 32(4) of the *Interpretation Act*, RSC 1985, C I-21.
[156] Stuart (2014) at 724.
[157] *Ibid* at 733-734.
[158] Deming (2014) at 51.

4.3.1 UNCAC and the OECD Convention

The inchoate offence of incitement is not specifically mentioned in either UNCAC or the OECD Convention. But there is no pressing need for this type of separate inchoate offence, since the definition of bribery under both conventions includes conduct such as "requesting a bribe," regardless of whether the bribe is paid, or "offering a bribe," regardless of whether the bribe is accepted or not.

4.3.2 US Law

The inchoate offence of incitement (which includes counselling, encouraging, instigating or soliciting) is referred to as the offence of solicitation in the US. The elements of this inchoate offence can be found in a standard American textbook on criminal law.[159] However, because of the expanded definition of the offense of bribery in section 78 dd-1, there is little or no need to use the offence of solicitation in respect to bribery offenses.

4.3.3 UK Law

In the UK, the common law offence of incitement was recognized by at least 1769.[160] It has now been replaced by section 44 of the *Serious Crimes Act 2007*. Under this section, those that intentionally commit acts that are capable of encouraging or assisting in the commission of an offence are themselves committing an offence, regardless of whether the substantive offence is carried out and regardless of whether their acts actually encourage or assist the principal offender. In order for the offence to be made out, the person doing the encouraging or assisting (D1) must intend to assist or encourage the substantive offence, or must believe that the substantive offence will be committed and that their acts will encourage or assist its commission. Section 65 clarifies that acts reducing the risk of criminal proceedings for the principal offender are considered to be capable of assisting or encouraging the commission of an offence.[161]

English courts have jurisdiction if the defendant knew or believed that the substantive offence would be committed in England or Wales, regardless of where the acts of encouragement or assistance took place. English courts also have jurisdiction if the encouragement or assistance took place in England or Wales, but the defendant knew or believed the substantive offence would take place abroad so long as the defendant knew the offence was illegal both in the UK and in the country of the substantive offence.[162]

4.3.4 Canadian Law

A person who counsels another person to commit an offence that is later committed is considered a party to that offence (section 22 of the *Criminal Code*). However, a person who

[159] LaFave (2003) at 188-204.
[160] *R v Vaughan*, 98 ER 308 (1769). See also *R v Higgins*, 102 E.R. 269 (1801).
[161] Ormerod (2011) at 465.
[162] Simester et al (2010) at 357.

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counsels another to commit an offence that is not committed is guilty of a different offence that is sometimes referred to as the offence of incitement. Section 464 of the *Criminal Code* states:

> 464. Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,
>
> (a) every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable; and
>
> (b) every one who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.

The term "counselling" is wide and, pursuant to section 22(3) of the *Criminal Code*, "includes procuring, soliciting or inciting." The *mens rea* of the offence requires an intention that the counselled offence be committed or recklessness in the sense of a conscious disregard for a substantial and unjustified risk that the offence counselled was likely to be committed.[163] The offence of incitement under section 464 has not been used in Canada so far to prosecute a person who counsels bribery that was not actually committed. It could have been used in the prosecution of Wallace and three other Canadians in respect to the alleged bribe offer in the Padma River Bridge project in Bangladesh (see Section 1.1 of Chapter 1).

[163] *R v Hamilton*, [2005] 2 SCR 432.

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CHAPTER 4

MONEY LAUNDERING

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1. INTRODUCTION TO MONEY LAUNDERING

The term "money laundering" describes a range of practices used to disguise the source of illicit profits and integrate them into the legitimate economy. Simply put, money laundering means 'washing' dirty money so that it appears clean. Corrupt officials and other criminals use money laundering techniques to hide the true sources of their income. This allows them to avoid detection by law enforcement and to spend their profits freely. Money laundering in some form is an essential part of most illicit enterprises, although methods vary widely. Large drug-trafficking organizations and corrupt public officials use complex, multi-jurisdictional layering schemes; small-time criminals use simpler strategies.

As Baker points out in a 2013 article, all the illicit funds in the global economy flow through similar channels. Drug smugglers, tax evaders and corrupt officials use their money for different ends and acquire it by different means. Nonetheless, Baker notes:

> All three forms of illicit money – corrupt, criminal, and commercial – use this structure, originally developed in the West originally for the purpose of moving flight capital and tax evading money across borders. In the 1960s and 1970s drug dealers stepped into these same channels to move their illicit money across borders. In the 1980s and 1990s, seeing how easy it was for the drug dealers to do it, other kinds of racketeers stepped into these same structures to move their illicit money across borders. In the 1990s and in the early years of this new century, again seeing how easy it was for drug dealers and racketeers, terrorist financiers also stepped into these same channels to move their illicit money across borders. Drug dealers, criminal syndicate heads, and terrorist masterminds have not invented any new ways of shifting illicit money across borders. They merely utilize the

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> mechanisms we originally created to move corrupt and commercially tax evading money across borders.[1]

Therefore, suppressing money laundering through a variety of anti-money-laundering (AML) schemes is essential to combating terrorist financing, organized crime and corruption. What Baker calls the "global shadow financial system" is integral to a broad range of corrupt and criminal activities worldwide.[2] Indeed, as Beare notes, while the 1931 arrest, conviction and downfall of Al Capone is often dismissed as being "merely for tax evasion," his undoing was in fact due to a failure to launder illicit money adequately.[3]

Because the purpose of money laundering is to conceal the source of illicit funds, it is inherently difficult to measure its global scope. In a recent article, McCarthy summarizes some of the more common estimates:[4]

> The IMF and the World Bank, for example, have estimated that some 2-4 per cent of the world's GDP stems from illicit sources. Agarwal and Agarwal (2004; 2006), using regression analysis and forecasts, suggest an even higher level of 5-6 per cent. At this rate somewhere between $2.0-2.5 trillion should flow through the money laundering market on an annual basis. Walker (1999, 2004, 2007) however, claims that this is too low a figure and, using input-output and gravity models, proposes that the true amount is more like $3 trillion per annum. Each estimate is subject to some criticism (cf. Reuter 2007), and are variously said to be overblown – either by media hype, or measurement errors – by as much as +/- 20 per cent (Schneider, 2008). Despite all this the consensus remains that the market for money laundering is a significant one. [footnotes omitted]

Despite the wide range of estimates, there is a degree of consensus among researchers. No one has an accurate estimate, but everyone agrees that a large amount of money is being laundered every year.

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[1] Raymond W Baker, "The Scale of the Global Financial Structure Facilitating Money Laundering" in Brigitte Unger & Daan van der Linde, eds, *Research Handbook on Money Laundering* (Edward Elgar, 2013) 190 at 191.

[2] *Ibid* at 190.

[3] Margaret Beare, *Criminal Conspiracies - Organized Crime in Canada*, (Oxford University Press, 2015) at 208.

[4] Killian J McCarthy, "Why Do Some States Tolerate Money Laundering? On the Competition for Illegal Money" in Unger & van der Linde, eds, (2013) 127 at 129.

2. THE ESSENTIAL ELEMENTS OF MONEY LAUNDERING

There are many ways to launder money. Most scholars break laundering schemes into three stages to make it easier to compare, contrast and analyze different methods. These three stages are:

1. **Placement**: illicit funds are used to make a purchase in the legitimate economy;
2. **Layering**: through repeated transactions, the source of the funds is concealed; and
3. **Integration**: the funds are fully and untraceably integrated into the economy.

Regardless of how a money laundering scheme works, it can be broken into these three stages. The "layering" stage, in which the source of the funds is concealed, is where most of the activity occurs in any given scheme. In small-scale schemes, the layering process may be quite simple. In large, complex laundering schemes, it may involve hundreds of transactions in multiple jurisdictions.

A useful and easily readable description of the basic concepts of money laundering and its prevention can be found in the Global Organization of Parliamentarians Against Corruption (GOPAC)'s 2011 guide, the *Anti-Money Laundering Action Guide for Parliamentarians*.[5] GOPAC is a non-profit organization made up of current or former legislators from around the globe. The organization is dedicated to promoting accountability and good governance in national parliaments in order to combat corruption.

3. THE MOST COMMON METHODS OF MONEY LAUNDERING

As noted above, the term "money laundering" encompasses a wide variety of different schemes used by everyone from small-time drug dealers to corrupt heads of state. As Beare notes, "[i]t is impossible to identify all the laundering possibilities - from cults to marathons and beyond," noting in the 1990s the Solar Templar doomsday cult was accused of being a front for laundering, and the Los Angeles Marathon Corporation was convicted of money laundering. Methods of money laundering can be as simple as small businesses dealing in cash using illicit cash to generate greater profits or as complex as international schemes using methods of concealing funds including offshore laundering havens, shell companies and wire transfers.[6] Beare identifies four typologies of money laundering schemes. *Simple-limited* schemes launder relatively small volumes of illicit proceeds through small cash-based businesses such as bars and vending machine companies. *Simple-unlimited* schemes can launder large amounts of money with few transactions utilizing big-budget companies with unclear resources, materials and service costs. *Serial-domestic* schemes use numerous

[5] Global Organization of Parliamentarians Against Corruption, *Anti-Money Laundering Action Guide for Parliamentarians* (GOPAC, 2011), online: <http://www.gopacnetwork.org/Docs/GOPAC_AML_ActionGuide_EN.pdf>.

[6] Beare (2015) at 243-44.

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financial transactions, moving funds through a network of transactions that involve multiple banks. *Serial-international* schemes use multiple transactions and international services, often returning funds into big banks in North America and Europe. Both *serial domestic* and *serial-international* schemes can use professionals such as lawyers and accountants.[7] The Liberty Reserve Global takedown demonstrates complex schemes used by money launderers. Liberty Reserve offered a digital currency service based in Costa Rica. The DOJ created a diagram of the complexity of the investigation, which involved 17 countries and 36 mutual legal assistance treaty (MLAT) requests in 15 countries for execution of search warrants, wiretap authorizations, freezing or seizing assets, all of which culminated in 5 arrests.[8]

This chapter focuses on money laundering in the context of corruption. While a great deal of global AML efforts are directed towards controlling organized crime and preventing terrorist financing, those topics are beyond the scope of this book. The following excerpt from "Laundering the Proceeds of Corruption," a 2011 report produced by the Financial Action Task Force (FATF), describes the most common money-laundering methods used by corrupt officials.[9] The FATF is an inter-governmental policy group composed of 34 nations, including the US, the UK and Canada, which sets standards in the form of the FATF 40 Recommendations, promotes procedures for combatting money laundering and evaluates member states' performance.

BEGINNING OF EXCERPT

An Analysis of the Most Common Methods Used to Launder the Proceeds of Grand Corruption

40. Laundering of corruption proceeds can take a variety of forms, depending on the nature of the corrupt act. In the grand corruption context, the most prevalent forms of proceeds are those arising from 1) bribe-taking or kickbacks; 2) extortion; 3) self-dealing and conflict of interest; and 4) embezzlement from the country's treasury by a variety of fraudulent means. Understanding the typical methods by which PEPs ["politically exposed persons" – a technical term for public officials in the AML context] unlawfully obtain proceeds assists in understanding how those funds could be laundered.

41. In bribery, money flows from a private entity, generally speaking, to a PEP or associate in exchange for the grant of some sort of government concession: a contract for goods or services, for example, or the right to extract resources from the state. The

[7] *Ibid* at 215-16.
[8] United States, Department of Justice, "The Liberty Reserve Global Takedown", online: <https://www.justice.gov/sites/default/files/usao-sdny/legacy/2013/05/30/visual.pdf>.
[9] Financial Action Task Force, "Laundering the Proceeds of Corruption: FATF Report" (FATF, July 2011), online: <http://www.fatf-gafi.org/media/fatf/documents/reports/Laundering the Proceeds of Corruption.pdf>.

proceeds of the bribery flow from the bribe giver to the corrupt PEP or an associate, possibly through a shell company or trust in which the PEP is the beneficial owner; it may never touch the home country of the corrupt PEP. A good example of this is found in the Bangkok film festival case, in which two promoters were able to bribe certain Thai officials to obtain the rights to sponsor and manage a government-funded film festival in Thailand.[10] The bribes were paid simply by means of the wire transfer of funds from US-based accounts, where the promoters were located, into offshore accounts in third countries maintained by family members of the PEP. The bribes never passed through Thailand, although that was the locus of the corrupt activity.

42. However, as noted later in the section on the use of cash, sometimes funds are retained in the country where the corruption takes place. For example, Joseph Estrada, then the President of the Philippines, often received cash or check payments from gambling operators in exchange for their protection from arrest or law enforcement activities. This money was simply deposited into domestic accounts in the name of a fictional person or in corporate vehicles established by Estrada's attorney, and then used for a variety of expenses.[11] Likewise, in the case of the bribery of US Congressman Randall Cunningham, who was a senior legislator with significant control over military expenditures, a military contractor bribed him both by checks to a corporation controlled by Cunningham, but also by agreeing to purchase real estate owned by Cunningham at a vastly inflated price.[12]

43. Proceeds are also generated through extortion schemes. In such schemes, funds are passed from the victim to the PEP. This can be done within the country or elsewhere. Pavel Lazarenko, former Prime Minister of Ukraine, regularly required entities that wished to do business in Ukraine to split equally the profits of the enterprise with him in exchange for his influence in making the business successful. These businesses would transfer a share of ownership to Lazarenko associates or family members, and money would be wired from the victim companies to offshore accounts controlled by Lazarenko.[13]

44. Self-dealing occurs when a PEP has a financial interest in an entity which does business with the state. The PEP is able to use his official position to ensure that the state does business with the entity, thereby enriching the PEP. A US Senate report noted a situation in which one West African PEP was responsible for selling the right to harvest timber from public lands, while at the same time owning the same company

[10] [39] *United States v. Green, et al*, (2010) court documents. Kickbacks and bribes generally have no legal distinction. In ordinary parlance, a kickback typically refers to the payment of a percentage of a specific contract, while bribery is simply the unrestricted payment of money.
[11] [40] *People of the Philippines v. Estrada* (2007), court decision.
[12] [41] *United States v. Cunningham* (2006), court documents.
[13] [42] *United States v. Lazarenko* (2006), court decision.

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that had been awarded those rights.[14] In such situations, money would flow from the affected country's accounts or central bank to accounts owned by the corporation or entity owned or controlled by the PEP.

45. Finally, embezzlement schemes are used in a number of corruption cases. Money flows can occur in a number of ways, using a variety of methods. In the case involving former governor of Plateau state in Nigeria, Joshua Dariye, for example, a grant for environmental contracts was made from the federal government to the State, and the money was deposited into a bank account established by the State. Dariye used his influence to cause the bank to issue a bank draft creditable to an account at a different Nigerian bank that Dariye had established under an alias about ten months previously.[15] In the case involving Sani Abacha, then the President of Nigeria, Abacha directed his national security advisor to create and present false funding requests, which Abacha authorised. Cash "in truckloads" was taken out of the central bank to settle some of these requests. The national security advisor then laundered the proceeds through domestic banks or Nigerian and foreign businessmen to offshore accounts held by family members.[16]

46. Thus, it would appear that all stages of the money laundering process – placement, layering, and integration – are present in the laundering of proceeds regardless of the manner of corruption. The specific methods by which the funds are actually laundered are discussed below.

END OF EXCERPT

3.1 Use of Corporate Vehicles and Trusts

BEGINNING OF EXCERPT

47. The project team's review of the case studies showed that every examined case featured the use of corporate vehicles, trusts, or non-profit entities of some type. That this is the case should perhaps not be surprising; corporate vehicles and trusts have long been identified by FATF as posing a risk for money laundering generally, and

[14] [43] Permanent Subcommittee on Investigations (2010), pp. 24-25.
[15] [44] *Federal Republic of Nigeria v. Joshua Chibi Dariye* (2007) (UK) court documents.
[16] [45] Okonjo-Iweala, The Nigerian Experience (2007) unpublished World Bank case study.

are addressed in Recommendations 33 and 34.[17] WGTYP [Working Group on Typologies] long ago noted in its 1996-1997 Report on Money Laundering Typologies of the common use of shell corporations, and the advantages they provide in concealing the identity of the beneficial owner and the difficulty for law enforcement to access records.

48. WGTYP issued a report detailing the risks of misuse of corporate vehicles and trusts in October 2006.[18] The intervening ten years changed little. As that report noted, "[o]f particular concern is the ease with which corporate vehicles can be created and dissolved in some jurisdictions, which allows these vehicles to be…misused by those involved in financial crime to conceal the sources of funds and their ownership of the corporate vehicles." This point was again made more recently in FATF's 2010 typology, Money Laundering Using Trust and Company Service Providers.[19]

49. These typologies, as well as other publically available information, set forth the money laundering risks that corporate vehicles and trusts present, regardless of the predicate crime. Features of corporate vehicles that enhance the risk of money laundering include:

- the ease with which corporate vehicles can be created and dissolved in some jurisdictions;
- that a vehicle can be created as part of a series of multi-jurisdictional structures, in which a corporation in one jurisdiction is owned by one or more other corporations or trusts in other jurisdictions;
- the use of specialised intermediaries and professionals to conceal true ownership;
- the ease in which nominees may be used to disguise ownership, and corporations;
- and other vehicles whose only purpose is to disguise the beneficial owner of the underlying asset.[20]

50. Moreover, each jurisdiction has its own set of requirements regarding identification of the beneficial owner and the circumstances under which that information may be accessed. As discussions within the FATF regarding clarification

[17] [46] In preparation for the fourth round of mutual evaluations, the FATF has recently started a review of some key components of the Recommendations, including transparency of legal persons and arrangements. In February 2012, the FATF plenary will consider the WGEI [Working Group on Evaluations and Implementation] recommendation on amending the standards related to the transparency of legal persons and arrangements.
[18] [47] FATF (2006).
[19] [48] FATF (2010b).
[20] [49] See, e.g., United States Government Accountability Office (2006).

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of the standards related to beneficial ownership have demonstrated, few jurisdictions collect beneficial ownership information at the time of company formation, increasing the challenges of international cooperation. Each of these features has the effect of making it more difficult for financial institutions, regulators, and law enforcement to obtain information that would allow for an accurate understanding of the ownership and control of the assets involved and the purposes for which specific financial transactions are conducted. Some vehicles are even designed to protect against asset confiscation; certain trusts, for example, require the trustee to transfer assets upon receiving notice of a law enforcement or regulatory inquiry.[21]

51. The ease by which an individual can obtain a corporate vehicle is highlighted by J.C. Sharman's recently-published foray into purchasing shell corporations. Sharman, a professor at Griffith University in Brisbane, Australia, noted that of 45 service providers he was able to contact, 17 of them were willing to form the company with only a credit card and mailing address (to receive the documents). [22] Sharman acknowledged that the relatively small sample size of his study "necessitates a degree of modesty about the findings," and that obtaining a bank account for the corporations without divulging an identity would be more difficult. Nevertheless, as he notes, "If one law-abiding individual with a modest budget can establish anonymous companies and bank accounts via the Internet using relatively high-profile corporate service providers, how much simpler is it likely to be for criminals, who are not bound by any of these restrictions, to replicate this feat?"

52. In the corruption context, it is easy to understand why a corrupt PEP may wish to use a corporate vehicle. In some jurisdictions, PEPs are subject to public asset disclosure requirements, rules regarding engaging in outside transactions to prevent self-dealing and conflicts of interest, and a host of other codes of conduct, and ethical prohibitions.[23] Specific investigative bodies and watchdog groups may exist to guard against corruption, and in many countries a robust media is able to publicise missteps by public officials. Some countries have effectively implemented FATF Recommendation 6 [now Recommendation 12], and require financial institutions to conduct enhanced due diligence for those customers who are foreign PEPs. PEPs have their career and reputation at stake if found to be in possession of unexplained wealth. In this environment, corrupt PEPs have a greater need than others to ensure that specific criminal assets cannot be identified with or traced back to them. Corporate

[21] [50] Baker, R.W. (2005), p. 37.
[22] [51] Sharman, J.C. (2010).
[23] [52] Many of these are obligations of member states under the UNCAC. A good description of the available legislative and regulatory schemes employed by some countries is described in the UNODC's UN Anti- corruption Toolkit (2004), found at [updated link: <http://www.pogar.org/publications/finances/anticor/anticorruptiontoolkit.pdf>].

vehicles thus provide one of the most effective ways to separate the origin of the illegal funds from the fact that the PEP controls it.

53. One example of this comes from the case of Augusto Pinochet, the former President of Chile. Pinochet was assisted by his US-based bank (and its U.K. branch) in setting up corporate vehicles in order to both hide his assets and shield them from the reach of asset freezing and confiscation or civil recovery orders. Specifically, Pinochet was able to set up offshore shell corporations and a trust in 1996 and 1998, even after a Spanish magistrate had filed a detailed indictment against Pinochet for crimes against humanity and issued world-wide freezing orders. [24] These corporations, established in jurisdictions that at the time had weak AML controls, were listed as the nominal owners of the US bank accounts and other investment vehicles that benefited Pinochet and his family. The bank's KYC documentation listed only the corporations, not Pinochet, as the owners of the accounts, despite the fact that the bank knew that Pinochet was the beneficial owner (since the bank itself had set up the corporations). The bank has since been convicted of AML-related criminal charges.

54. According to the case study of Vladimiro Montesinos, Peruvian President Fujimori's security advisor, he used shell corporations very effectively to disguise and move money illegally obtained through defence contracts with the Peruvian government.[25] Such a scheme, involving several corporate vehicles in a number of jurisdictions with each vehicle holding bank accounts in yet other jurisdictions, is designed to frustrate any financial institution, regulator or government investigator attempting to unravel the scheme.

END OF EXCERPT

3.2 Use of Gatekeepers

BEGINNING OF EXCERPT

55. Gatekeepers were significantly represented in the cases within the project team inventory. "Gatekeepers are, essentially, individuals that 'protect the gates to the financial system' through which potential users of the system, including launderers, must pass in order to be successful."[26] The issue of gatekeepers has been addressed

[24] [53] Permanent Subcommittee on Investigations (2004).
[25] [54] ADB/OECD (2007b); UNODC and World Bank (2007).
[26] [55] FATF (2010c).

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by FATF on several occasions, including WGTYP's 2003- 2004 Report, which concluded:

> Increasingly, money launderers seek out the advice or services of specialised professionals to help facilitate their financial operations. This trend toward the involvement of various legal and financial experts, or gatekeepers, in money laundering schemes has been documented previously by the FATF and appears to continue today. The work undertaken during this year's exercise confirmed and expanded the FATF's understanding of specific characteristics of this sector and what makes it vulnerable to money laundering. The most significant cases each involve schemes of notable sophistication, which were possible only as a result of the assistance of skilled professionals to set up corporate structures to disguise the source and ownership of the money.

56. In 2010, FATF published its Global Money Laundering and Terrorist Financing Threat Assessment, which described gatekeepers as a "common element" in complex money laundering schemes. The report noted that gatekeepers' skills are important in creating legal structures that could be used to launder money and for their ability to manage and perform transactions efficiently and to avoid detection. Recommendation 12 [now Recommendation 22] acknowledges the role that such gatekeepers can play by recommending that such individuals engage in due diligence and record keeping when engaged in certain activities.

57. The review of the cases illustrates the variety of ways in which gatekeepers, in particular lawyers, are used to launder the proceeds of corruption. They have been used to create corporate vehicles, open bank accounts, transfer proceeds, purchase property, courier cash, and take other means to bypass AML controls. In addition, lawyers have subsequently used rules of attorney-client privilege to shield the identity of corrupt PEPs.

58. West African PEPs: In four separate case studies of West African PEPs and their families, the US Senate discovered that lawyers were used to create corporate vehicles, open bank accounts and purchase property with the express purpose of bypassing AML controls set up to screen for PEPs.[27] For example, the son of the President of one West African nation, who himself was a minister within the government, wished to purchase real estate and aircraft within the United States. To do so, a lawyer for the PEP opened bank accounts there. However, because of US banking rules requiring enhanced level of due diligence for funds moving through those accounts, several US banks closed the accounts on the belief that they were being used to conduct

[27] [56] Permanent Subcommittee on Investigations (2010).

suspicious transactions. In response, the lawyers for the PEP would deposit incoming funds into attorney-client or law office accounts, and then transfer the money into newly-created accounts for the PEP. Due to the fact that the lawyer's accounts were not subject to the same enhanced due diligence as the PEP, the lawyer was able to circumvent the enhanced AML/CFT measures. Ultimately, at least two banks were able to identify the fact that the attorney's accounts were being utilised in this manner and closed the attorney accounts, but not before hundreds of thousands of dollars had passed through.

59. Duvalier case: Haitian government assets diverted by Jean-Claude Duvalier were likewise disguised by the use of lawyers as intermediaries, who would hold accounts for the Duvalier family. This, according to the UK court that examined the matter, had the added advantage of the use of professional secrecy to avoid identifying the client.[28] The court opinion identified numerous accounts held by law firms for Duvalier and his family, both in the UK and in Jersey. The use of professional secrecy was used to attempt to prevent an inquiry into the nature of the funds.

60. Chiluba case: Similarly, in a civil recovery suit instituted in the UK against the former President of Zambia, the court, in its factual findings, described in great detail the use of certain lawyers and law firms to distribute and disguise money embezzled from the coffers of the Zambian government.[29] Special corporate vehicles had been set up, purportedly for use by the country's security services, and government funds were transferred to accounts held by those entities. Thereafter, millions of dollars were transferred to the client accounts of certain law firms, from which the lawyers would then make certain disbursals upon instructions from complicit PEPs. These disbursals were to other accounts located both in Zambia and in other countries, as well as payments for personal expenses and asset acquisitions for the government officials and their families. As the Court noted in its opinion, "There is no reason for his client account to be used for any genuine currency transactions. This is … money which has been traced back to [the Zambian Ministry of Finance]. It is a classic example of washing money through [the attorney's] client account to hide its origins and to clothe it with an aura of respectability."

61. The court also noted an instance in which the PEP's lawyer withdrew GBP 30 000 – an amount that vastly exceeded the President's annual salary – and delivered it personally to the President. Moving the money through the lawyer's accounts disguised the fact that the money originated from government accounts, and further hampered the ability to trace the proceeds. The court noted that the lawyers involved did not make any efforts to determine the source or the purpose of the money: "Yet [the lawyer] made no enquiry as to how the President could simply take such a large

[28] [57] *Republic of Haiti v. Duvalier*, 1990 UK.

[29] [58] *Attorney General of Zambia v. Meer Cares, et al*, UK court opinion (2007).

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amount of money. An honest solicitor would not participate in such a transaction without a full understanding of its nature so that he could be satisfied it was lawful. [The lawyer] did not so satisfy himself because he was unwilling to ask the question because he was afraid of the answer." Additionally, the lawyers involved formed foreign shell corporations, which were then used to purchase properties with government money for the benefit of corrupt officials.

END OF EXCERPT

3.3 Use of Domestic Financial Institutions

BEGINNING OF EXCERPT

62. Much of the focus on PEPs to date has been to ensure that foreign PEPs are subject to enhanced due diligence regarding the source of funds deposited into financial institutions – in other words, measures to prevent corrupt PEPs from laundering their proceeds in foreign bank accounts. For example, the Third EU Directive requires enhanced due diligence only for foreign PEPs. The UNCAC, however, does not distinguish between foreign PEPs and those prominent political figures within the institution's own country. The World Bank policy paper on PEPs notes that many financial institutions do not distinguish between foreign and domestic PEPs.[30]

63. The Interpretive Note to Recommendation 6 encourages jurisdictions to extend its EDD requirements to domestic PEPs as well. Recently the FATF has discussed the degree to which domestic PEPs should be subject to enhanced due diligence, and in addressing the issue, has recommended that domestic PEPs continue to be considered on a risk-based approach, and that foreign PEPs continue to receive enhanced due diligence.[31]

64. Some typology exercises the project team reviewed have concluded that domestic PEPs may present a significant risk for corruption-related money laundering. Professor Jason Sharman, in summarizing the ADB/OECD paper on PEPs, characterised the notion that domestic PEPs do not present a threat of money laundering as a "myth."[32] The project team's analysis of the case study inventory found that PEPs are not only using foreign financial institutions to transfer and hide

[30] [59] Greenberg, T.S. et al. (2009).
[31] [60] This is the situation as at the publication of this report (July 2011).
[32] [61] Sharman, J.C., (2009).

the proceeds of corruption. PEPs are also using domestic financial institutions to launder funds.

65. Perhaps the most obvious example of this involves President Joseph Estrada of the Philippines, who was convicted in his country of the crime of plunder. The court's ruling in that case noted that a significant portion of the money that Estrada collected as a result of kickbacks from illegal gambling and tobacco excise taxes ultimately ended up at a bank account in the Philippines in the name of an alias, Jose Velarde. The court noted that Estrada used the account and would simply sign Velarde's name to deposit slips, oftentimes in the presence of bank personnel. Money that went through that account was used for various asset purchases, including real estate for the benefit of Estrada.[33]

66. The US Senate, in its 2010 investigation of the use of US banks to launder corruption proceeds, described in two different reports the banking and asset purchase activities of the President of a West African oil producing country as well as that of his son, who was also a high-level government official. The son, for example, in purchasing in cash a house in the United States for USD 30 million, wire transferred money, in six different USD 6 million tranches, from a personal bank account he held in his own country, through an account in France and then to the United States. The son had an official government monthly salary of approximately USD 6 000.

67. The case involving assets stolen by Joshua Chibi Dariye also highlight the use of domestic accounts in at least the initial stages of a more complex scheme. Dariye, the Governor of Plateau State in the Federal Republic of Nigeria from May 1999 through May 2007, embezzled money belonging to the state in several ways. Checks issued from the central bank of Nigeria to Plateau State for ecological works were received by Dariye and, rather than being deposited into a government account, were instead diverted to an account in Nigeria Dariye had established using an alias. The money was then transferred to accounts held in Dariye's own name in the UK. Likewise, Dariye purchased real estate by diverting money destined for a Plateau State account into an account in Nigeria in the name of a corporation he controlled. That corporation, in turn, transferred money to UK accounts in the corporation's name to effectuate the real estate purchase.[34]

68. Raul Salinas, the brother of the President of Mexico, likewise was able to move money out of his home country by using the Mexican branch of a US-based international bank. A US-based bank official introduced Salinas' then-fiancée to a bank official at the Mexico City branch of the bank. The fiancée, using an alias, would

[33] [62] *People of the Philippines v. Joseph Estrada* court opinion.
[34] [63] *Federal Republic of Nigeria v. Joshua Chibi Dariye* (2007) (UK).

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deliver cashier's checks to the branch, where they were converted to dollars and wired to US accounts.[35]

69. PEPs need accounts in their own country in which to fund their lifestyles, and there have been examples in which the PEP, after secreting money overseas, then moved the money back to his home country. The US Senate, in its 2004 investigation of corruption-related money laundering, provided one such example. Augusto Pinochet of Chile, notwithstanding a modest official government salary, was able to secret millions of dollars in UK and US accounts, often through the use of aliases and family members. In 1998 a Spanish investigating magistrate instituted worldwide asset freeze orders as a result of an investigation into Pinochet's role in human rights abuses and other crimes and was subsequently facing charges in Spain and Chile. Pinochet was able however, to purchase USD 1.9 million in cashier's checks (in USD 50 000 increments) from his account in the US, which he was thus able to cash using banks in Chile.[36]

70. That corrupt PEPs would seek to move money outside of their home jurisdiction is at the root of Recommendation 6, requiring enhanced due diligence for foreign PEPs. An examination of the corruption case studies revealed that in nearly every case foreign bank accounts were being used in part of the scheme. Beginning with one of the earliest cases, Marcos of the Philippines, through the significant and egregious activity of Sani Abacha and a number of Nigerian governors, and most recently with the US Senate's study of three West African heads of state, corrupt PEPs nearly universally attempt to move their money outside of their home country. This money is typically moved from developing countries to financial institutions in developed countries or those with a stable climate for investment.

71. Of course, corruption is not restricted to developing countries. The project team analyzed the Nino Rovelli judicial corruption matter, for example. [37] There, approximately USD 575 million was paid out to individuals as a result of bribes paid to judicial officials in Italy. The money ultimately was moved and disguised in a series of financial transactions involving accounts and corporate vehicles in the United States, British Virgin Islands, Singapore, Cook Islands and Costa Rica. Likewise, the developing world's financial systems may well be used to hide money. In the Titan Corporation bribery case for example, bribes from a US corporation to the President of Benin, intended to secure government contracts in telecommunications, was moved, in cash, directly to Benin.[38]

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[35] [64] Permanent Subcommittee on Investigations (1999).

[36] [65] Permanent Subcommittee on Investigations (2004).

[37] [66] *United States v. Proceeds of Crime Transferred to Certain Domestic Financial Accounts* (2007), court filings.

[38] [67] *United States v. Titan Corporation (US)* (2005), court filings.

72. The reason for this preference is obvious. Foreign accounts hold the advantage of being harder to investigate for the victim country, are perceived of as more stable and safer, and are more easily accessed than accounts held in the PEPs home country. Moreover, a PEP can "stack" foreign jurisdictions: a bank account in one country could be owned by a corporation in another jurisdiction, which is in turn owned by a trust in a third jurisdiction. Each additional country multiplies the complexity of the investigation, reduces the chances of a successful result, and extends the time needed to complete the investigation.

END OF EXCERPT

3.4 Use of Nominees

BEGINNING OF EXCERPT

73. The use of associates or nominees – trusted associates or family members, but not necessarily the lawyers and accountants described in the gatekeepers section – to assist the PEP in disguising and moving the proceeds of corruption was common in the inventory of cases. FATF has documented the use of such nominees previously. The WGTYP annual report for 2003-2004 noted at paragraph 78:

> PEPs, given the often high visibility of their office both inside and outside their country, very frequently use middlemen or other intermediaries to conduct financial business on their behalf. It is not unusual therefore for close associates, friends and family of a PEP to conduct individual transactions or else hold or move assets in their own name on behalf the PEP. This use of middlemen is not necessarily an indicator by itself of illegal activity, as frequently such intermediaries are also used when the business or proceeds of the PEP are entirely legitimate. In any case, however, the use of middlemen to shelter or insulate the PEP from unwanted attention can also serve as an obstacle to customer due diligence that should be performed for every customer. A further obstacle may be involved when the person acting on behalf of the PEP or the PEP him or herself has some sort of special status such as, for example, diplomatic immunity.

74. A typical use of nominees can be found in the case of Arnoldo Aleman. Aleman was able to siphon government funds through a non-profit institution known as the Nicaraguan Democratic Foundation (FDN), an entity incorporated by Aleman's wife in Panama. In addition, Aleman and his wife set up both front companies and non-

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profit organisations to funnel money through. Lastly, Aleman was able to defraud the government in the sale of telecommunications frequency to a private entity, using companies set up by advisors to Aleman. Aleman was also assisted in his efforts to steal and subsequently move money through the active participation of Byron Jerez, the country's tax commissioner at the time.[39]

75. The scheme set up by a high level PEP in a Central American country likewise depended on the assistance of both family members as well as other associates to succeed. The PEP would divert money that was intended to be paid to the country's treasury through a series of financial transactions, which would then ultimately end up in foreign bank accounts in the name of the PEP's former wife and daughter.[40]

END OF EXCERPT

3.5 Use of Cash

BEGINNING OF EXCERPT

76. The use of cash, and its placement into the financial system, has long been identified as a method for the laundering of proceeds of crime. Indeed, when the FATF 40 Recommendations were first issued in 1990, the focus of many of its preventative measures was on detecting money laundering at the cash proceeds stage. The anonymous nature of cash, with its lack of paper trail, is attractive and may outweigh other negatives. Some of the predicate crimes, such as drug trafficking, are historically cash businesses. Indeed, even for crimes that do not generate cash requiring placement into the financial system, WGTYP has noted (Report on Money Laundering Typologies, 2000-2001) some laundering schemes in which the proceeds are converted back to cash in order to break the paper trail.

77. While smaller-scale, endemic corruption (in which money is provided to lower- or mid-level government officials in order to act or refrain from acting in their official capacity), would be expected to generate cash in need of placement, the grand corruption cases would not be expected to have significant amounts of cash. A cash payment to a PEP would break the chain of bank records, of course, but it would require the PEP to run the gauntlet of AML/CFT controls designed to combat placement of illegally-derived cash into the system. This would include the possibility that the PEP's transactions (as well as those for his family and close associates) are subject to enhanced due diligence in accordance with Recommendation 6. In each case

[39] [68] *United States v. $125,938 (US)* (2008) court filings.

[40] [69] *United States v. Alfanso Portillo (US)* (2009) court documents.

in which the PEP receives the cash, he must engage in a calculus to determine whether the risks associated with placement – including the possibility of EDD as a result of his PEP status – outweigh the benefits of having broken the chain. It appears that in a significant number of cases, the corrupt PEP wants the cash and, moreover is able to place the cash without attracting undue attention.

78. The US Senate's investigation of corruption-related money laundering identified the President of one oil rich West African country, for which a US bank accepted nearly USD 13 million in cash deposits over a three-year period into accounts controlled by the President or his wife. The report noted that some of these deposits were for a million dollars at a time, and the currency was in shrink-wrap packaging. The report could identify no legitimate source for such currency. This same bank also provided USD 1.9 million in cashier checks to a PEP from a South American country, using the maiden name of the wife of the PEP as the payee. These cashiers' checks were ultimately cashed in the PEP's home country. The bank involved was fined and criminally prosecuted for these violations and ultimately was closed as a result.[41]

79. The Zambian asset recovery lawsuit, noted above, also highlights the use of cash. As part of the scheme, the president of Zambia directed his UK-based lawyer to withdraw GBP 30 000 in cash from accounts containing diverted government money and deliver it to him personally. There were also other significant cash payments, including a USD 250 000 payment made from a diverted account to the Zambian Ambassador to the United States, which he then took in a suitcase to Switzerland and gave to the head of the Zambian security service, and hundreds of thousands of dollars in cash used to purchase property in the UK and elsewhere. The court found that there was no legitimate purpose for the large cash withdrawals.[42]

80. Other case studies have shown the presence of significant amounts of unexplained cash. Diepreye Alamieyeseigha, for example, was found to have over GBP 1 000 000 in his apartment in the UK at the time of his arrest, notwithstanding the fact that as governor of Bayelsa State in Nigeria, his salary was a fraction of that. Another governor of a Nigerian state around that time, Joshua Chibi Dariye, previously discussed, was found to have deposited into his UK accounts in excess of GBP 480 000 during a four and a half year period. According to a US Senate report on the matter, immediately after Sani Abacha's death in 1998, his wife was stopped at a Lagos airport with 38 suitcases full of cash, and his son was found with USD 100 million in cash. According to the World Bank study he was able to place significant amounts of cash in the financial system by using associates. Lastly, Montesinos used cash couriers to transfer funds from Switzerland to Mexico and Bolivia.

[41] [70] Permanent Subcommittee on Investigations (2004).

[42] [71] *Attorney General of Zambia v. Meer Cares, et al*, (UK)(2007) court opinion.

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81. PEPs have an advantage not usually available to the general public: the use (and abuse) of the so-called "diplomatic pouch." Intended to protect free communication between diplomats and their foreign missions, a diplomatic bag is protected from search or seizure by the *1961 Convention on Diplomatic Relations*.[43] A diplomatic bag may only be used for official materials and, while the Convention protects it from search, it does not relieve the carrier of adherence to the laws of the host nation, including cross-border currency reporting requirements.

82. Such was the situation that the US Senate uncovered in its report on the financial affairs of one West African PEP. His daughter, who was in graduate school in the United States, asked her US bank to count certain cash she had stored in her safe deposit box. The bank found USD 1 million in cash, in USD 100 bills, wrapped in plastic. When asked about the source of the money, the daughter replied that her father, the PEP, provided her the cash when he came into the United States, and that he often brought cash into the United States. The PEP had never declared his transport of the cash, as he was required to do by US law.[44]

END OF EXCERPT

4. INTERNATIONAL STANDARDS FOR PREVENTION AND CRIMINALIZATION OF MONEY LAUNDERING

4.1 UNCAC

As discussed in previous chapters, UNCAC is the most extensive and most widely ratified international convention addressing corruption. In addition to prohibiting bribery and other forms of corruption, the drafters of UNCAC recognized that effective anti-money laundering strategies are an important factor in preventing and detecting large-scale corruption. Like other forms of corruption, the transnational nature of money laundering necessitates international cooperation and consistent standards in anti-money laundering efforts. UNCAC therefore addresses money laundering in both Chapter II (Preventative Measures) and in Chapter III (Criminalization and Law Enforcement). Article 14 sets out standards for State Parties to follow in developing anti-money laundering measures, while Article 23 of UNCAC criminalizes the laundering of the proceeds of corruption. A more comprehensive overview of the anti-money laundering provisions of UNCAC can be found in Carr and Goldby's paper, "The UN Anti-Corruption Convention and Money Laundering."[45]

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[43] [72] http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf.
[44] [73] Permanent Subcommittee on Investigations (2010).
[45] Indira Carr & Miriam Goldby, "The United Nations Anti-Corruption Convention and Money Laundering" (2009) Working Paper, online: <http://ssrn.com/abstract=1409628>.

4.1.1 Article 23 – Criminalization of Money Laundering

Article 23 is ambitious in scope. It criminalizes the actions of those involved in money laundering in a number of different capacities. Unlike some of the other criminalization provisions of UNCAC, the criminalization of money laundering under Article 23 is mandatory, although the provision may be adapted if necessary to conform to the "fundamental principles" of the State Party's domestic law. Article 23 provides as follows:

> Article 23. Laundering of proceeds of crime
>
> 1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
>
> (a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
>
> (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;
>
> (b) Subject to the basic concepts of its legal system:
>
> (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
>
> (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

The following excerpt from the *Legislative Guide for the Implementation of the United Nations Convention against Corruption* provides guidance on Article 23 to legislators tasked with incorporating Article 23 into a state's domestic legislation:

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BEGINNING OF EXCERPT

(e) Money-laundering

220. Article 23 requires the establishment of offences related to the laundering of proceeds of crime, in accordance with fundamental principles of domestic law. The related Convention articles addressing measures aimed at the prevention of money-laundering were discussed in the previous chapter.

221. In the context of globalization, criminals take advantage of easier capital movement, advances in technology and increases in the mobility of people and commodities, as well as the significant diversity of legal provisions in various jurisdictions. As a result, assets can be transferred instantly from place to place through both formal and informal channels. Through exploitation of existing legal asymmetries, funds may appear finally as legitimate assets available in any part of the world.

222. Confronting corruption effectively requires measures aimed at eliminating the financial or other benefits that motivate public officials to act improperly. Beyond this, combating money-laundering also helps to preserve the integrity of financial institutions, both formal and informal, and to protect the smooth operation of the international financial system as a whole.

223. As noted in the previous chapter, this goal can only be achieved through international and cooperative efforts. It is essential that States and regions try to make their approaches, standards and legal systems related to this offence compatible, so that they can cooperate with one another in controlling the international laundering of criminal proceeds. Jurisdictions with weak or no control mechanisms render the work of money launderers easier. Thus, the Convention against Corruption seeks to provide a minimum standard for all States.

224. The Convention against Corruption specifically recognizes the link between corrupt practices and money-laundering and builds on earlier and parallel national, regional and international initiatives in that regard. Those initiatives addressed the issue through a combination of repressive and preventive measures and the Convention follows the same pattern (see also chap. II of the present guide).

225. One of the most important of the previous initiatives related to the Organized Crime Convention, which mandated the establishment of the offence of money-laundering for additional predicate offences, including corruption of public officials, and encouraged States to widen the range of predicate offences beyond the minimum requirements.

226. "Predicate offence" is defined as "any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 23 of this Convention" (art. 2, subpara. (h)).

227. As a result of all these initiatives, many States already have money laundering laws. Nevertheless, such laws may be limited in scope and may not cover a wide range of predicate offences. Article 23 requires that the list of predicate offences include the widest possible range and at a minimum the offences established in accordance with the Convention against Corruption.

228. The provisions of the Convention against Corruption addressing the seizure, freezing and confiscation of proceeds (see art. 31) and the recovery of assets (see chap. V of the Convention and, especially, art. 57) include important related measures. States should review the provisions they already have in place to counter money-laundering in order to ensure compliance with these articles and those dealing with international cooperation (chap. IV). States undertaking such a review may wish to use the opportunity to implement the obligations they assume under other regional or international instruments and initiatives currently in place.

229. Article 23 requires that States parties establish the four offences related to money-laundering described in the following paragraphs:

(f) Conversion or transfer of proceeds of crime

230. The first offence is the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action (art. 23, para. 1 (a) (i)).

231. The term "conversion or transfer" includes instances in which financial assets are converted from one form or type to another, for example, by using illicitly generated cash to purchase precious metals or real estate or the sale of illicitly acquired real estate, as well as instances in which the same assets are moved from one place or jurisdiction to another or from one bank account to another.

232. The term "proceeds of crime" means "any property derived from or obtained, directly or indirectly, through the commission of an offence" (art. 2, subpara. (e)).

233. With respect to the mental or subjective elements required, the conversion or transfer must be intentional, the accused must have knowledge at the time of conversion or transfer that the assets are criminal proceeds and the act or acts must be done for the purpose of either concealing or disguising their criminal origin, for

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example by helping to prevent their discovery, or helping a person evade criminal liability for the crime that generated the proceeds.

234. As noted in article 28 of the Convention against Corruption, knowledge, intent or purpose may be inferred from objective factual circumstances.

(g) Concealment or disguise of proceeds of crime

235. The second money-laundering offence is the concealment or disguise of the nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime (art. 23, para. 1 (a) (ii)).

236. The elements of this offence are quite broad, including the concealment or disguise of almost any aspect of or information about property.

237. Here, with respect to the mental or subjective elements required, the concealment or disguise must be intentional and the accused must have knowledge that the property constitutes the proceeds of crime at the time of the act. This mental state is less stringent than for the offence set forth in article 23, subparagraph 1 (a) (i). Accordingly, drafters should not require proof that the purpose of the concealment or disguise is to frustrate the tracing of the asset or to conceal its true origin.

238. The next two offences related to money-laundering are mandatory, subject to the basic concepts of the legal system of each State party.

(h) Acquisition, possession or use of proceeds of crime

239. The third offence is the acquisition, possession or use of proceeds of crime knowing, at the time of receipt, that such property is the proceeds of crime (art. 23, para. 1 (b) (i)).

240. This is the mirror image of the offences under article 23, paragraph 1 (a)(i) and (ii), in that, while those provisions impose liability on the providers of illicit proceeds, this paragraph imposes liability on recipients who acquire, possess or use the property.

241. The mental or subjective elements are the same as for the offence under article 23, paragraph 1 (a) (ii): there must be intent to acquire, possess or use, and the accused must have knowledge, at the time this occurred, that the property was the proceeds of crime. No particular purpose for the acts is required.

(i) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the foregoing offences

242. The fourth set of offences involves the participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences mandated by the article (art. 23, para. 1 (b) (ii)).

243. These terms are not defined in the Convention against Corruption, allowing for certain flexibility in domestic legislation. States parties should refer to the manner in which such ancillary offences are otherwise structured in their domestic system and ensure that they apply to the other offences established pursuant to article 23.

[Note – see Chapter 3, Sections 3 and 4, for a discussion on inchoate crimes and secondary liability.]

244. The knowledge, intent or purpose, as required for these offences, may be inferred from objective factual circumstances (art. 28). National drafters could see that their evidentiary provisions enable such inference with respect to the mental state, rather than requiring direct evidence, such as a confession, before the mental state is deemed proven.

245. Under article 23, States parties must apply these offences to proceeds generated by "the widest range of predicate offences" (art. 23, para. 2 (a)).

246. At a minimum, these must include a "comprehensive range of criminal offences established in accordance with this Convention" (art. 23, para. 2 (b)). For this purpose, "predicate offences shall include offences committed both within and outside the jurisdiction of the State party in question. However, offences committed outside the jurisdiction of a State party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State party implementing or applying this article had it been committed there" (art. 23, para. 2 (c)). So, dual criminality is necessary for offences committed in a different national jurisdiction to be considered as predicate offences.

247. Many States already have laws on money-laundering, but there are many variations in the definition of predicate offences. Some States limit the predicate offences to trafficking in drugs or to trafficking in drugs and a few other crimes. Other States have an exhaustive list of predicate offences set forth in their legislation. Still other States define predicate offences generically as including all crimes, or all serious crimes, or all crimes subject to a defined penalty threshold.

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248. An interpretative note for the Convention against Corruption states that "money-laundering offences established in accordance with this article are understood to be independent and autonomous offences and that a prior conviction for the predicate offence is not necessary to establish the illicit nature or origin of the assets laundered. The illicit nature or origin of the assets and, in accordance with article 28, any knowledge, intent or purpose may be established during the course of the money-laundering prosecution and may be inferred from objective factual circumstances" (A/58/422/Add.1, para. 32).

249. The constitutions or fundamental legal principles of some States do not permit the prosecution and punishment of an offender for both the predicate offence and the laundering of proceeds from that offence. The Convention acknowledges this issue and, only in such cases, allows for the non-application of the money-laundering offences to those who committed the predicate offence (art. 23, para. 2 (e)).[46]

END OF EXCERPT

4.1.2 Article 14 – Measures to Prevent Money-Laundering

As mentioned above, in addition to mandating the criminalization of money laundering, UNCAC also requires state parties to take measures to establish a regulatory regime intended to prevent money laundering. The relevant article is Article 14, which is reproduced below:

> Article 14. Measures to prevent money-laundering
>
> 1. Each State Party shall:
>
> (a) Institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, including natural or legal persons that provide formal or informal services for the transmission of money or value and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer and, where appropriate, beneficial owner identification, record-keeping and the reporting of suspicious transactions;

[46] United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption* [UN Legislative Guide (2012)], 2nd ed (New York: United Nations, 2012) at 46–74, paras 220-249, online: <https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf>. Reprinted with the permission of the United Nations.

(b) Without prejudice to article 46 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

3. States Parties shall consider implementing appropriate and feasible measures to require financial institutions, including money remitters:

   (a) To include on forms for the electronic transfer of funds and related messages accurate and meaningful information on the originator;

   (b) To maintain such information throughout the payment chain; and

   (c) To apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator.

4. In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.

5. States Parties shall endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.

Carr and Goldby note that Article 14(1) requires states to implement a regulatory and supervisory regime that monitors both formal and informal methods of transferring money in order to combat money laundering. [47] They state that "[t]he system known as *Hawala* (in India) or *Fie Ch'ieu* (in China) is typically used by migrant workers to transfer small amounts of money to relatives in villages lacking bank accounts or access to banks, but can also be

[47] Carr & Goldby (2009).

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abused by criminals."[48] Although Carr and Goldby welcome this inclusion of informal networks of money transfer into supervisory regimes, they argue that "much research still needs to be done in order to design an effective regime for the regulation and supervision of such informal networks."[49]

Article 14 of UNCAC also requires states to develop comprehensive anti-money laundering regimes. Although not expressly mandated, there is a strong suggestion by UNCAC that states look to international standard setting bodies, such as the FATF, when designing anti-money laundering frameworks. Therefore, although the FATF recommendations are not themselves binding international law, in addition to their independent ability to set standards through peer pressure, they are given some degree of legal recognition under UNCAC.

The following excerpt from the UNCAC *Legislative Guide* summarizes and explains the various mandated and recommended actions that, pursuant to Article 14, State Parties are to follow:

BEGINNING OF EXCERPT

Summary of Main Requirements

138. Article 14 contains two mandatory requirements:

(a) To establish a comprehensive domestic regulatory and supervisory regime to deter money-laundering (para. 1 (a));
(b) To ensure that agencies involved in combating money-laundering have the ability to cooperate and exchange information at the national and international levels (para. 1 (b)).

139. In addition, pursuant to article 14 States must consider:

(a) Establishing an FIU (para. 1 (b));
(b) Implementing measures to monitor cash movements across their borders (para. 2);
(c) Implementing measures to require financial institutions to collect information on originators of electronic fund transfers, maintain information on the entire payment chain and scrutinize fund transfers with incomplete information on the originator (para. 3);
(d) Developing and promoting global, regional and bilateral cooperation among relevant agencies to combat money-laundering (para. 5).

[48] *Ibid* at 8.
[49] *Ibid* at 8-9.

Mandatory requirements: obligation to take legislative or other measures

(a) Regulatory and supervisory regime

140. Article 14, paragraph 1 (a), requires that States parties establish a regulatory and supervisory regime within their competence in order to prevent and detect money-laundering activities. This regime must be comprehensive, but the precise nature and particular elements of the regime are left to States, provided that they require, at a minimum, banks and non-bank financial institutions to ensure:

(a) Effective customer identification;
(b) Accurate record-keeping;
(c) A mechanism for the reporting of suspicious transactions.

141. The requirements extend to banks, non-bank financial institutions (e.g. insurance companies and securities firms) and, where appropriate, other bodies that are especially susceptible to money-laundering (art. 14, para. 1 (a)). The interpretative notes add that other bodies may be understood to include intermediaries, which in some jurisdictions may include stockbrokering firms, other securities dealers, currency exchange bureaux or currency brokers (A/58/422/Add.1, para. 18). An addition to the equivalent provisions in the Organized Crime Convention is that financial institutions include "natural or legal persons that provide formal or informal services for the transmission of money or value" (art. 14, para. 1 (a)). This is a reference to concerns about both formal remitters and informal value-transfer systems, such as the *hawala* networks that originated in South Asia and have become global in recent decades. These channels offer valuable services to expatriates and their families, but are also vulnerable to abuse by criminals, including corrupt public officials.

142. Thus, this regime should apply not only to banking institutions, but also to areas of commerce where high turnover and large volumes make money-laundering likely. Previous experience shows that money-laundering activities have taken place in the real estate sector and in the trade of commodities, such as gold, precious stones and tobacco.

143. In many forums, the list of institutions is being expanded beyond financial institutions to include businesses and professions related to real estate and commodities. For example, recommendation 12 of the FATF Forty Recommendations extends, when certain conditions are met, the requirements of customer due diligence and record-keeping to casinos, real estate agents, dealers in precious metals and stones, lawyers, notaries, other independent legal professionals and accountants and trust and company service providers. Similar requirements are set forth in article 1 of Directive 2005/60/EC adopted by the European Parliament and the Council of the European Union on 26 October 2005.

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144. More recently, increased attention has been focused on money service businesses and informal value-transfer systems, such as *hawala* and *hundi*. In a growing number of jurisdictions, these are also subject to a regulatory regime for the purposes of detecting money-laundering, terrorist financing or other offences.

145. Customer identification entails requirements that holders of accounts in financial institutions and all parties to financial transactions be identified and documented. Records should contain sufficient information to identify all parties and the nature of the transaction, identify specific assets and the amounts or values involved, and permit the tracing of the source and destination of all funds or other assets.

146. The requirement for record-keeping means that client and transaction records should be kept for a specified minimum period of time. For example, under the FATF Forty Recommendations, at least five years is recommended, while for States parties to the International Convention for the Suppression of the Financing of Terrorism, retention of records for five years is mandatory.

147. Suspicious transactions are to be notified to the FIU or other designated agency. Criteria for identifying suspicious transactions should be developed and periodically reviewed in consultation with experts knowledgeable about new methods or networks used by money launderers.

148. The interpretative notes indicate that the words "suspicious transactions" may be understood to include unusual transactions that, by reason of their amount, characteristics and frequency, are inconsistent with the customer's business activity, exceed the normally accepted parameters of the market or have no clear legal basis and could constitute or be connected with unlawful activities in general (A/58/422/Add.1, para. 19). The International Convention for the Suppression of the Financing of Terrorism defines suspicious transactions as all complex, unusually large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose (General Assembly resolution 54/109, annex, art. 18, para. 1 (b) (iii)).

149. The powers to be granted to regulators and staff of the FIU to inspect records and to compel the assistance of record keepers in locating the records must also be defined. As some of these records may be covered by confidentiality requirements and banking secrecy laws that prohibit their disclosure, provisions freeing financial institutions from complying with such requirements and laws may be considered. Drafters should also ensure that the inspection and disclosure requirements are written in such a way as to protect financial institutions against civil and other claims for disclosing client records to regulators and FIUs.

150. The implementation of such measures is likely to require legislation. In particular, the requirement that financial institutions must disclose suspicious transactions and the protection of those who make disclosures in good faith will require legislation to override banking secrecy laws (see also paras. 1-3 of art. 52, on the prevention and detection of transfers of proceeds of crime).

(b) Domestic and international cooperation

151. Coordination of efforts and international cooperation is as central to the problem of money-laundering as it is to the other offences covered by the Convention against Corruption. Beyond the general measures and processes such as extradition, mutual legal assistance, joint investigations and asset recovery (which are covered in detail in the sections on international cooperation in chapter IV and asset recovery in chapter V, below), the Convention seeks to strengthen such coordination and cooperation.

152. Article 14, paragraph 1 (b), requires that administrative, regulatory, law enforcement and other domestic authorities in charge of the efforts against money-laundering are able to cooperate at both the national and international level. This includes the exchange of information within the conditions prescribed by their domestic law. This must be done without limiting or detracting from (or in the words of the Convention, "without prejudice to") the requirements generated by article 46 (Mutual legal assistance).

153. In order for cooperation to be possible, domestic capabilities must be developed for the identification, collection and interpretation of all relevant information. Essentially, three types of entity may be part of a strategy to combat money-laundering and could, thus, be considered by States:

(a) Regulatory agencies responsible for the oversight of financial institutions, such as banks or insurance entities, with powers to inspect financial institutions and enforce regulatory requirements through the imposition of regulatory or administrative remedies or sanctions;
(b) Law enforcement agencies responsible for conducting criminal investigations, with investigative powers and powers to arrest and detain suspected offenders and that are subject to judicial or other safeguards;
(c) FIUs, which are not required under the Convention, whose powers are usually limited to receiving reports of suspicious transactions, analysing them and disseminating information to prosecution agencies, although some such units have wider powers (see more on FIUs in sect. V.E, below).

154. The authority of each entity to cooperate with national bodies and with other similar agencies in other States is usually specified in the relevant legislation. If States do have such entities, legislation may be needed to amend existing mandates and the

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division of labour among these entities, in accordance with each State's constitutional or other principles and the specificities of its financial services sector.

155. Some of these measures may constitute a strong challenge for countries in which the financial sector is not heavily regulated and the necessary legislation and administrative infrastructure may have to be created. It is essential to note, however, that the relevance and utility of these arrangements are not limited to the control of money-laundering, but also to corruption. They also strengthen confidence in the financial infrastructure, which is instrumental to sustainable social and economic development.

156. The remaining provisions of this article are also closely connected to domestic and international cooperation, and are examined below, as they are not mandatory under the Convention.

Optional requirements: obligation to consider

(a) Financial intelligence units

157. Article 14, paragraph 1 (b), requires States parties to consider the establishment of FIUs to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering. Since the 1990s, many States have established such units as part of their regulatory police or other authorities. There is a wide range of structure, responsibilities, functions and departmental affiliation or independence for such units. According to the interpretative notes, the call for the establishment of an FIU is intended for cases where such a mechanism does not yet exist (A/58/422/Add.1, para. 20).

158. The Egmont Group (an informal association of FIUs) has defined such units as a central, national agency responsible for receiving (and, as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information (a) concerning suspected proceeds of crime; or (b) required by national legislation or regulation; in order to counter money laundering.[50]

159. The Convention does not require that an FIU be established by law, but legislation may still be required to institute the obligation to report suspicious transactions to such a unit and to protect financial institutions that disclose such information in good faith (see also art. 58, on FIUs). In practice, the vast majority of FIUs are established by law. If it is decided to draft such legislation, States may wish to consider including the following elements:

[50] [31] The website for the Egmont group is http://www.egmontgroup.org/, which, inter alia, provides links to FIUs on all continents.

(a) Specification of the institutions that are subject to the obligation to report suspicious transactions and definition of the information to be reported to the unit;
(b) Legislation defining the powers under which the unit can compel the assistance of reporting institutions to follow up on incomplete or inadequate reports;
(c) Authorization for the unit to disseminate information to law enforcement agencies when it has evidence warranting prosecution and authority for the unit to communicate financial intelligence information to foreign agencies, under certain conditions;
(d) Protection of the confidentiality of information received by the unit, establishing limits on the uses to which it may be put and shielding the unit from further disclosure;
(e) Definition of the reporting arrangements for the unit and its relationship with other Government agencies, including law enforcement agencies and financial regulators. States may already have money-laundering controls in place that can be expanded or modified to conform to the requirements of article 14 relating to money-laundering and those of article 31 relating to freezing, confiscation, seizure, disposal of proceeds, as well as provisions on asset recovery, as necessary.

160. It is worth noting that actions taken to conform to article 14 may also bring States into conformity with other conventions and initiatives, such as Security Council resolution 1373 (2001), the International Convention for the Suppression of the Financing of Terrorism, the Organized Crime Convention and the FATF Nine Special Recommendations on Terrorist Financing.

161. Further information about various options that can be included in laws, regulations and procedures to combat money-laundering can be obtained from the Anti-Money-Laundering Unit of the United Nations Office on Drugs and Crime.

(b) Other measures

162. As part of the effort to develop the capacity to provide effective international cooperation, States are required to consider the introduction of feasible measures aimed at monitoring the cross-border movement of cash and other monetary instruments (art. 14, para. 2). The goal of such measures would be to allow States to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash appropriate negotiable instruments. Generally, structures based on monitoring or surveillance will require legal powers giving

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inspectors or investigators access to information on cross-border transactions, in particular in cases where criminal behaviour is suspected.[51]

163. Article 14, paragraph 3, contains provisions going beyond the Organized Crime Convention. It requires that States consider the implementation of measures obliging financial institutions, including money remitters:

(a) To include on forms for the electronic transfer of funds and related messages accurate and meaningful information on the originator;
(b) To maintain such information throughout the payment chain; and
(c) To apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator.

164. The concern is essentially about the identification of remitters and beneficiaries on the one hand and the traceability of the transaction on the other. There are no exact estimates on the extent of funds transferred across national borders, especially with respect to informal remitters, who are popular in many countries. Given that they range in the tens of billions of United States dollars, however, it is an area of regulatory concern.

165. As mentioned above, the Convention against Corruption builds on parallel international initiatives to combat money-laundering. In establishing a domestic regulatory and supervisory regime, States parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering (art. 14, para. 4). An interpretative note states that during the negotiations, the words "relevant initiatives of regional, interregional and multilateral organizations" were understood to refer in particular to the Forty Recommendations and the Eight[52] Special Recommendations of the FATF, as revised in 2003 and 2001, respectively, and, in addition, to other existing initiatives of regional, interregional and multilateral organizations against money-laundering, such as the Caribbean Financial Action Task Force, the Commonwealth, the Council of Europe, the Eastern and Southern African Anti-Money-Laundering Group, the European Union, the Financial Action Task Force of South America against Money Laundering and the Organization of American States" (A/58/422/Add.1, para. 21).

166. Ultimately, States are free to determine the best way to implement article 14. However, the development of a relationship with one of the organizations working to combat money-laundering would be important for effective implementation.

167. In implementing article 14, paragraph 4, States may wish to consider some specific elements relative to the measures that the comprehensive regulatory regime must include. The Forty Recommendations are useful in this regard, as are model regulations that have been prepared by the United Nations Office on Drugs and Crime

and the Organization of American States (see sect. II.G (Information resources) at the end of this chapter of the guide).

168. Furthermore, paragraph 5 of article 14 requires that States endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.[53]

END OF EXCERPT

4.2 OECD Anti-Bribery Convention

The OECD Convention does not deal extensively with money laundering, but it does touch on the issue in articles 7 and 8, which are reproduced below:

> Article 7: Money Laundering
>
> Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.
>
> Article 8: Accounting
>
> In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.
>
> Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

[51] [32] See the website of the Financial Action Task Force on Money Laundering at [updated link: http://www.fatf-gafi.org/].
[52] [33] In October 2004, the FATF adopted a ninth Special Recommendation on Terrorist Financing.
[53] UN Legislative Guide (2012) at 46–53, paras 138-168. Reprinted with the permission of the United Nations.

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The OECD website notes that "The Financial Action Task Force (FATF) is the international standard setter in the development and promotion of national and international policies to **combat money laundering and terrorist financing**" [emphasis in original] and that "[t]he OECD's work on tax crime and money laundering is designed to complement that carried out by FATF."[54] The FATF recommendations, which are covered in the following section, provide a more comprehensive treatment of money laundering and the measures that states can take to combat it.

4.3 FATF Recommendations

As already noted, the Financial Action Task Force (FATF) is a governmental policy group composed of 34 nations including the US, UK and Canada. The latest version of the FATF Recommendations was released in 2012. There are 40 recommendations in this new version, which merged the original 40 recommendations (issued in 1996) with nine additional 2003 recommendations (on countering terrorism financing). The recommendations can be found at: <http://www.fatf-gafi.org/topics/fatfrecommendations/documents/fatf-recommendations.html>. The Recommendations also include interpretive notes. The following excerpt from Paul Allan Schott's *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism*, 2nd ed (World Bank, 2006) provides a general introduction to the FATF and the Recommendations. This excerpt is based on the 2003 version of the *Forty Recommendations*, but this does not affect the validity of the general comments set out below.

BEGINNING OF EXCERPT

[Chapter III: International Standard Setters, pp. III-7 to III-12]

Formed in 1989 by the G-7 countries,[55] the Financial Action Task Force on Money Laundering (FATF) is an intergovernmental body whose purpose is to develop and promote an international response to combat money laundering.[56] In October of 2001, FATF expanded its mission to include combating the financing of terrorism.[57]

FATF is a policy-making body, which brings together legal, financial and law enforcement experts to achieve national legislation and regulatory AML and CFT reforms. Currently, its membership consists of 31 [now 34] countries and territories

[54] OECD CleanGovBiz, "Money Laundering", online: <http://www.oecd.org/cleangovbiz/toolkit/moneylaundering.htm>.
[55] [30] *Id.* The G-7 countries are Canada, France, Germany, Italy, Japan, United Kingdom, and United States.
[56] [31] About FATF, and Terrorist Financing at http://www.fatf-gafi.org/.
[57] [32] *Id.* at Terrorist Financing.

and two regional organizations.[58] In addition, FATF works in collaboration with a number of international bodies[59] and organizations.[60] These entities have observer status with FATF, which does not entitle them to vote, but otherwise permits full participation in plenary sessions and working groups.

FATF's three primary functions with regard to money laundering are:

1. monitoring members' progress in implementing anti-money laundering measures;
2. reviewing and reporting on laundering trends, techniques and counter-measures; and
3. promoting the adoption and implementation of FATF anti-money laundering standards globally.

1. *The Forty Recommendations*

FATF has adopted a set of 40 recommendations, *The Forty Recommendations on Money Laundering (The Forty Recommendations)*, which constitute a comprehensive framework for AML and are designed for universal application by countries throughout the

[58] [33] The 31 member countries and territories are: Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong-China, Iceland, Ireland, Italy, Japan, Luxemburg, Mexico, Kingdom of the Netherlands, New Zealand, Norway, Portugal, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States. The two regional organizations are the European Commission and the Gulf Co-operation Council.
[59] [34] The international bodies are regional FATF-style regional bodies (FSRBs) that have similar form and functions to those of FATF. Some FATF members also participate in the FSRBs. These bodies are: Asia/Pacific Group on Money Laundering (APG), Caribbean Financial Action Task Force (CFATF), Council of Europe MONEYVAL (previously PC-R-EV) Committee, Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) and Financial Action Task Force on Money Laundering in South America (GAFISUD). For a discussion of these organizations, See Chapter IV, Regional Bodies and Relevant Groups, FATF- Style Regional Bodies. FATF also works with the Egmont Group.
[60] [35] Each of the international organizations, which have, among other functions, a specific anti-money laundering mission or function, are: African Development Bank, Asia Development Bank, The Commonwealth Secretariat, European Bank for Reconstruction and Development, European Central Bank (ECB), Europol, Inter-American Development Bank (IDB), Intergovernmental Action Group Against Money-Laundering in Africa (GIABA), International Association of Insurance Supervisors (IAIS), International Monetary Fund (IMF), Interpol, International Organization of Securities Commissions (IOSCO), Organization of American States/Inter-American Committee Against Terrorism (OAS/CICTE), Organization of American States/Inter-American Drug Abuse Control Commission (OAS/CICAD), Organization for Economic Co-operation and Development (OECD), Offshore Group of Banking Supervisors (OGBS), United Nations Office on Drugs and Crime (UNODC), World Bank and World Customs Organization (WCO).

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world.[61] The Forty Recommendations set out principles for action; they permit a country flexibility in implementing the principles according to the country's own particular circumstances and constitutional requirements. Although not binding as law upon a country, *The Forty Recommendations* have been widely endorsed by the international community and relevant organizations as the international standard for AML.

The Forty Recommendations are actually mandates for action by a country if that country wants to be viewed by the international community as meeting international standards. The individual recommendations are discussed in detail throughout this Reference Guide and, particularly in Chapters V, VI, VII, and VIII.

The Forty Recommendations were initially issued in 1990 and have been revised in 1996 and 2003 to take account of new developments in money laundering and to reflect developing best practices internationally. [The current version of the *Forty Recommendations* was revised in 2012.]

2. Monitoring Members Progress

Monitoring the progress of members to comply with the requirements of *The Forty Recommendations* is facilitated by a two-stage process: self assessments and mutual evaluations. In the self-assessment stage, each member responds to a standard questionnaire, on an annual basis, regarding its implementation of *The Forty Recommendations*. In the mutual evaluation stage, each member is examined and assessed by experts from other member countries.

In the event that a country is unwilling to take appropriate steps to achieve compliance with *The Forty Recommendations*, FATF recommends that all financial institutions give special attention to business relations and transactions with persons, including companies and financial institutions, from such non-compliant countries and, where appropriate, report questionable transactions, i.e., those that have no apparent economic or visible lawful purpose, to competent authorities.[62] Ultimately, if a member country does not take steps to achieve compliance, membership in the organization can be suspended. There is, however, the process of peer pressure before these sanctions are enforced.

3. Reporting on Money Laundering Trends and Techniques

One of FATF's functions is to review and report on money laundering trends, techniques and methods (also referred to as typologies). To accomplish this aspect of

[61] [36] *The Forty Recommendations*, [updated link: http://www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf].
[62] [37] *Id.*, Rec. 21.

its mission, FATF issues annual reports on developments in money laundering through its Typologies Report.[63] These reports are very useful for all countries, not just FATF members, to keep current with new techniques or trends to launder money and for other developments in this area.

4. The NCCT List

One of FATF's objectives is to promote the adoption of international AML/CFT standards for all countries. Thus, its mission extends beyond its own membership, although FATF can only sanction its member countries and territories. Thus, in order to encourage all countries to adopt measures to prevent, detect and prosecute money launderers, i.e., to implement The Forty Recommendations, FATF has adopted a process of identifying those jurisdictions that serve as obstacles to international cooperation in this area. The process uses 25 criteria, which are consistent with *The Forty Recommendations*, to identify such non-cooperative countries and territories (NCCT's) and place them on a publicly available list.[64]

…

[In response to criticisms levied against the use of the NCCT list, the last country on the NCCT list was removed in 2006, and no new states have been reviewed by the FATF under the NCCT criteria since 2001. Many felt that the NCCT focused attention unfairly on smaller, less powerful nations while ignoring the failings of more powerful countries such as the United States. Since it is no longer relevant, the remainder of the section on the NCCT list has not been included in this excerpt. However, the FATF has continued to issue public statements on high-risk and non-compliant countries. This list presently includes Iran, the Democratic People's Republic of Korea and Algeria. It is available at: http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/]

5. Terrorist Financing

FATF also focuses its expertise on the world-wide effort to combat terrorist financing. To accomplish this expanded mission FATF has adopted nine *Special Recommendations on Terrorist Financing (Special Recommendations)*.[65] As part of this effort, FATF members use a self-assessment questionnaire of their country's actions to come into compliance

[63] [38] See FATF Documents, Money Laundering Trends and Techniques at http://www.fatf-gafi.org/pdf/TY2004_en.PDF.
[64] [39] NCCT Initiative, http://www.fatf-gafi.org/NCCT_en.htm.
[65] [42] See *Special Recommendations*. These Special Recommendations are set out in Annex V, http://www.fatf-gafi.org/pdf/SRecTF_en.pdf.

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with the *Special Recommendations*.[66] FATF is continuing to develop guidance on techniques and mechanisms used in the financing of terrorism.

END OF EXCERPT

The FATF prepares guidance and best practices documents to assist states in implementing the Recommendations. Seven such documents have been published since the latest version of the Recommendations was released in 2012. They are available on the FATF website: <http://www.fatf-gafi.org/documents/guidance/>.

5. STATE-LEVEL AML REGIMES: US, UK AND CANADA

5.1 Introduction to the Essential Elements of AML Regimes

While the FATF Recommendations provide a global standard for AML measures, these recommendations must be put into place at the state level to be effective. The global effectiveness of the AML regime depends on a degree of standardization, but each state must also create a regime that fits within its domestic legal framework and policy goals. As a result, despite many shared elements, there is significant variation between different state-level AML regimes.

The overall goal of state-level AML regimes is to allow centralized monitoring of the financial sector. The set of laws and policies contained in the FATF Recommendations is intended to enable sweeping state surveillance and intelligence gathering across the financial sector. Data concerning suspicious transactions is transmitted to a central organization for analysis and selected information is then passed to law enforcement agencies for investigation. In general, the goal is to create a system in which suspicious transactions or patterns of transactions are promptly detected and thoroughly investigated, preventing the abuse of financial institutions by organized crime and corrupt officials.

There are three principal elements in a state-level AML regime, each of which is dealt with in a separate section below. The first element is a Financial Intelligence Unit (FIU). FIUs are central, national-level organizations that collect and analyze information concerning suspicious transactions reported by financial institutions. They pass selected information along to the appropriate law enforcement agencies for investigation.

The second element of a state-level AML regime is sweeping regulation of the financial sector, which requires financial institutions to report information to the FIU. There are three basic aspects of this regulatory framework. The first is customer due diligence measures (CDD), which require financial institutions to collect identifying information from each of

[66] [43] http://www.fatf-gafi.org/SAQTF_en.htm.

their customers. The second is record keeping requirements, which require financial institutions to retain all information collected for at least five years. The final aspect is transaction reporting requirements, which require financial institutions to report certain transactions to their respective FIUs.

The third element of a state-level AML regime is the creation of tools that law enforcement agencies can use to effectively prosecute money launderers once their activities are detected. These include the creation of stand-alone criminal offences for money laundering to enable prosecution of launderers. In theory, the three elements discussed above should create a state-level regime in which money laundering can be effectively combated through cooperation between the financial sector, the FIU and law enforcement agencies.

While the three elements described above are present in all state-level AML regimes that conform to the FATF recommendations, how each is put into place varies considerably from country to country. The following section surveys the state-level AML regimes in the US, Canada and the UK, comparing and contrasting the different approaches taken in each jurisdiction. Each subsection begins by reproducing the appropriate FATF recommendation, and then briefly discusses how the recommendation has been enacted by each of the three governments.[67]

5.2 Financial Intelligence Units

5.2.1 FATF Recommendations

Recommendation 29 of the FATF requires that each member state create a financial intelligence unit (FIU) as part of its AML regime. These FIUs cooperate internationally through their membership in the Egmont Group, an informal network whose membership currently includes 139 state-level FIUs. The Egmont Group's website, <http://www.egmontgroup.org/>, provides a library of research reports produced by the organization as well as sanitized cases from member FIUs.

The full text of Recommendation 29 is reproduced below:

> **29. Financial intelligence units**
>
> Countries should establish a financial intelligence unit (FIU) that serves as a national centre for the receipt and analysis of: (a) suspicious transaction reports; and (b) other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of that analysis. The FIU should be able to obtain additional information from reporting entities, and should have access on a timely

[67] Only selected FATF recommendations are reproduced here. The full text can be found online: <http://www.fatf-gafi.org/topics/fatfrecommendations/documents/fatf-recommendations.html>.

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> basis to the financial, administrative and law enforcement information that it requires to undertake its functions properly.

There is considerable scope available to states in implementing this recommendation. All that is strictly required is the creation of a central organization that collects and analyzes reports of suspicious transactions and "other information." Some states have chosen to create FIUs with a broad range of powers, while others have taken a more minimal approach. Furthermore, there is nothing in the recommendation to indicate how the FIU should relate to other government agencies, or who it should report to. States have made different choices in this regard as well. The following section briefly discusses and compares the FIUs created by the UK, the US and Canada respectively.

The US FIU is known as the Financial Crimes Enforcement Network (FinCEN).[68] Canada, displaying US influence, chose the name Financial Transactions and Reports Analysis Centre of Canada (FINTRAC).[69] The UK, taking a more prosaic approach, named its FIU the UK Financial Intelligence Unit (UKFIU). [70] FinCEN and FINTRAC are independent organizations that report through the financial arms of their respective states. FinCEN reports to the Secretary of the Treasury[71] and FINTRAC to the Minister of Finance.[72] In contrast, UKFIU is situated within the law enforcement apparatus of the UK (in an indication of this embedded role, the organization does not have its own website). It forms part of the National Crime Agency (NCA). The NCA website describes its function as follows:

> The NCA has a wide remit. We tackle serious and organised crime, strengthen our borders, fight fraud and cyber crime, and protect children and young people from sexual abuse and exploitation. We provide leadership in these areas through our organised crime, border policing, economic crime and CEOP commands, the National Cyber Crime Unit and specialist capability teams. The NCA works closely with partners to deliver operational results. We have an international role to cut serious and organised crime impacting on the UK through our network of international liaison officers.[73]

Had the US and Canada taken a similar approach, their FIUs would have been created as specialist bodies within the Federal Bureau of Investigation (FBI) and Royal Canadian Mounted Police (RCMP). Instead, FINCEN and FINTRAC have considerably more autonomy from law enforcement than UKFIU, as well as broader powers.

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[68] For more information, see: <http://www.fincen.gov/>.
[69] For more information, see: <http://www.fintrac-canafe.gc.ca/intro-eng.asp>.
[70] For more information, see: <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/economic-crime/ukfiu>.
[71] FINCEN, "What We Do", online: <https://www.fincen.gov/what-we-do>.
[72] FINTRAC, "Who We Are", online: <http://www.fintrac-canafe.gc.ca/fintrac-canafe/1-eng.asp>.
[73] NCA, "What We Do", online: <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do>.

5.2.2 US

Established under the *Bank Secrecy Act*, FINCEN performs a variety of functions, covering data gathering, regulation, research and analysis. Its website describes the organization's powers as follows:

> Congress has given FinCEN certain duties and responsibilities for the central collection, analysis, and dissemination of data reported under FinCEN's regulations and other related data in support of government and financial industry partners at the Federal, State, local, and international levels. To fulfill its responsibilities toward the detection and deterrence of financial crime, FinCEN:
>
> - Issues and interprets regulations authorized by statute;
> - Supports and enforces compliance with those regulations;
> - Supports, coordinates, and analyzes data regarding compliance examination functions delegated to other Federal regulators;
> - Manages the collection, processing, storage, dissemination, and protection of data filed under FinCEN's reporting requirements;
> - Maintains a government-wide access service to FinCEN's data, and networks users with overlapping interests;
> - Supports law enforcement investigations and prosecutions;
> - Synthesizes data to recommend internal and external allocation of resources to areas of greatest financial crime risk;
> - Shares information and coordinates with foreign financial intelligence unit (FIU) counterparts on AML/CFT efforts; and
> - Conducts analysis to support policymakers; law enforcement, regulatory, and intelligence agencies; FIUs; and the financial industry.[74]

Under the *Bank Secrecy Act* (*BSA*), FinCEN can bring enforcement actions for *BSA* violations.[75] For example, in May 2015, a FinCEN enforcement action led to the imposition of a $700,000 fine on a virtual currency exchange company that lacked an AML program.[76] In June 2015, FinCEN fined a casino in the Northern Mariana Islands $75 million for its failure to institute an AML program, hire compliance staff and create procedures for

[74] FINCEN, "What We Do", online: <https://www.fincen.gov/what-we-do>.
[75] For a list of FinCEN enforcement actions, see: <http://www.fincen.gov/news_room/ea/>.
[76] Richard L Cassin, "Ripple Labs Becomes First Virtual Money Exchange Fined by FinCEN", *The FCPA Blog* (7 May 2015), online: <http://www.fcpablog.com/blog/2015/5/7/ripple-labs-becomes-first-virtual-money-exchange-fined-by-fi.html>.

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detecting suspicious transactions.[77] In July 2015, FinCEN imposed "special measure five" on Tanzania-based FBME Bank Ltd, meaning US financial institutions are barred from "opening or maintaining correspondent accounts or payable through accounts for or on behalf of FBME."[78] FinCEN alleges that FBME is being used to facilitate money laundering and that high-risk shell companies are among its customers.[79] The bank expressed outrage at the ban and claimed it did not receive adequate notice, although FinCEN issued a notice in July 2014 warning that FBME was a primary money laundering concern and could be subject to a final ban.[80] For a full list of FinCEN enforcement actions see: <https://www.fincen.gov/news-room/enforcement-actions>.

5.2.3 UK

The UK's FIU responsibilities were transferred from the Serious Organized Crime Agency to the National Crime Agency (NCA) in 2013 with the passing of the *Crime and Courts Act*. In contrast to FinCEN, the UKFIU page on the NCA website states simply: "The UK Financial Intelligence Unit (UKFIU) receives, analyses and distributes financial intelligence gathered from Suspicious Activity Reports (SARs)."[81] While FinCEN and FINTRAC also handle SARs, which will be discussed in more detail in the following section, they also do a great deal more. UKFIUs mandate is narrower, likely due to its integration within the state's law enforcement apparatus. FinCEN and FINTRAC have broader mandates and greater organizational independence.

5.2.4 Canada

Similarly to its US counterpart, FINTRAC's description of its function is comprehensive, covering data gathering, analysis and research. The organization's website states that:

> Our mandate is to facilitate the detection, prevention and deterrence of money laundering and the financing of terrorist activities, while ensuring the protection of personal information under our control. We fulfill our mandate through the following activities:
>
> - Receiving financial transaction reports and voluntary information on money laundering and terrorist financing in accordance with

[77] Richard L Cassin, "FinCEN Fines Pacific Island Casino $75 Million for 'Egregious' Anti-Money Laundering Offenses", *The FCPA Blog* (4 June 2015), online: <http://www.fcpablog.com/blog/2015/6/4/fincen-fines-pacific-island-casino-75-million-for-egregious.html>.

[78] Richard L Cassin, "Tanzania Bank is 'Shocked' after 'Unexplained' FinCEN Ban", *The FCPA Blog* (27 July 2015), online: <http://www.fcpablog.com/blog/2015/7/27/tanzania-bank-is-shocked-after-unexplained-fincen-ban.html>.

[79] *Ibid.*

[80] *Ibid.*

[81] NCA, "UK Financial Intelligence Unit", online: <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/economic-crime/ukfiu>.

the legislation and regulations and safeguarding personal information under our control;

- Ensuring compliance of reporting entities with the legislation and regulations;
- Producing financial intelligence relevant to money laundering, terrorist activity financing and threats to the security of Canada investigations;
- Researching and analyzing data from a variety of information sources that shed light on trends and patterns in money laundering and terrorist financing;
- Maintaining a registry of money services businesses in Canada;
- Enhancing public awareness and understanding of money laundering and terrorist activity financing.[82]

FINTRAC is authorized by legislation to provide information to foreign FIUs, and also receives information from FIUs and law enforcement agencies in other jurisdictions (23-34).[83]

FINTRAC has broad powers to search without warrant, investigate and report to police authorities. Normal criminal law protections do not apply. For example, FINTRAC can enter any premises without a warrant unless the premises are a dwelling.[84] Terence D. Hall notes that "[t]here is a tension between the values placed on privacy and the protection of personal information and the public policy goals of deterring criminal activity and the financing of terrorism by requiring the collection and disclosure of personal and proprietary information."[85] In 2013, Canada's Privacy Commissioner audited FINTRAC, reporting that FINTRAC "continues to receive and retain personal information not directly related to its mandate."[86]

5.3 Regulation of Financial Institutions and Professionals

5.3.1 Customer Due Diligence

FATF Recommendation 10 deals with customer due diligence (CDD) measures. The essence of CDD is requiring financial institutions to ascertain whom they are dealing with for each major transaction. The full text of the recommendation is reproduced below.

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[82] FINTRAC, "Who We Are", online: <http://www.fintrac-canafe.gc.ca/fintrac-canafe/1-eng.asp>. FINTRAC has reorganized all its very detailed guidelines in respect to the *PCMLTFA*, and these can be found on FINTRAC's website at: <http://www.fintrac.gc.ca/guidance-directives/1-eng.asp>.

[83] Terence D Hall, *A Guide to Canadian Money Laundering Legislation*, 4th ed (LexisNexis, 2015) at 23.

[84] *Ibid* at 147–48.

[85] *Ibid* at 18.

[86] *Ibid* at 19.

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BEGINNING OF EXCERPT

10. Customer due diligence

Financial institutions should be prohibited from keeping anonymous accounts or accounts in obviously fictitious names.

Financial institutions should be required to undertake customer due diligence (CDD) measures when:

(i) establishing business relations;
(ii) carrying out occasional transactions: (i) above the applicable designated threshold (USD/EUR 15,000); or (ii) that are wire transfers in the circumstances covered by the Interpretive Note to Recommendation 16;
(iii) there is a suspicion of money laundering or terrorist financing; or
(iv) the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.

The principle that financial institutions should conduct CDD should be set out in law. Each country may determine how it imposes specific CDD obligations, either through law or enforceable means.

The CDD measures to be taken are as follows:

(a) Identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information.
(b) Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner, such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions understanding the ownership and control structure of the customer.
(c) Understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship.
(d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds.

Financial institutions should be required to apply each of the CDD measures under (a) to (d) above, but should determine the extent of such measures using a risk-based approach (RBA) in accordance with the Interpretive Notes to this Recommendation and to Recommendation 1.

Financial institutions should be required to verify the identity of the customer and beneficial owner before or during the course of establishing a business relationship or conducting transactions for occasional customers. Countries may permit financial institutions to complete the verification as soon as reasonably practicable following the establishment of the relationship, where the money laundering and terrorist financing risks are effectively managed and where this is essential not to interrupt the normal conduct of business.

Where the financial institution is unable to comply with the applicable requirements under paragraphs (a) to (d) above (subject to appropriate modification of the extent of the measures on a risk-based approach), it should be required not to open the account, commence business relations or perform the transaction; or should be required to terminate the business relationship; and should consider making a suspicious transactions report in relation to the customer.

These requirements should apply to all new customers, although financial institutions should also apply this Recommendation to existing customers on the basis of materiality and risk, and should conduct due diligence on such existing relationships at appropriate times.

END OF EXCERPT

As discussed in the first section of this chapter, PEPs launder large amounts of misappropriated government funds and bribes every year. Because of the particular risks associated with PEPs, FATF Recommendation 12, set out below, requires enhanced due diligence when dealing with them as customers:

BEGINNING OF EXCERPT

12. Politically exposed persons

Financial institutions should be required, in relation to foreign politically exposed persons (PEPs) (whether as customer or beneficial owner), in addition to performing normal customer due diligence measures, to:

(a) have appropriate risk-management systems to determine whether the customer or the beneficial owner is a politically exposed person;
(b) obtain senior management approval for establishing (or continuing, for existing customers) such business relationships;
(c) take reasonable measures to establish the source of wealth and source of funds; and
(d) conduct enhanced ongoing monitoring of the business relationship.

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> Financial institutions should be required to take reasonable measures to determine whether a customer or beneficial owner is a domestic PEP or a person who is or has been entrusted with a prominent function by an international organisation. In cases of a higher risk business relationship with such persons, financial institutions should be required to apply the measures referred to in paragraphs (b), (c) and (d).
>
> END OF EXCERPT

Both the UK and Canada have created comprehensive regulatory frameworks to implement the above recommendations.[87] Both countries require financial institutions to collect and record personal information about their customers. As suggested by the FATF, both also require banks to conduct ongoing monitoring of the customer relationship and to take steps to identify the beneficial owners of customers that are organizations. Finally, both Canada and the UK require financial institutions to take steps to determine if their customers are PEPs and require enhanced due diligence in such cases.[88] The PEP concept has been criticized by some for its vagueness. Different definitions are used internationally, and challenges arise in determining who fits each definition. Financial institutions must choose where to draw the line, which is often far from clear cut.[89]

At present, the US CDD regime is somewhat weaker. US regulations require financial institutions to set up a Customer Identification Program (CIP) to determine the identity of each customer.[90] However, there are no specific requirements to identify beneficial ownership or conduct ongoing monitoring of the customer relationship. FINCEN is moving to address these weaknesses in the near future. A proposal for new regulations incorporating

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[87] In the UK, see the *Proceeds of Crime Act 2002* and the *Money Laundering Regulations 2007*, SI 2007/2157. The Financial Conduct Authority (FCA) is the authority responsible for supervising compliance with the *Money Laundering Regulations* by most financial firms and organisations. For more detail, see the resources available at the FCA website: <http://www.fca.org.uk/>. See also William Rees et al, *Blackstone's Guide to the Proceeds of Crime Act*, 4th ed (Oxford University Press, 2011). In Canada, see the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (*PCMLTFA*), SC 2000, c 17 and the *PCMLTF Regulations* SOR/2002-184 and four subsequent Regulations. See the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) website for detailed information on the various regulations related to the enforcement of *PCMLTFA*: <http://www.fintrac-canafe.gc.ca/>. See also Hall, (2015), and Peter M German, *Proceeds of Crime: The Criminal Law, Related Statutes, Regulations and Agreements* (Carswell, 1998) (loose-leaf updated 2013), ch 3, 16.

[88] UK: *The Money Laundering Regulations 2007*, SI 2007/2157, ss 7, 14(4); Canada: *The Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, ss 53-67.2.

[89] Louis de Koker, "Applying Anti-Money Laundering Laws to Fight Corruption" in Adam Graycar & Russell G Smith, eds, *Handbook of Global Research and Practice in Corruption* (Edward Elgar, 2011) 340 at 344-47.

[90] 31 CFR § 103.121.

these elements was released in 2014.[91] The US does require enhanced CDD in the case of correspondent accounts created by US banks for non-US persons. These measures include a requirement to determine beneficial ownership of any organizations involved and to determine whether the account holder is a Senior Foreign Political Figure (the US statutory language, roughly equivalent to PEP).[92]

5.3.2 Transaction Reporting

FATF Recommendation 20 requires states to create legal requirements for financial institutions to report any suspicious transactions to their respective FIUs:

> 20. Reporting of suspicious transactions
>
> If a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing, it should be required, by law, to report promptly its suspicions to the financial intelligence unit (FIU).

Canada, the US and the UK follow this recommendation, requiring that all suspicious transactions be reported to their FIUs by financial institutions. However, there are some significant variations between the different reporting regimes. The UK only requires that all *suspicious* transactions be reported to UKFIU.[93] The US and Canada have similar requirements,[94] but both countries also require that *all* transactions over $10,000 be reported to their respective FIUs.[95] Canada requires anyone, including members of the public, who imports or exports cash or monetary instruments with a value of $10,000 or more to report the transaction to a customs officer. Reports are then passed on to FINTRAC.[96] The UK has taken a strict risk-based approach to transaction reporting, while Canada and the US have supplemented this with threshold-based reporting requirements. However, this should not be taken to mean that the UK's regime is weaker. Their reporting requirements are backed up with harsh sanctions for failure to report suspicious transactions.[97] Failure to disclose can result in up to five years imprisonment or a fine, or both. While the UK has taken a slightly different approach, it is not a more lenient one, and this "fear factor" has led to a dramatic

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[91] Fed Reg, Vol 79 No 149 (4 August 2014) online: <http://www.fincen.gov/statutes_regs/files/CDD-NPRM-Final.pdf>.

[92] Fed Reg, Vol 72 No 153 (9 August 2007) online: <http://www.fincen.gov/statutes_regs/frn/pdf/31_CFR_Part_103_312_EDD_Rule.pdf>.

[93] *Proceeds of Crime Act 2002* (UK), c 29, ss 330-331.

[94] US: 12 CFR §§ 21.11; Canada: *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, RSC 2000, c 17, s 7.

[95] US: 31 CFR Ch X § 1010.311; Canada: *The Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, s 12(1).

[96] Hall (2015) at 74.

[97] *Proceeds of Crime Act 2002* (UK), c 29, ss 330-332.

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increase in SAR submissions. However, critics claim that the high cost of compliance with the UK's SAR regime is disproportionate to its effectiveness.[98]

5.3.3 Record-Keeping

The final piece of the regulatory regime proposed by the FATF Recommendations is the requirement for financial institutions to retain transaction records and customer information for at least five years. This requirement is set out in Recommendation 11:

> 11. Record-keeping
>
> Financial institutions should be required to maintain, for at least five years, all necessary records on transactions, both domestic and international, to enable them to comply swiftly with information requests from the competent authorities. Such records must be sufficient to permit reconstruction of individual transactions (including the amounts and types of currency involved, if any) so as to provide, if necessary, evidence for prosecution of criminal activity.
>
> Financial institutions should be required to keep all records obtained through CDD measures (e.g. copies or records of official identification documents like passports, identity cards, driving licences or similar documents), account files and business correspondence, including the results of any analysis undertaken (e.g. inquiries to establish the background and purpose of complex, unusual large transactions), for at least five years after the business relationship is ended, or after the date of the occasional transaction.
>
> Financial institutions should be required by law to maintain records on transactions and information obtained through the CDD measures.
>
> The CDD information and the transaction records should be available to domestic competent authorities upon appropriate authority.

The US, UK and Canada all require financial institutions to store records for five years in accordance with Recommendation 11.[99] While the information stored in these records will vary slightly based on differences in their respective CDD regimes, there are no significant variations with regard to the record-keeping requirements themselves.

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[98] Karen Harrison & Nicholas Ryder, *The Law Relating to Financial Crime in the United Kingdom* (Farnham, England: Ashgate, 2013) at 32.

[99] Canada: *The Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, s 69; UK: *The Money Laundering Regulations 2007*, SI 2007/2157, s 19; US: 31 CFR § 103.121(3).

5.4 Money Laundering Offences

5.4.1 FATF Recommendations and UNCAC

FATF Recommendation 3 requires states to create offences to directly criminalize money laundering. The recommendation is reproduced below, along with an interpretive note. FATF Recommendation 3 on money laundering was produced in the original 2003 FATF Forty Recommendations. Recommendation 3 was drafted on the basis of two existing UN Conventions: the 1998 Narcotic Drugs and Psychotropic Substances Convention and the 2000 Transnational Organized Crime Convention. The money laundering provisions in those two conventions are now consolidated in the money laundering provisions in UNCAC. FATF Recommendation 3 provides:

> 3. Money laundering offence
>
> Countries should criminalise money laundering on the basis of the Vienna Convention and the Palermo Convention. Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences.
>
> Interpretive Note to Recommendation 3 (Money Laundering Offence)
>
> 1. Countries should criminalise money laundering on the basis of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (the Vienna Convention) and the United Nations Convention against Transnational Organized Crime, 2000 (the Palermo Convention) [and now in accordance with Articles 14 and 23 of UNCAC (2005), which are discussed in detail in Sections 4.1.1 and 4.1.2 of this Chapter].
> 2. Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences. Predicate offences may be described by reference to all offences; or to a threshold linked either to a category of serious offences; or to the penalty of imprisonment applicable to the predicate offence (threshold approach); or to a list of predicate offences; or a combination of these approaches.
>
> …
>
> 5. Predicate offences for money laundering should extend to conduct that occurred in another country, which constitutes an offence in that country, and which would have constituted a predicate offence had it occurred domestically. Countries may provide that the only prerequisite is that the conduct would have constituted a predicate offence, had it occurred domestically.

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6. Countries may provide that the offence of money laundering does not apply to persons who committed the predicate offence, where this is required by fundamental principles of their domestic law.

The US, the UK and Canada all have money laundering offences that generally comply with FATF and UNCAC requirements. However, there are significant differences between the three countries' provisions. Canada and the US define money laundering as the use of the proceeds of a list of specified offences ("predicate offences"). The UK takes a more inclusive approach. Under its regime, virtually all profit-driven crime can lead to money laundering charges.

5.4.2 US

In the United States, money laundering is primarily enforced at the federal level. Thirty-six states have money laundering offences. Where money laundering is criminalized at the state level, federal and state authorities work closely together. Approximately 2,500 natural and legal persons are charged with federal money laundering offences each year, resulting in over 1,200 convictions. In 2014, a total of 3,369 money laundering charges were laid and 1,967 convictions registered (the greater number of charges accounted for by the fact that a person may be charged with multiple counts of various money laundering offences).[100]

The two primary money laundering offences are 18 USC 1956: Money Laundering (proceeds laundering) and 18 US 1957: Money Laundering (transactional). Respectively, charges for these offences were laid 1,895 and 517 times in 2014, accounting for 72% of all money laundering charges in United States. Other money laundering related charges are USC 1952: Interstate & foreign travel/transportation, including of proceeds, in aid of racketeering enterprises, 18 USC 1962: Receiving or deriving income from racketeering activities (RICO) and 31 USC 5332: Bulk cash smuggling.[101]

The relevant provisions of 18 USC 1956 and 18 USC 1957 are reproduced below:

18 U.S. Code s.1956 – Laundering of monetary instruments

(a) (1) Whoever, *knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity*, conducts or attempts to conduct such a financial transaction which *in fact involves the proceeds of specified unlawful activity*—

(A) (i) with the intent to *promote the carrying on of specified unlawful activity*; or

[100] Financial Action Task Force, "Anti-Money Laundering and Counter-Terrorist Financing Measures - United States Mutual Evaluation Report" [US Mutual Evaluation Report (2016)] (FATF, 2016) at 64-65, online: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>.

[101] *Ibid* at 64-65.

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) *knowing that the transaction is designed* in whole or in part—

(i) *to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity*; or

(ii) *to avoid a transaction reporting requirement* under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

(2) Whoever *transports, transmits, or transfers, or attempts* to transport, transmit, or transfer a monetary instrument or funds *from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States*—

(A) with the intent to *promote the carrying on of specified unlawful activity*; or

(B) *knowing* that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the *proceeds of some form of unlawful activity* and knowing that such transportation, transmission, or transfer is *designed in whole or in part*—

(i) *to conceal or disguise the nature, the location, the source, the ownership, or the control* of the proceeds of specified unlawful activity; or

(ii) *to avoid a transaction reporting requirement* under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent

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statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent—

(A) to *promote the carrying on of specified unlawful activity*;

(B) *to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity*; or

(C) *to avoid a transaction reporting requirement* under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section. [Emphasis added. The remainder of the section has not been included.]

18 U.S. Code s.1957 – Engaging in monetary transactions in property derived from specified unlawful activity

(a) Whoever, in any of the circumstances set forth in subsection (d), *knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity*, shall be punished as provided in subsection (b).

(b) (1) Except as provided in paragraph (2), the punishment for an offense under

this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both. If the offense involves a pre-retail medical product (as defined in section 670) the punishment for the offense shall be the same as the punishment for an offense under section 670 unless the punishment under this subsection is greater.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from

which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are—

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General.

(f) As used in this section—

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956 of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956 of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the terms "specified unlawful activity" and "proceeds" shall have the meaning given those terms in section 1956 of this title. [Emphasis added]

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While the US statutory provisions are longer and more complex than their Canadian equivalents (discussed below), their overall effect is similar. Only the proceeds of certain crimes ("specified unlawful activity") can give rise to a money laundering charge. The term "specified unlawful activity" is defined in 18 USC 1956(c)(7), and provides a long list of offenses that encompasses most serious crimes and includes violations of the *Foreign Corrupt Practices Act*. To be convicted, the accused must have known that the property in question was derived from unlawful activity of some kind. The two US provisions excerpted above include a variety of different uses that can give rise to a money laundering conviction, including attempting to avoid transaction reporting requirements and promoting the carrying on of a specified unlawful activity (funding further crimes). However, the overall effect is that money laundering consists of using the proceeds of certain defined crimes in certain defined ways.

Sentences for money laundering offenses are often lengthy and can reach a life term. From 2010-2015, prison sentences greater than 61 months (5 years) were imposed in 40% of convictions, while non-custodial sentences were used in only 15% of convictions. The table below outlines the sentences given in US federal money laundering cases from 2010-2014.

Table 4.1 Sentencing for Money Laundering Convictions (FY2010-FY2014)

Offense	# of Defendants	Not imprisoned	1-12 Months	13-14 Months	25-36 Months	37-60 Months	61+ Months	Life
18 USC 1956	5076	784	341	520	456	823	2106	46
18 USC 1957	1253	174	81	145	112	249	486	6

Source: US Mutual Evaluation Report (FATF, 2016) at 74.

Further Reading

For lawyers prosecuting or defending money laundering charges, the above provisions raise a host of issues. For a detailed analysis of the US money laundering provisions, including elements of the offences, possible defenses and sanctions, see Carolyn Hart, "Money Laundering" (Fall 2014) 51 Am Crim L Rev 1449.

Charles Doyle, "Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal Criminal Law" (Congressional Research Service, 2012), online: <www.crs.gov>; *United States Code Annotated*, Title 18, ss1956 and 1957.

5.4.3 UK

In the UK, money laundering is criminalized by sections 327-329 of the *Proceeds of Crime Act, 2002* (*POCA*). Those provisions provide as follows:

327 Concealing etc

1) A person commits an offence if he—
   (a) conceals criminal property;
   (b) disguises criminal property;
   (c) converts criminal property;
   (d) transfers criminal property;
   (e) removes criminal property from England and Wales or from Scotland or from Northern Ireland.
2) But a person does not commit such an offence if—
   (a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;
   (b) he intended to make such a disclosure but had a reasonable excuse for not doing so;
   (c) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.
3) Concealing or disguising criminal property includes concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it.

328 Arrangements

1) A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.
2) But a person does not commit such an offence if—
   (a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;
   (b) he intended to make such a disclosure but had a reasonable excuse for not doing so;
   (c) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.

[The meaning of "suspicion" in section 328 has been the subject of some debate due to its subjectivity. The case law has indicated a preference for the

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"more than fanciful possibility" test. It should also be noted that "arrangement" does not include legal proceedings.[102]]

329 Acquisition, use and possession

1) A person commits an offence if he—
   (a) acquires criminal property;
   (b) uses criminal property;
   (c) has possession of criminal property.
2) But a person does not commit such an offence if—
   (a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;
   (b) he intended to make such a disclosure but had a reasonable excuse for not doing so;
   (c) he acquired or used or had possession of the property for adequate consideration;
   (d) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.
3) For the purposes of this section—
   (a) a person acquires property for inadequate consideration if the value of the consideration is significantly less than the value of the property;
   (b) a person uses or has possession of property for inadequate consideration if the value of the consideration is significantly less than the value of the use or possession;
   (c) the provision by a person of goods or services which he knows or suspects may help another to carry out criminal conduct is not consideration.

As the above provisions make clear, the UK's domestic AML offences encompass a considerably larger range of acts than their equivalents in the US and Canada.

Section 340(3) of the *POCA* defines criminal property broadly. Property is criminal property if:

(a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and

[102] Karen Harrison & Nicholas Ryder, *The Law Relating to Financial Crime in the United Kingdom* (Ashgate, 2013) at 14-15.

(b) the alleged offender knows or suspects that it constitutes or represents such a benefit.

The person benefitting from criminal conduct need not commit the criminal act. The definition also includes property from anywhere in the world.

In the UK, unlike Canada and the US, there is no defined set of predicate offences for money laundering. There is also no need, under some of the provisions above, for any intent to conceal the source of the funds. The use or possession of the proceeds of any crime whatsoever can be prosecuted as money laundering. Under this regime, stealing and selling bicycles can give rise to money laundering charges. There is a requirement that the accused know that the proceeds in question were derived from criminal activity and a statutory defence if the accused reported the act as a suspicious transaction. Nonetheless, far more criminal activity is captured by this regime than in either the US or Canada.

Section 333 of the *POCA* also creates an offence of "tipping off." The offence is committed where a person in the regulated sector tells a customer or third person that a money laundering investigation is underway or under consideration and where this disclosure is likely to be prejudicial.[103]

Sentencing guidelines for money laundering offences came into force October 1, 2014. For more information see Chapter 7, Section 5.

Further Reading

For a detailed analysis of the provisions of the *Proceeds of Crime Act 2002*, see Edward Rees, QC, Richard Fisher & Richard Thomas, *Blackstone's Guide to the Proceeds of Crime Act 2002*, 4th ed (Oxford University Press, 2011).

For a critical look at the success of the UK's money laundering laws, see Peter Allan Sproat, "An Evaluation of the UK's Money Laundering and Asset Recovery Regime" (2007) 47:3 Crime, L & Soc Change 169.

For more on the UK's anti-money laundering regime and its weaknesses, see Karen Harrison & Nicholas Ryder, *The Law Relating to Financial Crime in the United Kingdom* (Ashgate, 2013) 9-37.

[103] Stuart H Deming, *Anti-Bribery Laws in Common Law Jurisdictions* (Oxford University Press, 2014) at 166.

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5.4.4 Canada

Money laundering laws in Canada were first enacted in 1989 and were subsequently amended in 1997, 2001 and 2005.[104] The current money laundering offences are set out in sections 462.31(1) and 354(1) of the *Criminal Code*, which state:

> Laundering proceeds of crime
>
> **462.31** (1) Every one commits an offence who *uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means,* any property or any proceeds of any property *with intent to conceal* or convert that property or those proceeds, *knowing or believing* that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of
>
> (a) the commission in Canada of a *designated offence*; or
>
> (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.
>
> Possession of property obtained by crime
>
> **354.** (1) Every one commits an offence who has in his *possession* any property or thing or any proceeds of any property or thing *knowing* that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from
>
> (a) the commission in Canada of an *offence punishable by indictment*; or
>
> (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment [Emphasis added].

There are three important aspects to section 462.31. First, it applies only to the proceeds of "designated offences." The term "designated offence" is defined in section 462.3 of the *Criminal Code* as an offence that may be prosecuted as an indictable offence under Canadian legislation, unless is it expressly excluded by regulation. This means violations of the *Corruption of Foreign Public Officials Act* or bribery offences in the *Criminal Code* are included as designated offences. Second, while the range of actions that can constitute the *actus reus* of the offence is broad, there must be intent to conceal on the part of the accused. Finally, the accused must know or believe that the property or proceeds were derived from the commission of an indictable offence. An offence under section 462.31 is punishable by up to ten years imprisonment. Section 354(1) does not require any intent to conceal the source of

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[104] For a brief history of the development of money laundering laws in Canada, see Standing Senate Committee on Banking Trade and Commerce, "Follow the Money: Is Canada Making Progress in Combatting Money Laundering and Terrorist Financing? Not Really" (Ottawa: Senate Reports, March 2013), online: <http://www.parl.gc.ca/Content/SEN/Committee/411/BANC/rep/rep10mar13-e.pdf>.

the property or proceeds, but it requires specific knowledge that the property was derived from an indictable offence. Therefore, only certain uses of the proceeds of relatively serious crimes will be caught by these provisions.

Money laundering charges are typically laid along with a predicate offence such as bribery or drug trafficking. From 2010 to 2014, 1,800 money laundering charges were laid in 1,027 cases involving one or more counts of money laundering along with other offences. Prosecuting the money laundering is typically not prioritized in these circumstances. The tables below, reproduced from FATF's 2016 mutual evaluation of Canada, show that while the conviction rate for these cases was 59.6%, the money laundering charge led to a conviction only 9.4% of the time.[105] Conversely, the money laundering charge was stayed 14.6% of the time and withdrawn 72.7% of the time. In FATF's mutual evaluation of Canada, discussed in greater detail in Section 6.3.3 of this chapter, it is explained that insufficient evidence, avoidance of over-charging, plea bargaining, and length of proceedings in money laundering cases were some of the reasons why this is done.[106] Given the principle of totality in sentencing, pursuing a money laundering charge when there is already a conviction for the predicate offence may not greatly increase the sentence, and therefore prosecutors may believe their resources are better directed at crafting a plea bargain or focusing on the predicate offence.

Table 4.2 Results of ML-Related Cases

	2010	2011	2012	2013	2014	Total	%
Guilty	82	108	140	136	146	612	59.6%
Acquitted	2	0	0	4	7	13	1.3%
Stayed	8	12	15	26	18	79	7.7%
Withdrawn	49	63	74	64	53	303	29.5%
Other Decisions	0	0	12	4	4	20	1.9%
Total	**141**	**183**	**241**	**234**	**228**	**1027**	**100%**

Source: Statistics Canada's Integrated Criminal Court Survey (ICCS) as cited in Canada Mutual Evaluation Report (FATF, 2016) at 52.

[105] Financial Action Task Force, "Anti-Money Laundering and Counter-Terrorist Financing Measures - Canada Mutual Evaluation Report" [Canada Mutual Evaluation Report (2016)] (FATF, 2016) at 54, online: <http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-canada-2016.html>.

[106] *Ibid*.

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Table 4.3 Results of ML-Charges

	2010	2011	2012	2013	2014	Total	%
Guilty	38	21	35	31	44	169	9.4%
Acquitted	5	1	8	6	9	29	1.6%
Stayed	17	26	144	45	31	263	14.6%
Withdrawn	132	190	366	327	294	1309	72.7%
Other Decisions	2	2	14	7	5	30	1.7%
Total	**194**	**240**	**567**	**416**	**383**	**1800**	**100%**

Source: Statistics Canada's Integrated Criminal Court Survey (ICCS) as cited in Canada Mutual Evaluation Report (FATF, 2016) at 52.

Conviction rates for money laundering were higher in cases where that is the only charge laid. In a limited sample size of 35 single-charge money laundering cases from 2010 to 2014, 12 resulted in convictions, a 34.3% rate. Stays were imposed 14.3% of the time, a comparable proportion as when money laundering is charged with other offences, while withdrawals were far less frequent, occurring 40% of the time, compared to 72.7% when money laundering is charged alongside other offences.

Sentencing for money laundering ranges from non-custodial sentences to penitentary terms. FATF suggests sanctions imposed in Canada for money launderers are low and not dissuasive enough. In 145 sentencing cases where money laundering was the most serious offence, nearly half received no prison time, and only 11% received over 2 years' incarceration.[107]

Table 4.4 Sanctions in ML Cases where ML was the Most Serious Offence, from 2010 to 2014

	Number	Percentage
Custodial Sentence	**80**	**55.2%**
• Less than 12 months	47	32.4%
• 12 to 24 months	17	11.7%
• More than 24 months	16	11.0%
Conditional sentence, probation, fine, restitution	**65**	**44.8%**
Total	**145**	**100.0%**

Note. There are other undisclosed cases where the ML offence runs concurrently with another MSO. Source: Canada Mutual Evaluation Report (FATF, 2016) at 54.

Further Reading

For a detailed legal analysis of Canada's money laundering offences see Terence D Hall, *A Guide To Canadian Money Laundering Legislation*, 4th ed (Lexis Nexis, 2015); Peter

[107] *Ibid* at 54.

M German, *Proceeds of Crime: The Criminal Law, Related Statutes, Regulations and Agreements* (Carswell, 1998) (loose-leaf, updated quarterly) ch. 5 and 6; *Anti-Money Laundering Law,* BC CLE Course Materials (BC CLE, May 2011); and Margaret Beare, *Criminal Conspiracies – Organized Crime in Canada,* (Oxford University Press, 2015), ch 6.

For a good critical analysis of money laundering in Canada and a claim as to its dubious benefits, see Margaret E Beare & Stephen Schneider, *Money Laundering in Canada: Chasing Dirty and Dangerous Dollars* (University of Toronto Press, 2007).

5.5 The Role of Legal Professionals

5.5.1 FATF Recommendations

FATF Recommendations 22 and 23 state that lawyers should be required to engage in CDD measures when performing transactions for clients and to report suspicious transactions. Many members of the legal profession and legal organizations such as the Canadian Bar Association have strongly opposed the inclusion of lawyers in these reporting regulations.[108] The interpretive note to Recommendation 23, reproduced below, modifies FATF's position somewhat:

> Interpretive Note to Recommendation 23 (DNFBPS [designated non-financial businesses and professions] – Other Measures)
>
> 1. Lawyers, notaries, other independent legal professionals, and accountants acting as independent legal professionals, are not required to report suspicious transactions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.
> 2. It is for each country to determine the matters that would fall under legal professional privilege or professional secrecy. This would normally cover information lawyers, notaries or other independent legal professionals receive from or obtain through one of their clients: (a) in the course of ascertaining the legal position of their client, or (b) in performing their task of defending or representing that client in, or

[108] John A Kelley, "International Anti-Money Laundering and Professional Ethics" (2006) 40:2 Intl Lawyer 433. For an explanation of lawyer opposition to reporting requirements, see Kent Roach et al, "Sentries or Facilitators?: Law and Ethics in Trusting Lawyers with Money Laundering Prevention" (2004) 49 Crim LQ 34. For a comparative analysis of responses to the FATF recommendations in various jurisdictions (EU, UK, US, Canada, Australia and New Zealand) and an examination of the effects of gatekeeper obligations on the solicitor-client relationship, see Maria Italia, "Lawyers and Accountants as 'Gatekeepers' to Combat Money Laundering: An International Comparison" (2013) 42:2 Austl Tax L Rev 116.

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concerning judicial, administrative, arbitration or mediation proceedings.

3. Countries may allow lawyers, notaries, other independent legal professionals and accountants to send their STR [suspicious transaction report] to their appropriate self-regulatory organisations, provided that there are appropriate forms of cooperation between these organisations and the FIU.

4. Where lawyers, notaries, other independent legal professionals and accountants acting as independent legal professionals seek to dissuade a client from engaging in illegal activity, this does not amount to tipping-off.

In this interpretive note, the FATF clarifies that its recommendations are tempered by the requirements of legal privilege and confidentiality, and leaves it in the hands of member states to decide how to implement an AML regime that respects those duties. Lawyers in the US, the UK and Canada are subject to different degrees of regulation. This variation is a function of a number of factors, principally legislative policy, the power of the bar and the constitutional structure of the country in question. For instance, after the government of Canada attempted to impose stringent regulations on the legal profession, the Federation of Law Societies successfully challenged these measures on constitutional grounds (further discussed at Section 5.5.4). In the UK, on the other hand, lawyers have been less successful in staving off state regulation of their practice.

There are two principal ways that lawyers must deal with state-level AML regimes. The first is regulation. Similarly to financial institutions, lawyers in some countries are subject to reporting, record-keeping and CDD requirements. The second is direct criminal liability. In some countries, AML laws are drafted in such a way that lawyers must be extremely careful to avoid prosecution for careless handling of funds or lack of due diligence in the ordinary course of their practice.

5.5.2 US

To date, the US has not taken serious steps to regulate lawyers as part of their AML regime. According to an article on the International Bar Association's Anti-Money-Laundering Forum:

> the American legal system regards legal professional privilege as fundamental to the lawyer-client relationship. Therefore, it is disinclined towards modifying its current anti-money laundering legislation to include professionals such as lawyers. Trust and confidence are considered as keystone principles to the legal professional relationship. They would be eroded indefinitely, if lawyers were required to reveal information relating to the client to third parties, based upon mere suspicions. A client must feel

> free to seek legal assistance and be able to communicate with his legal representative fully and frankly.[109]

US lawyers are not subject to any mandatory reporting requirements, with one exception. They are required to report any cash transaction greater than $10,000 to the IRS.[110] Other than that, their work is outside the US AML regime.

US lawyers are also not likely to be caught by the country's anti-money laundering offenses in the ordinary course of their work. As discussed in Section 5.4, the US money-laundering offenses require that the accused have actual knowledge that the funds in question were derived from criminal activity. While some courts have held that willful blindness is sufficient to make out this element of the offence, it is still unlikely that a lawyer who was not knowingly complicit in a money laundering scheme could be successfully prosecuted.[111]

5.5.3 UK

Lawyers in the UK are in an unenviable position relative to their North American colleagues. They face significant potential criminal liability under section 328 of the *POCA*, even in the ordinary course of their practice. Section 328 targets those who assist in the layering and integration stages of the money laundering process. The Crown is required to establish that the accused entered into or became concerned in an arrangement that they knew or suspected "facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person." This provision is intended to catch financial advisors, accountants, lawyers and other professionals who assist in a money laundering scheme.

Section 328 is broad enough that even careless lawyers can be prosecuted. For example, in *R v Duff*, a solicitor was sentenced to six months imprisonment because he suspected that his client's funds had been criminally derived, but did not report his suspicions.[112] This came to light some years later when his client was arrested for cocaine smuggling.[113] There are statutory defences to a section 328 charge, but they require the accused either to have reported their suspicions or to have a reasonable excuse for their failure to do so. This regime forces lawyers to report any suspicions or face criminal charges.

The UK courts have limited the scope of section 328 somewhat. In the 2005 case of *Bowman v Fels*, the English Court of Appeal held that section 328 does not apply to lawyers involved in ordinary litigation or other dispute resolution processes who, as a result of the privileged

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[109] "Lawyers and Money Laundering", International Bar Association Money Laundering Forum, online: <http://www.anti-moneylaundering.org/Lawyers_and_Money_Laundering.aspx>.
[110] 26 USC s 6050I. This provision was unsuccessfully challenged in *United States v W Ritchie & Pc*, 15 F (3d) 592 (1994), 73 AFTR 2d 94-994, online: <http://openjurist.org/15/f3d/592>.
[111] Carolyn Hart, "Money Laundering" (2014) Am Crim L Rev 1449 at 1460.
[112] *R v Duff*, [2003] 1 Cr App R (S) 466.
[113] Edward Rees, QC, Richard Fisher & Richard Thomas, *Blackstone's Guide to the Proceeds of Crime Act 2002*, 4th ed (: Oxford University Press, 2011) at 130.

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information they receive, come to suspect that the property at issue is criminal property.[114] The case involved a family law dispute. The claimant, Ms. Bowman, sought recognition of a proprietary interest in the defendant's home based on the doctrine of constructive trust. The claimant and the defendant had previously both lived in the house together in a common-law relationship. During the course of preparing for litigation, the claimant's solicitors began to suspect that the house may have been criminal property and became concerned that if they did not disclose their suspicions to the authorities that they would be held liable under section 328 for participating in an arrangement to aid their client in acquiring an interest in criminal property. The Court in *Bowman* clarified that the solicitors were in no such danger. Section 328 does not override the concept of legal privilege and therefore would not have applied to the acts of the solicitors of the claimant or the defendant.

However, the Court in *Bowman* did not address the position of lawyers who assist clients in matters not involving litigation. Therefore, the potential liability of lawyers acting in a transactional context remains uncertain.[115]

Further Reading

For further information on legal privilege in the context of UK anti-money laundering law see: The Law Society, "Chapter 6: Legal Professional Privilege" in *Practice Notes: Anti-Money Laundering*, online: <http://www.lawsociety.org.uk/advice/practice-notes/aml/legal-professional-privilege/>.

5.5.4 Canada

The Canadian government has tried unsuccessfully to subject lawyers to reporting and CDD requirements much like those imposed on financial institutions. When they were promulgated, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and *Regulations* applied to lawyers. They imposed reporting and CDD requirements and allowed searches of law offices and seizure of evidence. The application of the *Act* and *Regulations* to lawyers was challenged by the Federation of Law Societies on constitutional grounds. In a 2015 ruling, the Supreme Court upheld the Federation's position and read down the relevant

[114] *Bowman v Fels*, [2005] EWCA Civ 226.

[115] Edward Powles, "All that Glisters Is Not Gold: Laundering the UK Money Laundering Regime" (2006) 42 Cambridge LJ 40 at 42.

provisions to effectively exclude lawyers from the *Act* and *Regulations*.[116] The Federation has created model rules to deal with money laundering, which have been adopted by the provincial law societies.[117] The Federation's model rule on cash transactions states that "[a] lawyer shall not receive or accept from a person, cash in an aggregate amount of $7,500 or more Canadian dollars in respect of any one client matter or transaction."[118] The B.C. Law Society Rule 3-59 also adopts the $7,500 cash rule.[119] However, these rules are less comprehensive and generally impose less stringent requirements than the government's *Regulations*. The federal legislation and regulations require that financial institutions and other professionals, such as accountants or investment brokers, report all transactions of $10,000 or more to FINTRAC. On the other hand, lawyers need not report cash transactions to anyone. The law societies take the position that when a cheque or electronic bank transfer of $10,000 or more is received by a law firm, that money has already been subjected to the automatic FINTRAC reporting requirement (for $10,000 or more) at the point of deposit of that money with a financial institution.

As in the US, Canadian lawyers are unlikely to be prosecuted for money laundering offences unless they deliberately facilitate a money laundering scheme. As discussed in Section 5.4.4, the Canadian offences require that the accused have actual knowledge that the funds in question were obtained through the commission of an indictable offence. Willful blindness,

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[116] *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7. The SCC articulated a new principle of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms*. The SCC held that it is a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes. The SCC stated that this duty is a basic tenet of the Canadian legal system, a distinct element of a lawyer's broad common law duty of loyalty and a fundamental part of the solicitor-client relationship. The Court noted that the lawyer's duty of commitment to the client's cause is essential to maintain confidence in the integrity of the administration of justice. Under the impugned regulations, lawyers must create and preserve records not required for client representation and the solicitor-client confidences contained in these records are not adequately protected against the sweeping warrantless searches authorized by sections 62-64 of the *PCMLTFA,* which violate section 8 *Charter* rights against search and seizure in law offices as set out in *Lavallee, Rackel & Heintz v Canada (Attorney General),* 2002 SCC 61.

[117] The FLSC Model Code is available online: <http://www.flsc.ca/en/federation-model-code-of-professional-conduct/>. Rule 3.2-7 prohibits lawyers from "knowingly assist[ing] in or encourage[ing] any dishonesty, fraud, crime or illegal conduct, or instruct[ing] the client on how to violate the law and avoid punishment," including money laundering. The same prohibition is also found in Rule 3.2-7 of the BC Law Society *Code of Professional Conduct for* BC, online: <https://www.lawsociety.bc.ca/page.cfm?cid=2638&t=Chapter-3-–-Relationship-to-Clients#3.2-7>. For a useful description of the Law Society of B.C. rules, see Barbara Buchanan, "BC Lawyers and Professional Responsibility" in *Anti-Money Laundering Law* (Materials for CLE BC Seminar on *Anti-Money Laundering Law,* May 27, 2011), online: <http://www.cle.bc.ca/>.

[118] Federation of Law Societies of Canada, *Model Rule on Cash Transactions* (adopted by Council of the Federation of Law Societies of Canada as of July 2004), online: <http://flsc.ca/wp-content/uploads/2014/10/terror1.pdf>.

[119] Law Society of BC, *Law Society Rules 2015*, Rule 3-59, online: <https://www.lawsociety.bc.ca/page.cfm?cid=4089&t=Law-Society-Rules-2015>.

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but not subjective recklessness, will normally suffice as actual knowledge.[120] Section 462.31(1) of the *Criminal Code* also requires some intent to conceal the source of the funds. Mere careless conduct on the part of a lawyer is unlikely to make out the offence.

Further Reading

For a practical guide to lawyers' legal and ethical obligations regarding money laundering, see International Bar Association, American Bar Association & Council of Bars and Law Societies of Europe, *A Lawyer's Guide to Detecting and Preventing Money Laundering* (October 2014), online: <http://www.lawsociety.org.uk/support-services/advice/articles/new-global-aml-guidance/>.

For a comparative review of money laundering regimes in Canada and the US, see Ronan Reinart, "Laundering Around the World: Legislative Responses to Money Laundering in Canada, the US and Bermuda" (2004) 4 Asper Rev Intl Bus & Trade L 131 and Nicholas Ryder, *Money Laundering: An Endless Cycle? A Comparative Analysis of the Anti-Money Laundering Policies in the United States, the United Kingdom, Australia and Canada* (Routledge, 2012).

For a summary of various US and international AML developments, see Mikhail Reider-Gordon, "US and International Anti-Money Laundering Developments" (2011) Spring 2011 Intl Lawyer 365.

6. EVALUATING THE EFFECTIVENESS OF AML REGIMES

6.1 Introduction

This section discusses tools for evaluating the success or failure of state-level AML regimes and introduces the two most common international evaluators, the Basel Institute on Governance and the FATF. It describes both the Basel AML Index and the FATF mutual evaluation process and briefly summarizes how the US, the UK and Canada performed on each of these evaluations. It then excerpts a critical evaluation from the Canadian Senate and discusses some of the systemic barriers to creating effective state-level AML regimes.

[120] See G Ferguson et al, *Canadian Criminal Jury Instructions* (Vancouver: CLE BC, 2017) at 6.60, user note before para 13.

6.2 The Basel AML Index

Since 2012, the Basel Institute on Governance has produced an annual index on anti-money laundering.[121] The Basel AML Index provides a useful tool for assessing and comparing *the risk* of money laundering in different countries worldwide and for observing over time changes to that risk within a given country.

The index is a composite weighting of the average of 14 indicators, relying on data provided by groups such as FATF, Transparency International and the World Bank.[122] For the 2016 report, data was available for 149 countries who were given a score from 0 (lowest risk) to 10 (highest risk).[123]

Factors weighed in the total score are:

- 65% - Money Laundering/Terrorist Financing Risk
- 15% - Financial Transparency & Standards
- 10% - Corruption Risk
- 5% - Public Transparency & Accountability
- 5% - Political Risk[124]

Table 4.5 A sample of 20 countries and their scores and rankings from the 2016 Basel Index.

Country	**Overall Score** (0-10)	**Rank** (1-149)
Iran	8.61	1
Afghanistan	8.51	2
Panama	7.09	25
Nigeria	6.97	32
Brazil	6.23	56
Russia	6.22	58
Guatemala	5.97	66
Luxembourg	5.89	70

[121] As it describes itself, the Basel Institute is an "independent not-for-profit competence centre specialised in corruption prevention and public governance, corporate governance and compliance, anti-money laundering, criminal law enforcement and the recovery of stolen assets": "Basel Institute on Governance", online: <http://index.baselgovernance.org/index/about>.
[122] Basel Institute on Governance, "Basel AML Index 2016" (2016) at 12, online: <https://index.baselgovernance.org/sites/index/documents/Basel_AML_Index_Report_2016.pdf>.
[123] To be included in the public version of the report, data must be available on 8 or more indicators including all three indicators assessing the money laundering/terrorist financing risk. An overview of 203 countries is available in an Expert Edition of the report, available free of charge to academics, public and supervisory institutions and NPO's and for a fee to commercial institutions.
[124] These factors are determined by a number of sub-factors. For example, the money laundering/terrorist financing risk stems from FATF Recommendations (30%), TJN - Finance Secrecy Index (25%) and UN INCSR - Volume II on Money Laundering (20%). One exception is Corruption Risk, where the entire score stems from the TI CPI - Perception of Public Corruption.

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Country	**Overall Score** (0-10)	**Rank** (1-149)
Japan	5.76	76
India	5.69	78
Switzerland	5.46	88
Italy	5.36	90
Germany	5.33	92
United States	5.17	97
Taiwan, China	5.12	99
France	5.03	103
Canada	5.00	105
South Africa	4.86	117
United Kingdom	4.77	121
Finland	3.05	149

It is important to note that the Index measures *risk* of money laundering and terrorist financing. In practice, factors relating to a country's financial sector and economy are important considerations for money launderers and can contribute significantly to the volume of laundering in any given country. For example, the US ranks 97th of 149 countries, meaning there are approximately 50 countries which have a lower risk for money laundering. However, that US ranking does not mean that all the countries which were ranked as lower money laundering risks are doing more, or are more effective, in trying to control and prevent money laundering. In practice, the majority of international money launderers choose not to operate in small, isolated economies. One study found that nearly half of the world's money laundering originates in the US, due in part to the dominance of US dollars in global markets and transactions.[125]

6.3 FATF Mutual Evaluations

FATF assesses compliance with its AML recommendations through a process of mutual evaluation. For the first three rounds of evaluation, countries were assessed on their technical compliance with the FATF recommendations. However, a new methodology was developed in 2013 to evaluate the *effectiveness* of AML regimes. This methodology is used in the ongoing fourth round of FATF evaluations, which began in mid-2014. So far, only Australia, Belgium, Ethiopia, Norway and Spain have undergone this revised evaluation process. The calendar of fourth round evaluations can be seen at: <http://www.fatf-gafi.org/media/fatf/documents/assessments/Global-assessment-calendar.pdf>.

Evaluations are carried out by teams of experts, described by FATF as follows:

> An assessment team will usually consist of 4 expert assessors (comprising at least one legal, financial and law enforcement expert), principally drawn

[125] Killian J McCarthy, "Why Do Some States Tolerate Money Laundering? On the Competition for Illegal Money" in Unger & van der Linde, eds., (2013) 127 at 138.

> from FATF members, and will also include members of the FATF secretariat. Depending on the country and the money laundering and terrorist financing risks, additional assessors or assessors with specific expertise may also be required.[126]

Prior to 2014, countries were assigned a rating for compliance with each FATF recommendation. Possible ratings were C (compliant), LC (largely compliant), PC (partially compliant) or NC (non-compliant). After an evaluation, a country may be required to report back to the FATF at intervals to describe its progress in addressing any shortcomings identified by the evaluation team.

The US, UK and Canada have not yet undergone evaluations under the 2013 methodology and the third round of evaluations ended before the new FATF recommendations were released in 2012. Only Canada has undergone a follow-up report since 2012. Care must be exercised in using the FATF evaluations as a basis for comparing AML regimes in the US, UK, Canada and elsewhere. Also, the process for conducting mutual evaluations and the FATF Recommendations themselves have changed significantly over the past ten years. The mutual evaluations and follow-up reports on each member state were prepared at different times, and may not be directly comparable. The mutual evaluations are intended as a tool to assist countries to improve their AML regimes and to allow the FATF to exert peer pressure on reluctant countries. The evaluations are not a global comparative survey for scholarly analysis.

Nonetheless, the FATF mutual evaluation process provides the best primary data on global AML efforts and is an important source for surveys by other organisations, including the Basel Institute. The following sections summarize the most recent evaluations of the AML regimes in the US, the UK and Canada, focusing on any key weaknesses identified.

6.3.1 US

The United States had a FATF mutual evaluation in 2016, which like the previous evaluation in 2006 was generally positive. The United States has significant exposure to potential money laundering due to the global dominance of the US dollar. The US was one of the first countries to place significant focus on money laundering and has a developed anti-money laundering system.[127]

Of FATF's 40 recommendations, the US was found compliant with 11, largely compliant with 20, partially compliant with 6 and non-compliant with 3. The non-compliances related

[126] "Procedures for the FATF Fourth Round of AML/CFT Mutual Evaluations" (FATF, 2014) at 6, online: <http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF-4th-Round-Procedures.pdf>.

[127] US Mutual Evaluation Report (2016) at 5, 23.

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to lacking trans-parency of beneficial ownership and the regulation of designated non-financial businesses and professions including lawyers, accountants and real estate agents.[128]

Mutual legal assistance from the US was positive. From 2009 to 2014, the US received 1,541 requests from MLA relating to money laundering, terrorist financing or asset forfeiture and recovery and granted the request in 1,062 of those cases.

Table 4.6 Response to Incoming MLA Requests

Response to incoming MLA requests	ML	TF	Asset Forfeiture
Granted	568	53	501
Denied (grounds include lack of evidence, assistance not legally available, and other process reasons)	64	3	72
ML and asset forfeiture cases: Other reasons for not executing request (includes unable to locate evidence, withdrawn, and other non-process reasons)	150	N/A	102
TF cases: Other reasons for not executing request (includes no response from requestor, unable to locate evidence, and withdrawn)	N/A	14	N/A
Inexecutable under U.S. law	4	0	10
Total number of MLA requests related to ML, TF & asset forfeiture	786	70	685

Source: US Mutual Evaluation Report (FATF, 2016) at 164.

In the same years, 21 requests to extradite a money laundering suspect were made, resulting in 10 extraditions. Contested extraditions took an average of one year to resolve.

Table 4.7 Response to Incoming Extradition Requests

Response to incoming extradition requests	ML	TF
Granted	10	0
Denied	3	0
Other (Includes cases withdrawn, fugitive not located, fugitive located in another country or fugitive arrested in requesting country)	6	0
Inexecutable under U.S. law	2	0
Total number of extradition requests related to ML & TF	21	0

Source: US Mutual Evaluation Report (FATF, 2016), at 165.

[128] *Ibid* at 255-259.

One beneficial aspect of the US system is the assigning of an attorney to US embassies in specific countries to assist in mutual legal assistance and extradition requests.[129]

Recommendations made in the FATF mutual evaluation include ensuring beneficial ownership information is required to be obtained at the federal level[130] as well as assessing and addressing exposure to the risk of money laundering by non-financial businesses and professions such as lawyers, accountants and real estate agents.[131]

6.3.2 UK

The last mutual evaluation of the UK took place in 2007. Overall, the assessment team concluded that the country's AML regime was effective. As the executive summary notes:

> The UK has a comprehensive legal structure to combat money laundering and terrorist financing. The money laundering offence is broad, fully covering the elements of the Vienna and Palermo Conventions, and the number of prosecutions and convictions is increasing. The terrorist financing offence is also broad. The introduction of the *Proceeds of Crime Act 2002* (POCA) has had a significant and positive impact on the UK's ability to restrain, confiscate and recover proceeds of crime. The UK has also established an effective terrorist asset freezing regime. Overall, the UK FIU appears to be a generally effective FIU. The UK has designated a number of competent authorities to investigate and prosecute money laundering offences. Measures for domestic and international co- operation are generally comprehensive as well.[132]

However, the report noted that a key weakness in the regime was its failure to comply fully with Recommendation 5 (customer due diligence, which is now Recommendation 10 in the 2012 Recommendations).[133]

A follow-up report produced in 2009 describes the steps the UK had taken to address the deficiencies identified in the 2007 report. It concludes that:

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[129] *Ibid* at 167.
[130] *Ibid* at 38, 118, 154.
[131] *Ibid* at 135.
[132] Financial Action Task Force, "Summary of the Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: United Kingdom of Great Britain and Northern Ireland" (FATF, 2007) at 1, online: <http://www.fatf-gafi.org/topics/mutualevaluations/documents/mutualevaluationofunitedkingdomofgreatbritainandnorthernireland.html>.
[133] *Ibid* at 10-11. For a detailed breakdown of UK compliance with each FATF Recommendation at the time of the report, see the Mutual Evaluation Report Executive Summary at 10-15, online: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20UK%20ES.pdf>.

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> The UK has taken substantive action towards improving compliance with Recommendation 5, and nearly all of the deficiencies identified in the MER [mutual evaluation report] relating to the customer due diligence (CDD) framework have been addressed by the Money Laundering Regulations 2007. Although a few shortcomings remain, the UK has taken sufficient action to bring its compliance to a level essentially equivalent to LC [largely compliant].[134]

The full 2009 follow-up report is available online: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/FoR UK.pdf>.

The UK has recently introduced a beneficial ownership law that requires disclosure in a publicly accessible registry of the beneficial ownership of companies and trusts. That law will greatly aid in the identification of money launderers. Mandatory disclosure of beneficial ownership is discussed more fully in Chapter 5, Section 5.2.2.

6.3.3 Canada

Canada had a FATF mutual evaluation in 2016, and that evaluation noted significant progress since the previous evaluation in 2007. The FATF report noted overall that "Canada has a strong framework to fight ML and TF, which relies on a comprehensive set of laws and regulations, as well as a range of competent authorities." [135] Of the 40 FATF recommendations, Canada was found compliant with 11, largely compliant with 18, partially compliant with 6 and non-compliant with 5.[136] The non-compliant ratings resulted from the anti-money laundering legal obligations being inoperative in respect to lawyers, inadequate beneficial ownership laws (discussed in Chapter 5, Section 5.2.2 of this book) and failing to meet the standards for foreign politically exposed persons.[137] The latter concern was addressed through amended regulations to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* in July 2016.

The evaluation states that most high-risk areas are governed by Canada's AML/CTF framework, but finds that the exemption of legal counsel, law firms and Quebec notaries is a "significant loophole" in Canada's framework.[138] This has a trickle-down effect throughout the AML/CTF regime. As the evaluation notes "[i]n light of these professionals' key gatekeeper role, in particular in high-risk sectors and activities such as real-estate

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[134] Financial Action Task Force, "Mutual Evaluation Fourth Follow-Up Report: Anti-Money Laundering and Combating the Financing of Terrorism, United Kingdom" (FATF, 2009) at 4, online: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/FoR UK.pdf>.

[135] Canada Mutual Evaluation Report (2016) at para 12.

[136] *Ibid* at 205-209.

[137] *Ibid* at 205-209.

[138] *Ibid* at 31.

transactions and the formation of corporations and trusts, this constitutes a serious impediment to Canada's efforts to fight ML."[139]

The evaluation suggests that law enforcement results are not commensurate with Canada's money laundering risk and that asset recovery appears low. The report notes that some provinces appear more effective in asset recovery, citing Quebec as an example.[140] As discussed in Chapter 6, Section 3.1.2, Quebec is the only province to have a dedicated, multi-governmental anti-corruption agency.

As discussed in Section 5.4.4 of this chapter, the evaluation is also critical of the prosecution of money laundering cases, finding that there is a high percentage of withdrawals and stays of proceedings and that sanctions in money laundering cases are not sufficiently dissuasive.[141]

The evaluation commended Canada's mutual legal assistance system. From 2008 to 2015, Canada received 383 mutual legal assistance requests for money laundering offences. Canada provided assistance in 253 of these requests, while 17 were withdrawn, 36 abandoned and 7 refused. Feedback from 46 counties found that assistance provided by Canada is of good quality.[142]

Canada is also cooperative with extradition requests, although the process can be lengthy. From 2008 to 2015, Canada received 92 requests for extradition in money laundering cases, 77 of which came from the US. These resulted in 48 persons being extradited and 13 subject to other measures such as deportation or voluntary return.[143] As noted in Section 6.3.1 of this chapter, contested extradition from the US in money laundering cases is resolved in one year on average. The extradition process from Canada is lengthier, with 53% of cases taking 18 months to 5 years to complete, 28% from 3 to 5 years and 4% over 5 years.[144]

Recommendations stemming from the mutual evaluation included mitigating the risks posed by the exclusion of lawyers, law firms and Quebec notaries from the *MLTF Act*, engaging prosecutors at earlier stages in money laundering cases and ensuring asset recovery is pursued as a policy objective.[145]

6.4 Other Evaluations

As the previous two sections demonstrate, both the FATF and the Basel Institute are relatively positive about the performance of the US, the UK and Canada. However, in the case of the Basel Index this is a relative measure – it simply shows that many other countries

[139] *Ibid* at 7.
[140] *Ibid* at 6.
[141] *Ibid* at 36.
[142] *Ibid* at 108-09.
[143] *Ibid* at 110.
[144] *Ibid* at 110.
[145] *Ibid* at 31, 37, 77, 87, 101.

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in the world are doing worse in reducing or controlling their risk of money laundering. In the case of the FATF mutual evaluations, most of the focus is on implementation of the Recommendations. However, in some cases, even complete compliance with the FATF Recommendations may not produce an effective AML regime in practice. Some commentators have produced more critical reviews of the AML regimes discussed above.[146]

The excerpt below is from a 2013 Canadian Senate report entitled "Follow the Money: Is Canada Making Progress in Combatting Money Laundering and Terrorist Financing? Not Really."[147] This Report was completed pursuant to section 72 of the *PCMLTFA*, which mandates that a Parliamentary Committee review the act every five years. As the title of the report suggests, the Senate committee found that there is little evidence that the *PCMLTFA*, FINTRAC and the rest of Canada's anti-money laundering regime is effective at reducing or prosecuting money laundering. The Report goes on to suggest eighteen recommendations for reform. The following excerpt (pages 5-7) provides an overview of the Committee's findings and recommendations:

BEGINNING OF EXCERPT

B. The Impact

Recognizing that Canada's anti-money laundering and anti-terrorist financing legislation has had incremental changes over the past 11 years, the Committee believes that it is appropriate to examine the extent to which Canada's Regime is effective in detecting and deterring the laundering of money and the financing of terrorist activities, and contributes to the successful investigation and prosecution of those who are involved in these criminal activities. The Committee is interested in the responses to several questions:

- Have the scope and magnitude of money laundering and terrorist financing in Canada diminished over time?
- Are the time, money and other resources dedicated to addressing these activities having sufficient "results?" and
- What changes are needed to bring about better "results?"

Throughout the hearings, the Committee questioned witnesses about the scope and magnitude of money laundering and terrorist financing in Canada. While the

[146] For example, Louis de Koker calls for an evaluation of FATF itself due to its power and lack of transparency in decision-making: Louis de Koker, "Applying Anti-Money Laundering Laws to Fight Corruption" in Graycar & Smith, eds, (2011) 340 at 356.

[147] Standing Senate Committee on Banking Trade and Commerce, "Follow the Money: Is Canada Making Progress in Combatting Money Laundering and Terrorist Financing? Not Really" (Ottawa: Senate Reports, March 2013), online: <http://www.parl.gc.ca/Content/SEN/Committee/411/BANC/rep/rep10mar13-e.pdf>.

Committee learned that FINTRAC has a solid reputation internationally, witnesses shared only limited and imprecise information about the extent to which the Regime meets its objective of detecting and deterring money laundering and terrorist financing. The Committee believes that there continues to be a clear need for legislation to combat money laundering and terrorist financing in Canada.

The Committee feels that there is a lack of clear and compelling evidence that Canada's Regime is leading to the detection and deterrence of money laundering and terrorist financing, as well as contributing to law enforcement investigations and a significant rate of successful prosecutions. It is possible that some witnesses were unable to share confidential information in a public meeting. It is also possible that information about the success or failure of the Regime is not being collected. In any event, the Committee feels that the current Regime is not working as effectively as it should, given the time, money and other resources that are being committed by reporting entities, a variety of federal departments and agencies, other partners and taxpayers.

Given that multinational financial institutions have recently been implicated in money laundering and terrorist financing, the Committee is concerned about non-compliance with the Act by reporting entities. While the majority of non-compliance charges laid in Canada are in relation to cross-border reporting offences, the Committee is aware of the July 2012 report by the United States (U.S.) Senate Permanent Subcommittee on Investigations of the U.S. Senate Committee on Homeland Security and Governmental Affairs, entitled U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History, in relation to HSBC and money laundering using international wire transfers. [In 2013, HSBC paid $1.9 billion to settle money laundering charges filed by the US Department of Justice.[148]] The U.S. Senate Committee made several recommendations designed to strengthen anti-money laundering and anti-terrorist financing controls, particularly in relation to large, multinational financial institutions with affiliates in jurisdictions that are considered to be at high risk of being targeted by money launderers and those who finance terrorism. As financial institutions play a critical role in preventing illicit money from entering the financial system, the Committee feels that FINTRAC must be vigilant in ensuring that Canada's reporting entities comply with their obligations under the Act.

The Committee believes that an approach involving incremental legislative and regulatory changes must end. Consequently, ongoing efforts are needed to ensure that the resources committed to detecting, deterring, investigating and prosecuting money laundering and terrorist financing offences have the best "results" in the least costly,

[148] "HSBC's $1.9B Money Laundering Settlement Approved by Judge", *CBC News* (3 July 2013), online: <http://www.cbc.ca/news/business/hsbc-s-1-9b-money-laundering-settlement-approved-by-judge-1.1377272>.

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burdensome and intrusive manner. While it is virtually impossible to eliminate the illegal activities that lead to the need to launder money, a continuation of the current incremental approach – which appears to involve changes to fill gaps by adding reporting entities and to meet evolving FATF recommendations that may or may not have relevance for Canada – is not the solution that Canada needs at this time.

Having conducted a comprehensive study, the Committee's view is that the Act should be amended to address three issues:

- the existence of a structure for Canada's Regime that leads to increased performance in relation to the detection, deterrence, investigation and prosecution of money laundering and terrorist financing;
- the existence of information-sharing arrangements that ensure that suitable information is being collected and shared with the right people at the appropriate time, bearing in mind the need to protect the personal information of Canadians; and
- the existence of a scope and focus for the Regime that is properly directed to ensuring that individuals and businesses report the required information to the appropriate entity in an expedient manner.

The time for incremental change to the Regime has ended. The time for examination of fundamental issues has arrived.

END OF EXCERPT

Some commentators criticize the high costs of AML measures for businesses and society and question whether these costs are worth the potentially negligible benefits of AML regimes.[149] See, for example, Michael Levi & Peter Reuter, "Money Laundering" (2006) 32:1 Crime and Justice 289.

Further Reading

For a detailed cost-benefit analysis of AML laws in a hypothetical EU country, see Joras Ferwerda, "Cost-benefit analysis" in Brigitte Unger et al., eds, *The Economic and Legal Effectiveness of the European Union's Anti-Money Laundering Policy* (Edward Elgar Publishing, 2014) 205.

[149] The UK has embarked on a review of the country's AML regime with the goal of making the system more efficient and less costly for businesses. See: Department of Business, Innovation and Skills, Press Release, "Financial Red Tape Targeted in New Review" (28 August 2015), online: <https://www.gov.uk/government/news/financial-red-tape-targeted-in-new-review>.

For a detailed analysis of money laundering regulation in 80 countries with the aim of determining which regulations are most effective in curtailing money laundering and predicate offences, see Alberto Chong & Fernando Lopez-de-Silanes, "Money Laundering and its Regulation" (March 2015) 27:1 Economics and Politics 78.

6.5 Barriers to Creating Effective AML Measures

There are a variety of reasons why it is difficult to create effective AML measures. First, there are the difficulties posed by the lack of information available to legislators at the national and international level. There is no accurate estimate of the global scope of money laundering or its extent in any particular country. This makes it difficult to evaluate the success of any particular AML measure, since we cannot accurately measure the impact of any such measure. The secrecy surrounding government and FIU information also poses a challenge to those researching the effectiveness of AML measures.[150]

Investigation of money laundering also presents many problems, such as the morass of data and the length of time between a corrupt act and its discovery.[151] A further difficulty is that a successful AML regime relies heavily on the cooperation of the financial sector, which may have much more money to gain by facilitating money laundering than stopping it. As Beare and Schneider note in their 2007 book *Money Laundering in Canada*:

> The rhetoric of financial institutions come across as if all of the objectives of the banks are equal: profit, risk management, customer satisfaction, *and* a sense of societal/corporate responsibility towards the reduction of money laundering. In reality, these goals are often seen to be contradictory and are not given equal attention. As we have noted, a focus on profitability runs throughout the banking sector. Picking up on the 'what gets measured and gets rewarded, gets done' line of reasoning (Bogach and Gordon, 2000), it is important to consider the reward system within those institutions that have claimed to implement sound voluntary codes, especially where those codes might work against other rewarded objectives. During the US Senate's 1999 review of the operations of private banking, one bank official stated that 'no-one took the "know-your-customer" policies seriously until bonuses were threatened.' The internal study of bank defalcations [failure to repay loans] within Canadian financial institutions revealed a maze of individual, departmental, and branch incentives that were offered based on performance. These individual and group rewards were so coveted that they were seen to be partially responsible for overzealous banking decisions

[150] de Koker (2011) 340 at 354.
[151] Charles Monteith, "Case and Investigation Strategy" in Gretta Fenner Zinkernagel, Charles Monteith & Pedro Gomes Pereira, eds, *Emerging Trends in Asset Recovery* (Peter Lang AG, International Academic Publishers, 2013) 183.

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> (e.g., unwise loans and credit lines). Peer pressure from group incentives was particularly powerful. Hence any policy that resulted in the loss of customers – especially customers with large amounts of money – operated against the current reward structure. Banks are organized around the concept of attracting funds, and few banks reward those who turn money away.[152]

Gordon further criticizes this reliance on the private sector to report transactions and keep records. He calls for a greater role for the public sector and FIUs in AML efforts.[153] The recent movement to require public disclosure of the beneficial owners of shell companies and trusts is discussed in Chapter 5, Section 5.2.2 of this book.

Fletcher and Hermann outline several other challenges for AML regimes.[154] Political immunity of high-level politicians may block prosecution of money laundering offences. Corrupt officials may also use AML measures to freeze funds of their opponents and can frustrate the efforts of law enforcement in other countries to gather evidence against themselves or their government. Bank secrecy laws continue to pose a challenge to AML efforts, although strict secrecy has been relaxed due to FATF blacklisting and increased international pressure since September 11, 2001. Finally, Fletcher and Hermann note that the creation of FIUs is expensive for developing countries, and the effectiveness of FIUs has been questioned in less advanced, cash-oriented economies.

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[152] Margaret E Beare & Stephen Schneider, *Money Laundering in Canada: Chasing Dirty and Dangerous Dollars* (University of Toronto Press, 2007) at 214–216.

[153] Richard K Gordon, "Losing the War against Dirty Money: Rethinking Global Standards on Preventing Money Laundering and Terrorism Financing" (Spring 2011) 21:3 Duke J Comp & Intl L 503.

[154] Clare Fletcher and Daniela Herrmann, *The Internationalisation of Corruption* (, 2012) at 177-179.

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CHAPTER 5

ASSET RECOVERY AND MUTUAL LEGAL ASSISTANCE

CONTENTS

1. INTRODUCTION

2. ASSET RECOVERY CONCEPTS AND TOOLS

3. INTERNATIONAL CONVENTION OBLIGATIONS

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5. EFFECTIVENESS OF ASSET RECOVERY REGIMES

6. INTERNATIONAL MUTUAL LEGAL ASSISTANCE AGREEMENTS

1. INTRODUCTION

The World Bank estimates that US$20 billion to 40 billion is stolen every year through high-level corruption from developing countries and hidden overseas, and that these stolen assets are equivalent to 20-40% of official development assistance.[1] The Stolen Asset Recovery Initiative (StAR) estimates that only 5 billion was recovered in the past 15 years (between 0.8% and 1.6% of stolen assets).[2] StAR estimates that $1 trillion to $1.6 trillion in global proceeds from criminal activities, corruption and tax evasion crosses borders every year.[3]

Asset recovery in corruption cases includes the uncovering of corruption and the tracing, freezing, confiscating and returning of funds obtained through corrupt activities. It is particularly vital for developing countries that see their national wealth corruptly exported. There are several barriers to asset recovery. Once stolen assets are transferred abroad, recovery is extremely difficult. In developing countries, this difficulty results from limited legal, investigative and judicial capacity, as well as inadequate resources. Further, the lack of resources affects the ability of a state to make requests to countries holding the stolen assets. The problem is exacerbated in developed countries where assets are hidden or where necessary laws may be lacking to respond to requests for legal assistance.[4] Moreover, the lack of non-conviction based asset forfeiture laws in some countries makes it difficult when the officials engaged in stealing assets have died, fled or have immunity. The United Nations and other relevant organizations attach a high priority to the problem of cross-border

[1] World Bank & United Nations Office on Drugs and Crime, "Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan" (World Bank, 2007) at 9, online: <http://www.unodc.org/documents/corruption/StAR-Sept07-full.pdf>.

[2] World Bank & United Nations Office on Drugs and Crime, "Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action" (World Bank, 2011) at 1.

[3] *Ibid*.

[4] *Ibid.*

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transfers of illicitly obtained funds and the return of such funds. Confiscating assets is an important tool in the fight against corruption. It serves as both a sanction for improper, dishonest, and corrupt behaviours and a deterrent as the incentive to commit corruption is removed. Further, it incapacitates the offenders by depriving them of their assets and instruments of misconduct. It also repairs the damage done to victim populations when financial resources are confiscated from the offenders and ideally are directed toward economic development and growth in that country. Finally, asset recovery promotes accountability and positively affects the rule of law. The asset recovery process involves four steps: (1) identification; (2) investigation, tracing, freezing and seizing; (3) confiscation or forfeiture; and (4) return of the stolen assets to the owner.

This chapter discusses the international and domestic obligations to facilitate the recovery of stolen assets through UNCAC, OECD and other multilateral agreements. It then discusses StAR and the role of FIUs in facilitating recovery of stolen and corrupt assets before moving on to the various legal approaches to the freezing, confiscation and ultimate return of assets obtained by corruption.

2. ASSET RECOVERY CONCEPTS AND TOOLS

The following sections summarize the asset recovery process, identify the important agencies involved and describe the legal tools used for asset recovery. An important resource for these sections, and the chapter as a whole, is the 2011 StAR/World Bank publication *Asset Recovery Handbook: A Guide for Practitioners*.[5] This guide provides a detailed description of the entire asset recovery process. However, it is worth noting at this stage, as discussed in Section 5.2, that some commentators are not enamoured with the policies and practices of the World Bank and StAR.

2.1 Asset Recovery Steps

2.1.1 The General Process for Asset Recovery

The following excerpt is from the *Asset Recovery Handbook: A Guide for Practitioners* (2011): [6]

[5] Jean-Pierre Brun et al, "Asset Recovery Handbook: A Guide for Practitioners" (StAR/World Bank, 2011), online: <https://www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_Asset_Recovery_Handbook.pdf>.

[6] *Ibid.* at 5–8.

BEGINNING OF EXCERPT

1.1.1 Collection of Intelligence and Evidence and Tracing Assets

Evidence is gathered and assets are traced by law enforcement officers under the supervision of or in close cooperation with prosecutors or investigating magistrates, or by private investigators or other interested parties in private civil actions. In addition to gathering publicly available information and intelligence from law enforcement or other government agency databases, law enforcement can employ special investigative techniques. Some techniques may require authorization by a prosecutor or judge (for example, electronic surveillance, search and seizure orders, production orders, or account monitoring orders), but others may not (for example, physical surveillance, information from public sources, and witness interviews). Private investigators do not have the powers granted to law enforcement; however; they will be able to use publicly available sources and apply to the court for some civil orders (such as production orders, on-site review of records, prefiling testimony, or expert reports).

…

1.1.2 Securing the Assets

During the investigation process, proceeds and instrumentalities subject to confiscation must be secured to avoid dissipation, movement, or destruction. In certain civil law jurisdictions, the power to order the restraint or seizure of assets subject to confiscation may be granted to prosecutors, investigating magistrates, or law enforcement agencies. In other civil law jurisdictions, judicial authorization is required. In common law jurisdictions, an order to restrain or seize assets generally requires judicial authorization, with some exceptions in seizure cases…. Systems to manage assets will also need to be in place….

1.1.3 International Cooperation

International cooperation is essential for the successful recovery of assets that have been transferred to or hidden in foreign jurisdictions. It will be required for the gathering of evidence, the implementation of provisional measures, and the eventual confiscation of the proceeds and instrumentalities of corruption. And when the assets are confiscated, cooperation is critical for their return. International cooperation includes "informal assistance," mutual legal assistance (MLA) requests, and extradition.[7] Informal assistance is often used among counterpart agencies to gather information and intelligence to assist in the investigation and to align strategies and forthcoming procedures for recovery of assets. An MLA request is normally a written request used to gather evidence (involving coercive measures that include investigative techniques), obtain provisional measures, and seek enforcement of

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domestic orders in a foreign jurisdiction.

…

1.1.4 Court Proceedings

Court proceedings may involve criminal or NCB [non-conviction based] confiscation or private civil actions (each described below and in subsequent chapters); and will achieve the recovery of assets through orders of confiscation, compensation, damages, or fines. Confiscation may be property based or value based. Property-based systems (also referred to as "tainted property" systems) allow the confiscation of assets found to be the proceeds or instrumentalities of crime—requiring a link between the asset and the offense (a requirement that is frequently difficult to prove when assets have been laundered, converted, or transferred to conceal or disguise their illegal origin). Value-based systems (also referred to as "benefit" systems) allow the determination of the value of the benefits derived from crime and the confiscation of an equivalent value of assets that may be untainted. Some jurisdictions use enhanced confiscation techniques, such as substitute asset provisions or legislative presumptions to assist in meeting the standard of proof.

…

1.1.5 Enforcement of Orders

When a court has ordered the restraint, seizure, or confiscation of assets, steps must be taken to enforce the order. If assets are located in a foreign jurisdiction, an MLA request must be submitted. The order may then be enforced by authorities in the foreign jurisdiction through either (1) directly registering and enforcing the order of the requesting jurisdiction in a domestic court (direct enforcement) or (2) obtaining a domestic order based on the facts (or order) provided by the requesting jurisdiction (indirect enforcement).[8] This will be accomplished through the mutual legal assistance process… Similarly, private civil judgments for damages or compensation will need

[7] [13] For the purposes of this handbook, "informal assistance" is used to include any type of assistance that does not require a *formal* MLA request. Legislation permitting this informal, practitioner-to-practitioner assistance may be outlined in MLA legislation and may involve "formal" authorities, agencies, or administrations. For a description of this type of assistance and comparison with the MLA request process, see section 7.2 of chapter 7.

[8] [14] See United Nations Convention against Corruption (UNCAC), art. 54 and 55; United Nations Convention against Transnational Organized Crime (UNTOC), art. 13; United Nations Convention against Narcotic Drugs and Psychotropic Substances, art. 5; and the Terrorist Financing Convention, art. 8. For restraint or seizure, see UNCAC, art. 54(2).

to be enforced using the same procedures as for other civil judgments.

1.1.6 Asset Return

The enforcement of the confiscation order in the requested jurisdiction often results in the confiscated assets being transferred to the general treasury or confiscation fund of the requested jurisdiction (not directly returned to the requesting jurisdiction).[9] As a result, another mechanism will be needed to arrange for the return of the assets. If UNCAC is applicable, the requested party will be obliged under article 57 to return the confiscated assets to the requesting party in cases of embezzlement of public funds or laundering of such funds, or when the requesting party reasonably establishes prior ownership. If UNCAC is not applicable, the return or sharing of confiscated assets will depend on domestic legislation, other international conventions, MLA treaties, or special agreements (for example, asset sharing agreements). In all cases, total recovery may be reduced to compensate the requested jurisdiction for its expenses in restraining, maintaining, and disposing of the confiscated assets and the legal and living expenses of the claimant. Assets may also be returned directly to victims, including a foreign jurisdiction, through the order of a court (referred to as "direct recovery").[10] A court may order compensation or damages directly to a foreign jurisdiction in a private civil action. A court may also order compensation or restitution directly to a foreign jurisdiction in a criminal or NCB case. Finally, when deciding on confiscation, some courts have the authority to recognize a foreign jurisdiction's claim as the legitimate owner of the assets.

If the perpetrator of the criminal action is bankrupt (or companies used by the perpetrator are insolvent), formal insolvency procedures may assist in the recovery process.

…

A number of policy issues are likely to arise during any efforts to recover assets in corruption cases. Requested jurisdictions may be concerned that the funds will be siphoned off again through continued or renewed corruption in the requesting jurisdictions, especially if the corrupt official is still in power or holds significant influence. Moreover, requesting jurisdictions may object to a requested country's attempts to impose conditions and other views on how the confiscated assets should be used. In some cases, international organizations such as the World Bank and civil society organizations have been used to facilitate the return and monitoring of recovered funds.[11]

END OF EXCERPT

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Judges in the United States and the United Kingdom have, in a number of cases, made orders directing corrupt public officials and money launderers, as well as corporations and their agents involved in bribery of public officials to pay compensation or damages to a State that has been harmed by corruption offences.[12] For instance, when the British construction and engineering firm Mabey & Johnson disclosed to the UK Serious Fraud Office that it had paid bribes in several jurisdictions, it was ordered to make reparations of about £658,000 to Ghana, £618,000 to Iraq and £139,000 to Jamaica.[13] In the United States, Robert Antoine, director of operations for Haiti's State-owned telecommunications entity, and executives of the telecommunications companies, who bribed him were jointly ordered to pay $2.2 million in restitution to the government of Haiti. Similarly, the United States court ordered the three co-defendants of Steve Ferguson, head of the National Gas Company of Trinidad and Tobago, to make restitution to the government of Trinidad and Tobago in the amounts of $4 million, $2 million and $100,000 respectively.[14]

Further Reading

For more on the use of anti-money laundering framework in asset tracing, see Hounta & Lehmann, "Using the Anti-Money Laundering Framework in Asset Tracing" in *Tracing Illegal Assets: A Practitioner's Guide* (Basel Institute on Governance, International Centre for Asset Recovery, 2015) at 69-91, online: <https://forum.assetrecovery.org/sites/collective.localhost/files/publications/tracing_illegal_assets_manuscript_final_online.pdf>.

[9] [15] Stolen Asset Recovery (StAR) Initiative Secretariat, "Management of Confiscated Assets" (StAR, 2009), http://www.worldbank.org/star.

[10] [16] UNCAC, art. 53 requires that states parties take measures to permit direct recovery of property.

[11] [17] In 2007, the U.S. Department of Justice filed a civil confiscation action against a U.S. citizen indicted in 2003 for allegedly paying bribes to Kazakh officials for oil and gas deals. The action was for approximately $84 million in proceeds. The American citizen agreed to transfer those proceeds to a World Bank trust fund for use on projects in Kazakhstan. See "U.S. Attorney for S.D.N.Y, Government Files Civil Forfeiture Action Against $84 Million Allegedly Traceable to Illegal Payments and Agrees to Conditional Release of Funds to Foundation to Benefit Poor Children in Kazakhstan," news release no. 07-108, May 30, 2007; World Bank, "Kazakhstan BOTA Foundation Established," news release no. 2008/07/KZ, June 4, 2008, http://siteresources.worldbank.org/INTKAZAKHSTAN/News and Events/21790077/Bota_Establishment_June08_eng.pdf.

[12] United Nations Office on Drugs and Crime, "Digest of Asset Recovery Cases" [UN Digest (2015)] (United Nations, 2015), at 63-66, online: <https://www.unodc.org/documents/corruption/Publications/2015/15-05350_Ebook.pdf>.

[13] *Ibid* at 63.

[14] *Ibid* at 64.

2.1.2 Management of Seized Assets

Below is an excerpt from International Centre for Asset Recovery/Basel Institute on Governance publication entitled *Development Assistance, Asset Recovery and Money Laundering: Making the Connection* (2011):[15]

BEGINNING OF EXCERPT

Asset Recovery, Management of Seized Assets and the Monitoring the Use of Returned Assets

Two additional elements should be considered in the asset recovery process: the management of assets that have been seized and that are pending confiscation, and the monitoring of assets that are repatriated by the recipient country to the victim country.[16]

Both national and international authorities often overlook the management of seized assets that are pending a confiscation order. Some of the problems include the cost of maintenance of the property – whether the taxes that are due during the seizure or the cost of up-keeping it in storage – while the seizure is pending a confiscation order, and the depreciation that the asset may have during its storage. To overcome such a situation, it is useful to analyse how some jurisdictions deal with the challenges, varying from the anticipated sale of the seized assets, such as in the United States and several Eastern European countries, or the promise from the person that committed the corrupt or other criminal act before a court that he/she will not sell the asset and will maintain it in good condition, such as in the United Kingdom.

[15] International Centre for Asset Recovery, "Development Assistance, Asset Recovery and Money Laundering: Making the Connection" (Basel Institute on Governance, International Centre for Asset Recovery, 2011) at 18, online: <https://www.baselgovernance.org/sites/collective.localhost/files/publications/dfid_brochure_final_version_for_print.pdf>.

[16] [7] For more on the management and use of recovered assets, see [Ignasio] Jimu. Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Philippines and Kazakhstan. (2009), available at [updated link: https://www.baselgovernance.org/sites/collective.localhost/files/publications/biog_working_paper_06.pdf].

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Whatever the option chosen, if at all since many countries do not yet have regulations in place to adequately address the management of seized assets, countries must bear in mind the fact that the anticipated sale of assets must be properly introduced into a legal system, so as to avoid any conflicts with the right to property of persons who may have a legitimate claim to the assets. Furthermore, an adequate database of seized assets must be put in place so as to ensure transparency and security in the management of such assets.

On the other hand, the monitoring of returned assets is a much debated topic in the asset recovery field. Some countries returning assets have in the past requested or conditioned the return of proceeds of corruption and other criminal acts to spending on specific projects or areas mutually determined by both countries. The argument used by returning countries is that this is an attempt to avoid the returned assets being recycled out of the country again through further corruption or other criminal acts. Many victim countries, in turn, argue that such imposition and conditioning of the returned assets is a violation of their sovereign right to decide how to spend or invest returned money.

The monitoring of returned assets must be mutually decided upon both the recipient and victim countries in a case-by-case scenario, ensuring transparency and dialogue in the process. In past cases, there have been examples countries using independent third parties, such as civil-society organisations from both countries to monitor the process.[17]

END OF EXCERPT

In regard to the somewhat controversial issue of monitoring returned assets, Article 57(5) of UNCAC stipulates that state parties may "give special consideration to concluding agreements or mutually acceptable arrangements on a case-by-case basis, for the final disposal of confiscated property." This vague provision attempts to ensure that return of property to fragile, corrupt recipient states can have anti-corruption safeguards attached to the agreement to return. Aside from objections relating to the erosion of the recipient's

[17] For example, in Kazakhstan, criminal proceedings in Switzerland led to the restitution of assets derived from bribery. In a relatively successful monitoring arrangement, a non-profit, independent foundation was set up in Kazakhstan to monitor the use of returned assets. The foundation is supervised by IREX Washington and Save the Children: Gretta Fenner Zinkernagel & Kodjo Attisso, "Past Experience with Agreements for the Disposal of Confiscated Assets" in Gretta Fenner Zinkernagel, Charles Monteith & Pedro Gomes Pereira, eds, *Emerging Trends in Asset Recovery* (Peter Lang AG, International Academic Publishers, 2013) 340.

sovereignty, monitoring may pose its own challenges, such as expense and technical difficulties.[18]

The BOTA Foundation in Kazakhstan provides an example of a successful agreement to facilitate the return of assets. In 2007, the US DOJ brought a civil forfeiture action against $84 million held in a Swiss bank account—the money was tied to unlawful bribery transactions between oil and gas companies and Kazakh officials. In 2007, a memorandum of understanding between the governments of Kazakhstan, the US and Switzerland created the BOTA Foundation (BOTA) to ensure funds were used to benefit disadvantaged citizens in Kazakhstan. The MOU stipulated that the Foundation be independent from the Kazakh government, its officials and their associates. The Foundation was also monitored by the US and Switzerland and supervised by the World Bank. In order to continue receiving BOTA's funds, Kazakhstan had to participate in a program to improve budget accountability and increase transparency of oil and gas revenues. According to Aaron Bornstein, the executive director of BOTA until it closed in 2014, the foundation used the $115 million from the bank account and interest to help 200,000 poor children, youth and their families.[19] The Foundation disbursed $80 million directly to families and also funded various programs, including a tuition assistance program. As a result of BOTA's success, discussions are currently underway to set up a similar arrangement in the Ukraine. However, recovering the proceeds of corruption is often impossible. Civil society organizations and transparency advocates argue that money from *FCPA* settlements should also be used to compensate victims, just as settlements in environmental cases often go towards affected communities.[20] StAR echoes this argument, encouraging countries to consider legislation allowing third parties to be included in settlement agreements for foreign bribery cases.[21]

2.2 International Asset Recovery Agencies

The World Bank in partnership with UNODC launched the Stolen Asset Recovery Initiative (StAR) in 2007 for the international support of asset recovery. The StAR Initiative was designed to do the following:

(1) urge countries to ratify UNCAC and apply the framework,
(2) lower the barriers to asset recovery,
(3) build technical capacity to facilitate asset recovery,

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[18] *Ibid* at 329.
[19] Aaron Bornstein, "The BOTA Foundation Explained (Part Nine): How Effective was BOTA?", *The FCPA Blog* (22 April 2015), online: <http://www.fcpablog.com/blog/2015/4/22/the-bota-foundation-explained-part-nine-how-effective-was-bo.html>.
[20] Andy Spalding, "The BOTA Foundation explained (Part Twelve): Future BOTAs and the FCPA", *The FCPA Blog* (29 April 2015), online: <http://www.fcpablog.com/blog/2015/4/29/the-bota-foundation-explained-part-twelve-conclusion-future.html>.
[21] Larissa Gray et al, *Few and Far: The Hard Facts on Stolen Asset Recovery* (World Bank and OECD, 2014) at 45, online: <https://openknowledge.worldbank.org/handle/10986/20002>.

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(4) help to deter such flows and eliminate safe havens for corruption,
(5) generate and disseminate knowledge on asset recovery,
(6) advocate for implementation of measures that reduce barriers to asset recovery,
(7) support national efforts to build institutional capacity for asset recovery, and
(8) monitor recovered funds if requested.

Each country maintains its own asset recovery system. In 2010, the UK created the National Crime Agency to fight serious and organized crime. Within this agency, the Economic Crime Command deals with economic crime and the Organized Crime Command deals with serious and organized crime. The Asset and Forfeiture and Money Laundering Section of the Department of Justice is the US government body dealing with asset forfeiture and anti-money laundering enforcement efforts.[22] An international unit assists prosecutors in the restraint and forfeiture of assets located abroad and assists foreign governments seeking restraint and forfeiture of assets held in the United States. The Kleptocracy Team investigates and litigates to recover proceeds of foreign official corruption. The US manages the Consolidated Assets Tracking System—a database for managing the approximately $2 billion in assets seized.

Many jurisdictions, such as Canada, Australia, Italy, the US, and South Africa, maintain asset forfeiture funds to ensure adequate funding for asset recovery. Confiscation laws may require confiscated assets be liquidated and the proceeds paid into these accounts. Canada identifies its fund as the Seized Property Proceeds Account, South Africa has the Criminal Assets Recovery Account,[23] while the US has the Assets Forfeiture Fund.[24]

2.3 State-Level Financial Intelligence Units (FIUs)

Financial Intelligence Units (FIUs) are responsible for collecting suspicious transaction reports from financial and some non-financial organizations in order to combat money laundering. An FIU is defined as a central, national agency responsible for receiving (and, as permitted, requesting), analyzing and disseminating disclosures of financial information involving the proceeds of crime to the authorities as required by national legislation or regulation. FIUs may conduct investigations based on the reports received and disseminate results to local law enforcement.

FIUs are essential in the fight to prevent or reduce the laundering of proceeds of corruption and other crimes. Anti-money laundering legislation requires many financial and non-financial organizations to file activity or suspicious transaction reports, known as STRs, with FIUs. Some FIUs also collect currency transaction reports (CTRs). Organizations include

[22] Online: <http://www.justice.gov/criminal/afmls/>.
[23] Online: <http://www.justice.gov.za/reportfiles/other/cara-anr-2010-11.pdf>.
[24] Online: <http://www.justice.gov/criminal/afmls/>.

financial institutions, regulatory authorities and professions such as lawyers, accountants and trust company providers. The local FIU may also give information to the Egmont Group, the informal association of FIUS, which can then pass information to foreign FIUs.[25]

The US FIU is known as the Financial Crimes Enforcement Network (FinCEN), while the UK simply called it UKFIU. Canada created the Financial Transactions and Reports Analysis Centre (FINTRAC) in 2000. FINTRAC joined the Egmont Group in 2002. UNCAC does not require an FIU be established, but Article 58 states that parties shall cooperate to prevent the transfer of the proceeds of Convention offences and to promote recovery of such proceeds. To that end, Article 58 requires state parties to consider establishing an FIU.

Below is an excerpt from a 2010 StAR report entitled *Towards a Global Architecture for Asset Recovery*:

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123. Financial intermediaries, including banks, other financial service providers and gatekeepers – including lawyers, notaries, company formation and real estate agents – are the first line of defense against money laundering. Intermediaries are required to monitor the transactions and behavior of their clients and prospective clients with due diligence and report suspicious activities to the FIU.

124. FIUs centralize and analyze information regarding suspected money laundering activity. Their broader responsibilities vary between jurisdictions. Administrative FIUs are independent bodies which receive, process and then transmit information to the judicial or law enforcement authorities for investigation. FIUs established within

[25] The following description is taken from "Towards a Global Architecture for Asset Recovery" (StAR/World Bank/UNODC, 2010) at 38, online: <https://star.worldbank.org/star/publication/towards-global-architecture-asset-recovery>. "The Egmont Group is a network of 116 Financial Intelligence Units established to improve cooperation in the fight against money laundering and financing of terrorism and promote programs in this field at the national level. The Egmont Group manages a secure information network, which allows members to exchange information freely that would facilitate analysis or investigation of financial transactions. This information originates from suspicious activity reports or other disclosures from the financial sector, as well as government administrative data and public record information. Members agreed that information exchanged between FIUs be used only for the specific purpose for which the information was sought or provided. Rarely is information used as evidence and then only where authorized by the requested FIU. Nonetheless, the Egmont network serves as an important support to international asset recovery both in terms of detecting illicit flows, identifying possible leads, and facilitating tracing and the collection of evidence to support asset recovery cases."

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law enforcement agencies will have a proactive role in and may even lead the money laundering investigations. FIUs within the judicial branch, may have authority to order coercive and preventative measures in support investigations. In 2007, when Egmont had 101 members, there were 66 administrative FIUs, 29 law enforcement FIUs and 6 hybrids.

125. Suspicious activity reports (SARs) constitute an important source of leads identifying potential corruption and asset recovery cases. Most countries have reported a steady increase in both the quantity and quality of the STRs as financial intermediates gain experience and confidence. However, there is very little official data available on the proportion SARs where the suspicion relates to corruption. The Swiss mutual evaluation report suggests that about seven percent of SARs are corruption related, though about forty percent are unclassified. This seems to be a somewhat higher proportion than seen in other jurisdictions; the Isle of Man, for instance, reports that between one and a half to two percent of SARs were related to PEPs or suspected corruption in the period 2004-08, while Singapore reports that just over one percent of SARs referred for further investigation were corruption-related. Interviews with FIUs in major financial centers tend to confirm that the proportion of PEPs and corruption-related SARs is generally around one percent, though the FIUs are quick to point out that this probably underestimates the amount of corruption-related money laundering. Suspected corrupt activity may not be reported: for example, the financial intermediary refuses a customer but does not file a SAR. Alternatively, the corrupt activity is reported for unrelated reasons: the proceeds of corruption may be indistinguishable from the proceeds of other crimes and are often reported to the FIU because of the suspicious nature of the transaction rather than concerns regarding the origin of the funds.

126. Coordination with the institutions that are engaged in corruption on a regular basis, such as the audit authority and anti-corruption agencies, could be expected to improve understanding of risks and help identify red flags. This would enhance the FIUs ability to detect corruption related money laundering. Greater awareness of money laundering aspects of corruption would assist the audit authority and anti-corruption agencies engage with the FIU at an early stage in the investigation to assist in tracing.

127. There is little evidence that this coordination is taking place. A study by ESMAALG (the East and Southern Africa FATF-style regional body) of twelve member countries concludes “in most member countries, corruption and money laundering are investigated by agencies that are separate, distinct and have little interaction. This results in a regrettable dissipation of resources and unhealthy competition”. Upcoming research by the World Bank of an additional thirteen countries in several regions comes to similar conclusions. There is little understanding

of how money laundering and anti-corruption regimes interact and little incentive for countries to these relationships.

128. Clearly, if progress is to be made in tackling the proceeds of corruption these coordination issues will have to be addressed. This can be done at various levels.[26]

END OF EXCERPT

The following is an excerpt from a 2009 publication by the Basel Institute on Governance entitled *Tracing Stolen Assets: A Practitioner's Handbook*:[27]

BEGINNING OF EXCERPT

Probably the most interesting tool for an investigator in tracing assets, especially assets stashed away in financial centres, is the requirement obliging financial institutions and DNFBPs [designated non-financial businesses and professions] to report suspicious transactions to the national FIU. In most financial centres, financial institutions and DNFBPs have to file a suspicious activity report (SAR) if the assets the suspect entrusted to them originate from a predicate offence.[28] Corruption offences are mandatory predicate offences to money laundering. What does that mean for a Police Officer, Magistrate or Prosecutor investigating corruption, who believes that the suspect has stashed away the proceeds of the corruptive act in a particular financial centre? Most often, the investigator will not know which financial institution is involved. In Switzerland alone, there are 400 banks and nearly 10,000 non-banking financial institutions. A request for information from the Swiss MLA authorities without being able to name the financial institution involved would be considered as a 'fishing expedition', and returned to the sender.

How can we overcome this obstacle? Once again, the AML [anti-money laundering] framework may prove to be of assistance: A bank is likely to file a SAR in respect of a client if the information reaches the bank that the bank's client is under investigation for a predicate offence to money laundering. Once the SAR is with the FIU in the

[26] *Ibid* at 37–38.
[27] International Centre for Asset Recovery, "Tracing Stolen Assets: A Practitioner's Handbook" [Tracing Stolen Assets (2009)] (Basel Institute on Governance, International Centre for Asset Recovery, 2009) at 65–66, online: <https://www.baselgovernance.org/publications/421>.
[28] [6] E.g., Art. 9 Swiss AML Law, Art. 17 Liechtenstein Due Diligence Law.

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financial centre concerned, this FIU can share information with its counterpart FIU in the country where the predicate offence took place. Under certain conditions, this information can be made available to the investigator in the country where the predicate offence occurred (normally as intelligence only, not as evidence). This allows the investigator in question to locate the stolen assets and submit a tailor-made MLA request to his or her counterpart in the financial centre and avoid the problematic 'fishing expedition'.

However, to prompt an SAR, the financial institution in the financial centre must learn about the predicate offence in the country of origin of the crime in some way. In corruption cases, the country of origin is very often a developing or transition country with limited law enforcement capacities. Financial institutions will not regularly access news from developing or transition countries. Only a few major banks' compliance officers would systematically read newspapers and screen them for potential allegations against clients. So, the information on an ongoing investigation must somehow be spread and reach the financial institutions in financial centres. There are various mechanisms for ensuring this information can be spread, either by using existing contacts in the financial centre – networking is of crucial importance for successful asset tracing – or the international media in cases of high profile investigations. Or else specialists can be found in financial centres that target major financial institutions, and provided with case related information that is not confidential but sufficient for the financial institution to consider filing an SAR.

END OF EXCERPT

Further Reading

For a discussion of the potential of FIUs and their ideal use in asset recovery, see Thelesklaf & Salihodzic, "The Role of Financial Intelligence Units in Fighting Corruption and Asset Recovery" in Zinkernagel, Monteith & Pereira, eds, *Emerging Trends in Asset Recovery* (Peter Lang AG, International Academic Publishers, 2013).

2.4 Types of Tools for Asset Recovery

The following sections briefly describe the statutory and private law remedies that can be used for asset recovery, as well as the ways in which they interact and their limitations.

2.4.1 Criminal Forfeiture

Confiscation (or forfeiture) is a means of redress for authorities seeking to recover stolen assets. Confiscation is an order by which a person is permanently deprived of assets without compensation. As a result, title is acquired by the state. The rationale for confiscating proceeds of corruption is both to compensate victims and to provide deterrence by removing the enjoyment of the illegal gains. Criminal confiscation takes place after a criminal conviction has been made (at trial or by a guilty plea). The forfeiture order follows as part of the sentencing process. Guilt must be proven at trial "beyond a reasonable doubt" in common law regimes, or the judge must be "intimately convinced" in civil law regimes. Once a conviction is obtained, the court can order confiscation. In most jurisdictions, the standard of proof for establishing that certain assets are derived from criminal activities is lowered to a "balance of probabilities."

2.4.2 Civil (Non-Criminal Based) Forfeiture

Another form of forfeiture is non-conviction based (NCB) forfeiture. Criminal forfeiture and NCB forfeiture share the same objective, but their procedures are different. Criminal confiscation can only occur after a criminal conviction. NCB forfeiture, on the other hand, can operate separately from the criminal justice system or alongside it, and it allows for the restraint, seizure and forfeiture of stolen assets without a finding of guilt in the criminal context. NCB forfeiture only requires a finding that the property is tainted, either as the proceeds of a crime or as an instrument of criminal activity.

NCB forfeiture is an action against the asset itself (e.g., money, property, etc.), not the person. After an NCB forfeiture order, the defendant forfeits the thing itself subject to any innocent owners. There are generally three ways NCB forfeiture is available. First, it can form part of criminal proceedings without requiring a final conviction or finding of guilt. In this regard, NCB confiscation tools are incorporated into criminal legislation. The second method is through a separate proceeding normally governed by the rules of civil procedure and can occur independently or parallel to criminal proceedings. The final method is administrative confiscation, which can occur in some jurisdictions and does not require a judicial determination.

An acquittal from criminal charges does not bar NCB forfeiture proceedings.[29] Article 54 of UNCAC requires all State Parties to consider forfeiting the proceeds of crime without a conviction. It also obliges State Parties to enable domestic authorities to recognize and act on an order of confiscation issued by a court of another State Party. This is broadly worded and could include NCB forfeiture orders. Further, it obliges State Parties to permit competent authorities to order the confiscation of property of foreign origin acquired through Convention offences. Again, this is broadly worded and could include NCB forfeiture

[29] See, for example *Director of the Assets Recovery Agency v T and Others,* [2004] EWHC 3340 (UK); *National Director of Public Prosecutions v Prophet*, [2006] ZACC 17; *United States v One Assortment of 89 Firearms*, 465 US 354 (1984); *Proceeds of Crime Act 2002* (Cth), s 51 (Australia).

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orders. However, many jurisdictions have yet to put in place procedures allowing NCB forfeiture.

NCB forfeiture is particularly important for asset recovery in circumstances when there is a lack of evidence to support a criminal conviction (beyond a reasonable doubt). For example, when the offender is dead (bringing to an end criminal proceedings), has fled the jurisdiction, is immune from prosecution, is unknown, or the property is held by a third party who is aware (or wilfully blind) that the property is tainted. For these reasons, the Stolen Asset Recovery (StAR) Initiative views NCB forfeiture as a "critical tool for recovering the proceeds and instrumentalities of corruption."

Confiscation can be either property-based or value-based. In a property-based order, assets linked to illicit activities are specifically targeted for confiscation. In a value-based order, a monetary amount is calculated based on the value of the benefit, advantages, and profits a person gained from illicit activities.

Criminal proceedings and NCB forfeiture operate together to achieve the best results. Both procedures can occur without violating double jeopardy because NCB forfeiture is not considered a punishment or a criminal proceeding.[30] In both methods, it must be established that the targeted assets derived directly or indirectly from the commission of the crime. Tracing assets can be extremely difficult as they can quickly change form, location and ownership, and complicated legal vehicles are used to hide assets abroad. Fortunately, "know-your-customer" policies and procedures imposed by international treaties can assist in the asset tracing process. Further, FIUs can also provide helpful information in an asset tracing investigation.

For both criminal and NCB forfeiture, confiscated proceeds go to the prosecuting state treasury, unless compensation for victims is ordered as well.[31]

For non-conviction based forfeiture statutes in Canada, see provincial statutes such as the *Civil Forfeiture Act*, SBC 2005, c 29 and *Remedies for Organized Crime and Other Unlawful Activities Act, 2001*, SO 2001, c 28.

2.4.3 Administrative Freezing and Confiscation Measures

Administrative orders to freeze or confiscate assets are issued by a government rather than the judiciary and can bypass mutual legal assistance requests from foreign countries in cases of urgency. For example, after the Arab Spring, administrative measures were implemented to facilitate the rapid freezing of assets of corrupt former leaders in the Arab world. Canada,

[30] See, for example, *United States v Ursery*, 518 US 267 (1996); *The Scottish Ministers v Doig*, [2006] CSOH 176 (Scotland); *Walsh v Director of the Assets Recovery Agency*, [2005] NICA 6 (Northern Ireland CA); and *Ontario v Chatterjee*, 2009 SCC 19.

[31] Jacinta Anyango Oduor et al, *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (StAR/World Bank/UNODC, 2014) at 141.

the US, Switzerland and the EU introduced legislation allowing their governments to order financial institutions to freeze assets without a judicial order or mutual legal assistance request from the corrupt officials' countries.[32]

2.4.4 Fines that Correspond to the Value of the Benefit

Fines can also be imposed on individuals or corporations that are equal to or greater than the value of benefits derived from the inappropriate conduct. The judgment may be enforceable as a fine or a debt. Derived benefits include all assets and profits that can be reasonably linked to the offences forming the offender's criminal conviction. This is also referred to as "value-based confiscation," as the person is ordered to pay an amount of money equivalent to or greater than his/her criminal benefit. Fines are generally paid into the treasury of the prosecuting jurisdiction.[33]

The OECD/World Bank publication entitled, *Identification and Quantification of the Proceeds of Bribery* gives examples of how various countries use fines and value-based forfeiture orders to remove any "criminal benefits":[34]

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The term "benefits" is usually broadly defined to include the full value of cash or non-cash benefits received by a defendant (or a third party, at the defendant's direction) directly or indirectly as a result of the offence. Benefits will usually cover more than the rewards of a financial nature. Some examples include:

- the value of money or assets actually received as the result of committing an offence (for example, the revenues from an initial contract obtained by bribery);
- the value of assets derived or realized (by either the defendant or a third party at the direction of the defendant) directly or indirectly from the offence (for example, supplemental work obtained in the context of that same contract); and

[32] Gray et al (2014) at 41. See also UN Digest (2015) at 26-27, 40, 49-52. In respect to Canada, see Sections 4.3(1) and (2) of this Chapter.
[33] *Ibid* at 143.
[34] OECD/The World Bank, *Identification and Quantification of the Proceeds of Bribery: Revised edition*, (OECD Publishing, 2012) [Identification & Quantification (2012)] at 19-20, online: <http://dx.doi.org/10.1787/9789264174801-en>.

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- the value of benefits, services or advantages accrued (to the defendant or a third party at the direction of the defendant) directly or indirectly as a result of the offense (for example, the possibility to obtain future contracts based on the experience gained through that initial contract obtained through bribery).

…

Examples of fines calculated from benefits include Australia, Greece, Hungary and Korea. For instance, in Australia, the maximum penalty for a corporation will be the greater of AUD 11 million or three times the value of any benefit that the corporation has directly or indirectly obtained that is reasonably attributable to the conduct constituting the offence (including the conduct of any related corporation). If the court cannot determine the value of that benefit, it may be estimated at 10% of the annual turnover of the corporation during the 12 months preceding the offence. In Greece, the corporate liability legislation imposes an administrative fine of up to three times the value of the "benefit" against legal persons who are responsible for foreign bribery. In Hungary, fines for legal persons can be of a maximum of three times the financial advantage gained or intended to be gained, and at least HUF 500 000. In Korea, the maximum fine for a legal person is KRW 1 billion, but if the profit obtained through the offence exceeds a total of KRW 500 million, the legal person shall be subject to a fine up to twice the amount of the profit. [footnotes omitted]

END OF EXCERPT

2.4.5 Civil Actions and Remedies

2.4.5.1 Introduction

Civil remedies provide another tool in recovering the proceeds of corruption and can complement criminal proceedings. Civil actions are not limited to asset recovery purposes, but also achieve anti-corruption goals more generally by sanctioning wrongdoing and allowing injured parties to bring suits. All civil actions related to corruption will be discussed in this section, including those not specifically related to asset recovery.

Article 35 of UNCAC creates an international obligation to provide private actors with the right to initiate civil proceedings:

> Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

However, Article 35 does not provide special standing or a special right of action for private litigants and is subject to sovereignty and domestic law. As pointed out by Makinwa in *Private Remedies for Corruption*, this means that private rights of action "exist only to the extent provided under domestic laws and processes."[35] Makinwa also points out that Article 35 applies only where a causal link exists between the claimant and the wrongdoing.[36] As a result, Article 35 on its own "gives a very limited right of redress to only a very particular group of people."[37]

A foreign court is competent to hear a civil suit if the defendant lives in or is incorporated in the court's jurisdiction, if assets are located in or have passed through the jurisdiction, or if an act of corruption or money laundering was committed in the jurisdiction.[38] In some countries, civil and criminal proceedings can be run simultaneously. In *Attorney General of Zambia v Meer, Care & Desai and Others* (2007) ("*Attorney General of Zambia*"),[39] the court found that civil proceedings can run parallel to criminal proceedings, subject to the civil proceedings and evidence being "ring fenced" to prevent self-incrimination in the criminal trial.[40]

State parties, local public entities like municipalities and state-owned companies can initiate civil proceedings in foreign or domestic courts in the same manner as private citizens, although legal standing may be denied if the public entity has no direct and personal interest in the case.[41] Article 43 of UNCAC requires all State Parties *consider* assisting each other in investigations and proceedings in civil and administrative matters relating to corruption. Article 53 requires each State Party take necessary measures to:

(i) ensure that other States may make civil claims in its courts to establish ownership of property acquired through a Convention offence;

(ii) ensure that courts have the power to order the payment of damages to another State Party; and

(iii) ensure that courts considering criminal confiscation also take into consideration the civil claims of other countries.

Domestic statutes, such as the US *Racketeering Influenced and Corrupt Organizations Act* (*RICO*), sometimes recognize the right of foreign states to sue. Another option for victims of

[35] Abiola O Makinwa, *Private Remedies for Corruption* (The Hague: Eleven International, 2013) at 377.
[36] *Ibid* at 428.
[37] *Ibid* at 428.
[38] Jean-Pierre Brun et al, *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets* (World Bank, 2015) at 4.
[39] *Attorney General of Zambia v Meer, Care & Desai and Others* [2007] EWHC 952 (Ch) (UK).
[40] John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Edward Elgar, 2014) at 326.
[41] Brun et al (2015) at 14.

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corruption is to bring an action domestically and seek to enforce the judgment in the foreign jurisdiction in which assets are located.[42]

In general, to be enforceable in Canada, a judgment "must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce."[43] The defences to enforcement of a foreign judgment include fraud, public policy and lack of natural justice.[44] Overall, Canadian courts have adopted a "generous and liberal" approach to the enforcement of foreign judgments, but the recent case against Chevron demonstrates that enforcement of foreign judgments in complex disputes may involve years of litigation in multiple jurisdictions.[45]

An Example of a Complex Enforcement of a Foreign Judgment Case

In the Chevron case, in 2011, after a seven-year-long trial process, a provincial court in Ecuador issued a judgment ordering California-based oil company Chevron to pay $8.6 billion in environmental damages and $8.6 billion in punitive damages to the plaintiffs representing around 30,000 Ecuadorian indigenous villagers. In November 2013, Ecuador's Court of Cassation reduced the total amount to $9.5 billion. In May 2012, the plaintiffs sought recognition and enforcement of the Ecuadorian judgment against Chevron and its Canadian subsidiary in the Ontario Superior Court of Justice. The dispute ultimately reached the Supreme Court of Canada, which held that the only prerequisite to recognize and enforce a foreign judgment is that the foreign court had a real and substantial connection with the litigants or with the subject matter of the dispute, or that the traditional bases of jurisdiction (the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction) were satisfied.[46] There is no need to prove that a "real and substantial connection" exists between the enforcing forum and the judgment debtor or the dispute, or that that the foreign debtor has assets in the enforcing forum.[47] However, the fact that a court in Canada has jurisdiction in an enforcement proceeding does not mean that the judgment will be enforced because the debtor may still raise any of the available defences (i.e. fraud, denial of natural justice or public policy).[48] Here Chevron instituted legal proceedings in the United States alleging that the plaintiffs' American lawyer Steven Donziger and his team corrupted the Ecuadorian proceedings by offering a bribe of $500,000 to the trial judge and "ghost-writing" the judgment. In 2011, Judge Kaplan of the US District

[42] *Ibid* at 14.
[43] *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52 at para 31, [2006] 2 SCR 612.
[44] *Beals v Saldanha*, 2003 SCC 72 at paras 39-77, [2003] 3 SCR 416. See also British Columbia *Court Order Enforcement Act*, RSBC 1996, c 78, s 29(6); Ontario *Reciprocal Enforcement of Judgments Act*, RSO 1990, c R5, s 3; *Civil Code of Québec*, CQLR, c CCQ-1991, s 3155.
[45] *Chevron Corp v Yaiguaje*, 2015 SCC 42 at para 27, [2015] 3 SCR 69.
[46] *Ibid*.
[47] *Ibid* at para 3.
[48] *Ibid* at paras 34, 77.

> Court for the Southern District of New York granted Chevron a global anti-enforcement injunction with respect to the Ecuadorian judgment.[49] In 2014, Judge Kaplan held that the Ecuadorian judgment had been procured by fraud.[50] In Canada, the case is currently back before the Ontario Superior Court of Justice where Chevron argues that the Ecuadorian judgment was fraudulently obtained and may not be enforced against Chevron's Canadian subsidiary.[51]

Civil actions in corruption cases may benefit private interests or public interests. In this respect, Makinwa divides claims for damage into two categories. The first involves claims for damage to private interests. Claimants in this category are direct parties to a corruption-tainted transaction, such as shareholders or losing competitors in a bidding process. States or public entities can be included in this category if they are party to a tainted contract. Remedies for damaged private interests are found in tort law, principles of fiduciary duty, or securities and antitrust litigation. The second category of claims is for damage to public interests. Claimants in this category are indirect victims of corruption, or states and civil society groups claiming on behalf of indirect victims. Because obtaining legal standing and establishing a cause of action is challenging for indirect victims, they "do not have as clear a path to redress as compared with the methods available to direct victims such as principals, shareholders and third parties affected by noncompetitive behavior."[52] Makinwa, however, lists some strategies used in past cases involving damage to the public interest:

> [Examples include] a state government using private law processes to protect the *interest of the state and people;* a state company seeking redress for international corrupt activity affecting its officials; and a succeeding government using the processes of private law to seek remedies for corrupt actions. Other examples show attempts by NGOs and private citizens to seek redress on behalf of the general citizenry for damage caused by a corrupt activity.[53]

Recovery in civil proceedings can take the form of compensation for damages, return of property acquired through corruption to the legitimate owner, or restitution of the rewards

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[49] *Chevron Corp v Donziger*, 768 F Supp (2d) 581 (SDNY 2011). The United States Court of Appeals for the Second Circuit overturned the injunction in 2012: see *Chevron Corp v Naranjo*, 667 F (3d) 232 (2d Cir 2012).

[50] *Chevron Corp v Donziger*, 974 F Supp (2d) 362 (SDNY 2014), affirmed, 833 F (3d) 74 (2nd Cir 2016).

[51] Drew Hasselback, "Chevron's US$9.5 Billion Ecuador Case Returns to an Ontario Court", *Financial Times* (12 September 2016), online: <http://business.financialpost.com/news/chevrons-9-5-billion-ecuador-case-returns-to-an-ontario-court>; Colin Perkel, "Ecuadoreans Face off against Chevron in an Ontario Court" *The Globe and Mail* (15 September 2016), online: <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/ecuadoreans-face-off-against-chevron-in-an-ontario-court/article31913977/>.

[52] Makinwa (2013) at 432.

[53] *Ibid* at 407.

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of unjust enrichment. As mentioned above, civil remedies in corruption cases do not always further the goals of asset recovery and instead might be related to sanctioning wrongdoing and compensating individuals for harm arising from corrupt conduct. The following sections will explore various claims and remedies related to anti-corruption and asset recovery goals.

2.4.5.2 Personal Claims and Remedies

Victims of corruption can bring claims against other persons to seek redress for damage caused by corruption. For example, a victim might bring an action in tort for monetary damages to compensate for economic losses caused by corruption. Possible plaintiffs include governments that pay excessive amounts for goods or services due to bribes paid to their officials or harmed individuals like consumers and unsuccessful bidders.

a) Actions for compensation for damages in tort

In tort-based actions, the plaintiff is compensated for losses caused by a defendant's breach of duty. In the case of bribery, the giver and the receiver of the bribe will likely be joint tortfeasors, since both act wrongfully towards the plaintiff.[54] Causes of action useful to asset recovery and corruption include civil fraud, tortious interference, conspiracy and misfeasance in public office.[55] Tort claims are sometimes hindered by the need to establish intent on the part of the defendant and causation between the corrupt act and the loss.

Tortious interference is relevant when the private interests of parties to a transaction are damaged, such as when bribery taints a bidding process. The interfering conduct must be unlawful, like bribery, in order to provide a foundation for the tort. In *Korea Supply Co (KSC) v Lockheed Martin Corp* (2003),[56] KSC succeeded in recovering damages based on the tort of interference with prospective economic advantage. KSC stood to gain a hefty commission if it secured a contract for another company. The defendant, another bidder, bribed a public official and was awarded the contract instead.

The tort of misfeasance in public office holds potential to assist in asset recovery, as demonstrated by the successful claim for compensation in *Marin and Coye v Attorney General of Belize* (2011).[57] The state was allowed to bring an action for misfeasance against its own officials, who sold state land to a company beneficially owned by themselves.[58] However,

[54] Emile van der Does de Willebois & Jean-Pierre Brun, "Using Civil Remedies in Corruption and Asset Recovery Cases" (2013) 45:3 Case W Res J Intl L 615 at 637–639.
[55] *Ibid.*
[56] *Korea Supply Co v Lockheed Martin Corporation,* 63 P (3d) 937, 941 (Cal 2003).
[57] *Marin and Coye v Attorney General of Belize,* [2011] CCJ 9 (AJ).
[58] Hatchard (2014) at 96.

Makinwa warns that claims of misfeasance in public office are often unfeasible due to the requirement of establishing intent to cause loss.[59]

In *Attorney General of Zambia*, the Attorney General of Zambia sought the recovery of millions of dollars based on the tort of conspiracy. The money was siphoned from state coffers by ex-president Frederick Chiluba and his cronies under the pretext of payments for bogus security projects. The court found that Chiluba and other officials committed the tort of conspiracy to misappropriate funds and breached their fiduciary duties. They were liable for the value of the misappropriated assets.

Recent developments surrounding the case against SNC-Lavalin Group Inc. provide another example of a civil action for damages in the context of corruption. SNC-Lavalin was charged with corruption and fraud in relation to alleged bribery in Libya and is now suing two former executives for financial losses and reputational damage. SNC-Lavalin claims it was unaware that one of the executives was the beneficial owner of a shell consultancy company, which the executives used as a pretext for siphoning funds.[60]

b) Actions for contractual invalidity, contractual damages and contractual restitution

Makinwa outlines two different contracts involved in cases of bribery: the primary contract, which consists of offer and acceptance of the bribe, and the secondary contract, which comes into being because of the bribe.[61] The author notes that international consensus exists as to the unenforceability of the primary contract, since it evidences criminally prohibited

[59] Makinwa (2013) at 243.

[60] Nicholas van Praet, "SNC-Lavalin Sues Former Executives over Alleged Bribery and Embezzlement", *The Globe and Mail* (April 9, 2015), online at: <http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/snc-lavalin-sues-former-executives-over-alleged-bribery-embezzlement/article23870439/>. In his statement of defence, SNC's former executive vice-president of construction Riadh Ben Aissa alleged that specific SNC executives organized and approved purchases of a number of lavish gifts for Saadi Gadhafi, including a $38 million yacht. He further claimed that "most of SNC's senior executives knew that the so-called agency contracts were in reality bribes paid to Libyan foreign officials in exchange for the award of the sole-source contract" (see John Nicol & Dave Seglins, "SNC-Lavalin Replaces CEO amid More Allegations", *CBC News* (14 September 2015), online: <http://www.cbc.ca/news/business/snc-lavalin-card-bruce-1.3226097 >). Also, in December 2014, SNC-Lavalin recovered $13 million from Ben Aissa's frozen assets in Switzerland after Ben Aissa was found guilty for bribery in Swiss proceedings. The recovered money was part of the $47 million surrendered by Aissa and was awarded to SNC-Lavalin on the basis that the company was an "injured party." Recovery by corporate "victims" in bribery cases is very rare and has only occurred in two cases. See Richard L Cassin, "'Victim' SNC-Lavalin Collects $13 Million in Recovered Funds", *The FCPA Blog* (15 December 2014), online: <http://www.fcpablog.com/blog/2014/12/15/victim-snc-lavalin-collects-13-million-in-recovered-funds.html>.

[61] Makinwa (2013) at 471.

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behaviour. Therefore, a court will not interfere with disputes over the primary contract, but rather will leave the parties as is.

The secondary contract will generally be void or, particularly in common law jurisdictions, voidable at the instance of the betrayed principal. This unenforceability is based on public policy. If the secondary contract is invalidated, a court might order restitution of money paid by the victim under the contract. Restitution might include all sums paid by the victim or, in other cases, the expenses incurred by the defendant under the contract might be subtracted from the victim's recovery. If the contract is voidable and the betrayed principal wishes to rescind the contract and escape their obligations, the principal might need to show that they would have refused the contract in the absence of wrongdoing.

If the principal decides not to rescind, the court may award compensation for damages resulting from entering a contract with unfavourable terms. For example, if a government buys goods from a company that has bribed a public official, a court might find that the true price of the goods has been inflated by the amount of the bribe. This allows the government to recover the amount of the bribe as well as any other losses it can show.[62]

Damages are also available for breach of contract. Breaches might include defective or shoddy performance, or breach of a term in the contract stipulating that the defendant would not induce public officials.[63] A betrayed principal might also seek damages from a corrupt agent for breach of the duty of good faith and loyalty in employment or agency contracts.

Usually damages are calculated by determining the plaintiff's loss. However, in some jurisdictions, the defendant in a suit for contractual breach might be obliged to disgorge the profits of corruption instead of, or even in addition to, compensating the plaintiff for losses. The rationale behind this alternative measure of damages is that bribery is not only a breach of contract, but also a wrongful act.[64]

c) Unjust enrichment and disgorgement of profits

Unjust enrichment is available as a non-tortious, non-contractual cause of action. An action for unjust enrichment generally requires that one party acquire and retain a benefit at the expense of another. However, in the context of agents, such as public officials, who retain secret profits through corruption, retention of the benefit need not be at the principal's expense. The principal is not obliged to establish loss in order to seek restitution of secret profits because harm is considered to flow from the breach of fiduciary duty alone.[65]

Disgorgement of profits is an equitable remedy in common law systems based on notions of unjust enrichment. In the enforcement of the US *FCPA*, the Securities Exchange Commission

[62] Brun et al (2011) at 164-165.
[63] *Ibid* at 165.
[64] van der Does de Willebois & Brun, (2013) at 634.
[65] *Ibid* at 637.

(SEC) considers disgorgement to be an essential element of any SEC settlement for bribery offenses. Foreign companies that trade on the US Stock Exchanges (currently about 1600 multi-national companies) are subject to SEC penalties and disgorgement actions.[66]

In the StAR/World Bank report entitled *Asset Recovery Handbook: A Guide for Practitioners* (2011), the authors state:

> In the United States, disgorgement of profits is frequently sought by the Securities and Exchange Commission and the Department of Justice in civil or criminal actions to enforce the FCPA. Settlements often include recovery of the benefits of wrongful acts or illicit enrichment. In cases where a government contract was awarded as a result of bribery, the illicit enrichment is normally calculated by deducting direct and legitimate expenses linked to the contract from the gross revenue. The amount of the bribe and the taxes are generally not considered deductible expenses. In other civil actions brought by parties as private plaintiffs, U.S. courts have ruled that an employer or buyer is entitled to recover the amount of the bribe received by an employee even if the goods or services were exactly what the employer was seeking and even if the price was reasonable (Sears, Roebuck & Co. v. American Plumbing & Supply Co., 19 F.R.D. 334, 339 (E.D.Wis., 1956) (U.S.)).[67]

2.4.5.3 Proprietary Claims and Remedies

Proprietary claims are for specific assets, as opposed to personal claims against another party for damages. In a property-based action, the state or another party claims to be the rightful owner of assets, or the state claims on behalf of the rightful owners that assets have been taken by theft, fraud, embezzlement or other wrongdoing. For example, in *Federal Republic of Nigeria v Santolina Investment Corp* (2007), the London High Court of Justice found Nigeria to be the true owner of several bank accounts and properties in London, which were the proceeds of bribery accepted by a corrupt Nigerian official.[68] Over $17.7 million were recovered and repatriated.

Article 53 of UNCAC requires States to permit the initiation of civil actions by other State Parties to establish ownership of property acquired through corruption and to recognize another state's claim as the true owner. Unlike personal claims in tort and contract, a successful claimant in a property-based action will have priority over the defendant's other creditors.[69]

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[66] Robert W Tarun, *The Foreign Corrupt Practices Act Handbook* (American Bar Association, 2012) at 20.
[67] Brun et al (2011) at 168.
[68] *Federal Republic of Nigeria v Santolina Investment Corp, Solomon & Peters and Diepreye Alamieyeseigha*, [2007] EWHC 437 (Ch) (UK).
[69] van der Does de Willebois & Brun (2013) at 620.

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In common law jurisdictions, claimants can use constructive trusts to recover beneficial ownership of assets acquired through breach of trust or fiduciary duty. When public funds or property are embezzled or misappropriated, the State will be the beneficial owner of the stolen property, any profits derived from it, or any property into which the stolen property is converted. The State's beneficial ownership will stick to the asset as it goes through successive transactions, unless there is a bona fide purchaser for value without notice of the breach of trust. For example, Saadi Qadafi used funds belonging to the State of Libya to purchase a $10 million house in London. Ownership of the house was easily traceable to Qadafi, since it was owned by a shell company of which he was the beneficial owner. The court found that Qadafi held beneficial ownership of the house in constructive trust for Libya, allowing the transfer of the house to the State of Libya.[70]

The same logic of constructive trust has been extended to situations where a State or other principal claims a proprietary interest in a bribe accepted by an agent. A successful proprietary claim allows the principal to recover the bribe and any increases in its value. *Kartika Ratna Thahir v Pertamina* (1994) provides an example of the use of constructive trust to return a bribe to the bribe-taker's principal.[71] Pertamina, a state-owned oil and gas company, discovered that one of its executives had accepted bribes from contractors seeking preferential treatment. The court held that the executive breached his fiduciary duty by accepting the bribe, and therefore the bribe was held in trust for Pertamina.

As the Privy Council of the UK House of Lords stated in an earlier case:

> When a bribe is accepted by a fiduciary in breach of his duty then he holds that bribe in trust for the person to whom the duty was owed. If the property representing the bribe decreases in value the fiduciary must pay the difference between that value and the initial amount of the bribe because he should not have accepted the bribe or incurred the risk of loss. If the property increases in value, the fiduciary is not entitled to any surplus in excess of the initial value of the bribe because he is not allowed by any means to make a profit out of a breach of duty.[72]

Currently the law is unclear as to whether principals can still claim a proprietary interest in bribes accepted by their agents. One line of authority supports the idea that all traceable proceeds of a fiduciary's corruption belong to the victim in equity. However, according to *Sinclair Investments (UK) v Versailles Trade Finance Ltd* (2011),[73] claimants can only acquire a proprietary interest in a fiduciary's wrongfully acquired property if the property belongs or belonged to the claimant or if the fiduciary took advantage of a right belonging to the

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[70] Brun et al (2015) at 49–52.

[71] *Kartika Ratna Thahir v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)*, [1994] 3 SGCA 105 (Singapore).

[72] *The Attorney General for Hong Kong v (1) Charles Warwick Reid and Judith Margaret Reid and (2) Marc Molloy*, [1993] UKPC 2, [1994] 1 All ER 1.

[73] *Sinclair Investments (UK) v Versailles Trade Finance Ltd*, [2011] EWCA Civ 347.

claimant.[74] This suggests that betrayed principals cannot claim a proprietary interest in a bribe.[75]

2.4.5.4 Other Civil Claims, Remedies and Tools

a) Actions based on *FCPA* violations

FCPA violations can provide the basis for civil actions under other statutes including securities laws, antitrust laws, or the *Racketeering Influenced and Corrupt Organizations Act* (*RICO*).[76] For instance, if a violation adversely affects competition between companies, a civil action can be brought under state or federal antitrust laws.[77] Shareholders can also bring claims based on *FCPA* violations in order to obtain compensation for damages. For example, shareholders might bring a class action for damage caused by false and misleading information about a company's bribery activities that led to a fall in share prices.[78] For example, Avon Products Inc. (Avon) was sued by a group of shareholders in a derivative class action lawsuit alleging securities fraud. Avon conceded the fact that it had bribed Chinese government officials to boost sales revenues. In December 2014, Avon paid $135 million in fines for SEC and *FCPA* offenses as part of a DPA, which included the appointing of an independent monitor for 18 months to review Avon's *FCPA* compliance program. In August 2015, Avon settled the shareholder class action with a $62 million settlement.[79] Similar securities class actions against Petrobras[80] and Wal-Mart[81] were certified in 2016.

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[74] van der Does de Willebois & Brun, (2013) at 621-625.

[75] Brun et al (2015) at 52.

[76] Padideh Ala'i, "Civil Consequences of Corruption in International Commercial Contracts" (2014) 62 Am J Comp L 185 at 208-211.

[77] *Ibid* at 66.

[78] Makinwa (2013) at 390.

[79] The securities fraud lawsuit was brought on behalf of Avon's shareholders from 2006 to 2011 and led by two German investment funds. The plaintiffs alleged that the cosmetics company developed a corporate culture that was hostile to effective oversight and concealed the company's dependence on corrupt activities to boost sales in China. See Jonathan Stempel, "Avon Seeks Approval in U.S. of $62 Mln Accord over China Bribery", *Reuters* (18 August 2015), online: <http://www.reuters.com/article/avon-corruption-settlement-idUSL1N10T14B20150818>.

[80] In February 2016, the US District Judge Jed Rakoff in the Southern District of New York certified a class action brought against the Brazilian oil company Petrobras. The plaintiffs, who held Petrobras securities from 2010 to 2015, sought to recover their losses following a bribery and political kickbacks scandal involving dozens of public officials in Brazil. The scandal has contributed to a drop in Petrobras' market value to below $20 billion from almost $300 billion less than eight years ago. See Jonathan Stempel & Nate Raymond, "Brazil's Petrobras Must Face U.S. Group Lawsuits over Corruption: Judge", *Reuters* (2 February 2016), online: <http://www.reuters.com/article/us-brazil-petrobras-lawsuit-idUSKCN0VB2OQ>.

[81] In September 2016, the US District Judge Susan Hickey in Fayetteville, Arkansas certified a class action led by a Michigan retirement fund. The investors alleged that Wal-Mart concealed a corruption scheme in Mexico, where millions of dollars were paid in bribes to speed building permits and gain other benefits. See Anne D'Innocenzio, "Wal-Mart to Face Class-Action Over Alleged Bribery in Mexico", *CTV News* (22 September 2016), online: <http://www.ctvnews.ca/business/wal-mart-to-face-class-action-over-alleged-bribery-in-mexico-1.3083753>.

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Corporations may face foreign corrupt practices-related class actions in Canada as well. For example, SNC-Lavalin is currently defending securities class proceedings in Ontario and Quebec based on material misrepresentations in its disclosure of internal investigations of bribery in Bangladesh and elsewhere.[82]

b) Social damages

The concept of social damage is an emerging tool in obtaining compensation for damages to the public interest. Costa Rican law, for example, allows the Attorney General to bring a civil action for compensation when conduct causes damage to society. Costa Rica successfully used this tool to obtain compensation in a 2010 settlement after corruption was uncovered in a bidding process for telephone service providers in Costa Rica. As explained by Makinwa, "[t]he action filed by the government of Costa Rica under the Criminal Procedural Rules in Costa Rica, to seek pecuniary compensation for damage suffered by the collective interests of the state and peoples of Costa Rica, illustrates a resort to private law notions of compensation for damage suffered as a result of corrupt activity."[83]

c) Insolvency proceedings

Brun et al. point out that insolvency and receivership proceedings provide another tool in tracing and recovering assets. They summarize the advantages and disadvantages of using insolvency proceedings in asset recovery:

> Insolvency or receivership may present opportunities because the receiver (or other insolvency office holder) enjoys increased powers over assets. In such proceedings, the state claimant may be able to recover property simply by showing that it owns it. It is also easier to reclaim assets that have been transferred away, for example, by fraud. The insolvency office holder has the power to access information and demand testimony and has proved powerful and pivotal in large asset recovery cases. Within an insolvency proceeding, an insolvency office holder can compel the testimony of witnesses, including the directors or managers who may have been culpable in hiding assets. Refusal to cooperate can lead to imprisonment, which may motivate testimony that helps the office holder to locate and subsequently recover substantial assets.

[82] "Judge Certifies $1 billion Class Action Lawsuit against SNC-Lavalin", *CBC News* (20 September 2012), CBC News, online: <http://www.cbc.ca/news/canada/montreal/judge-certifies-1-billion-class-action-lawsuit-against-snc-lavalin-1.1169847>. See also SNC-Lavalin, *Annual Information Form (Year Ended December 31, 2015)* at 22-23, online: <http://www.snclavalin.com/en/investors/financial-information/annual-reports/2015>.

[83] Makinwa (2013) at 408.

> Formal insolvency processes are complex to implement internationally. Generally, in pursuing assets across borders, a plaintiff or creditor will need to pursue the assets under the insolvency laws of that country. Moreover, insolvency judgements are not easily recognized in foreign courts, unless certain regulations, conventions, or model laws apply. Therefore, the insolvency laws of the country where the assets are located will influence the effectiveness of approaching asset recovery through insolvency [footnotes omitted].[84]

d) *Partie civile*

Victims of corruption can participate in criminal proceedings for corruption-related offences as a *partie civile* in civil law jurisdictions. The victim must establish that they suffered direct and personal harm as a result of the criminal offence. This allows claims for damages to be assessed within a criminal trial and awarded if there is a conviction. For example, in 2007, Nigeria was awarded €150,000 for non-pecuniary damages after a French court convicted a former Nigerian energy minister for money laundering. Disadvantages of the *partie civile* approach include the victim state's lack of control over criminal proceedings and the fact that prosecutors may engage in plea bargaining without consideration of the *partie civile*.[85]

2.4.6 Limitations and Advantages of Criminal and Civil Proceedings

Both criminal and civil proceedings have their advantages and limitations. Civil actions are limited in terms of access to information and investigative powers. Criminal proceedings provide investigators with privileged access to information at the national and international level and allow them to overcome bank secrecy and obtain freezing orders more easily. Further, the assistance and cooperation between states provided by mutual legal assistance (MLA) in criminal proceedings is not mandatory in civil cases (see UNCAC Article 43). For example, in *Attorney General of Zambia,* the Zambian government was obliged to hire a private firm specializing in the tracing of assets due to the absence of MLA in civil actions.[86]

Benefits of civil litigation, aside from the lower burden of proof, include the possibility of action against third parties like facilitators (parties who knowingly facilitated the transfer of proceeds or received illicit assets). For example, a whole range of defendants were included in *Attorney General of Zambia*, including lawyers and other third parties.[87] However, plaintiffs might be required to establish dishonesty on the part of third parties, since incompetence is not always sufficient to ground liability.

Another advantage of civil actions is the possibility of the inclusion of moral and punitive damages in compensation. Further, plaintiffs can choose the jurisdiction in which recovery

[84] Brun et al (2015) at 113.
[85] Brun et al (2015) at 68–69.
[86] Hatchard (2014) at 327.
[87] *Ibid* at 326.

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is pursued. Civil remedies also provide a foreign state with greater control over the proceedings, whereas the harmed jurisdiction has no control over criminal proceedings in another jurisdiction. Prosecution must follow pre-set jurisdictional conditions. Civil recovery, on the other hand, can be pursued almost anywhere and in several jurisdictions at once.

As pointed out by Makinwa, civil actions can be pursued independently of the state, which is an advantage when states are unwilling to pursue criminal proceedings. Makinwa also points out that private suits deter corrupt transactions through the introduction of "an element of uncertainty in terms of the number, duration and costs (both financial and reputational) of potential private suits that may be filed by a variety of claimants. The criminal process is much more predictable as fines and punishment are pre-determined and can be more easily factored into the decision whether or not to give a bribe."[88]

Further Reading

For a detailed discussion of civil actions and remedies available in asset recovery proceedings in both common law and civil law jurisdictions, see van der Does de Willebois & Brun, "Using Civil Remedies in Corruption and Asset Recovery Cases" (2012) 45:3 Case W Res J Intl L 615.

For a recent guide to navigating civil actions in asset recovery, see the following StAR publication: Brun et al., *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets* (The World Bank, 2015), online: <https://star.worldbank.org/star/publication/public-wrongs-private-actions>.

2.4.7 Interaction between Remedies

The following is an excerpt from OECD/The World Bank report entitled *Identification and Quantification of the Proceeds of Bribery*:[89]

BEGINNING OF EXCERPT

1. Interaction between confiscation, disgorgement, and fines

Disgorgement and confiscation serve similar purposes, as noted above. Both seek to remove ill-gotten gains. However, disgorgement and confiscation can be computed

[88] Makinwa (2013) at 365.

[89] Identification & Quantification (2012) at 22-25.

based on different factors depending on the specific facts and circumstances of the bribery scheme and the relevant jurisdiction. Thus, it is possible to have both disgorgement and confiscation used in the same case. In the United States, disgorgement and restitution are quite similar and are unlikely to be used simultaneously. In the United States, if the SEC has already sought civil disgorgement of profits, generally the DOJ would exercise its discretion not to seek the same funds as a criminal restitution or forfeiture order. Unlike confiscation and disgorgement, the purpose of fines is to punish the offender, and not to remove the benefits of crime per se. In the U.S., the authorities frequently seek a criminal fine and/or a civil penalty in addition to disgorgement and forfeiture. In the United Kingdom, case law makes clear that a fine is to serve as a deterrent and that "offending itself must be severely punished quite irrespective of whether it has produced a benefit." If a defendant is in a position to pay both a fine and have the benefits confiscated, both may be ordered. In other cases, if the defendant does not have sufficient resources to pay both, confiscation will take primacy over a fine.

…

2. Interaction between confiscation and compensation for damages

Compensation is based on the existence of damages suffered by the victim and may be awarded even in cases where bribery did not generate any profit or benefit for the briber. However, bribes are generally intended to, and often do, ensure that the briber makes a profit. In certain instances, the profit may be greater than the damage suffered by the victim. There are various remedies that can be sought in this instance – the government enforcing anti-bribery laws can seek confiscation and the victim of the bribery can seek compensation for damages.

…

3. Interaction between confiscation and contractual restitutions

In some jurisdictions government agencies have the authority to declare void or invalidate contracts awarded by or through bribed officials. In such instances, the government harmed by the bribery may seek recovery of all the amounts expended and the property transferred under the terms of the tainted contracts. In this situation, contractual restitutions could be as high as the proceeds of crime confiscated by the government enforcing the antibribery laws.

…

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4. Interaction between remedies applied in foreign or multiple jurisdictions

Courts may take into account confiscation decisions or settlements with the same effect in foreign jurisdictions to avoid unfair duplication. …

Similarly, in the resolution of the Johnson & Johnson (J&J)/DePuy case, the United States and the United Kingdom simultaneously resolved investigations into some of the same misconduct. In the U.S., J&J's criminal fine was reduced by 25%, in part in light of anticipated fines in the U.K. and Greece, noting in the deferred prosecution agreement, "J&J and the Department agree that this fine is appropriate given […] penalties related to the same conduct in the United Kingdom and Greece […]." J&J was also required to disgorge profits from the conduct in a settlement with the SEC. DePuy settled the U.K. charges by agreeing to financial penalties under a civil recovery order. In reaching the settlement, the U.K. Serious Fraud Office also took the multijurisdictional nature of the settlement into account, stating that it had "taken particular note of the fact of disgorgement and recovery in more than one jurisdiction for the same underlying unlawful conduct. […] The Serious Fraud Office has considered the matter from a global perspective. It has worked to achieve a sanction in this jurisdiction which will form part of a global settlement that removes all of the traceable unlawful property and at the same time imposes a penalty."

END OF EXCERPT

3. INTERNATIONAL CONVENTION OBLIGATIONS

3.1 UNCAC

International cooperation is extremely important for successful foreign recovery of corrupt assets. Most corruption cases require asset recovery efforts beyond domestic borders. For instance, the assets may be held in one jurisdiction and then laundered to another jurisdiction, with the offence committed in a third jurisdiction and the company responsible for paying bribes headquartered in a fourth jurisdiction. Further, money can be moved very quickly through computers, mobile devices and wire transfers.

As corrupt activities often involve several borders, international cooperation is emphasised in UNCAC. Chapter V of UNCAC provides a framework to facilitate the recovery of stolen assets. The first provision of Chapter V, Article 51, declares that asset recovery is a "fundamental principle" of the Convention:

> The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.

Article 51 makes cooperation and assistance mandatory. Procedures and conditions for asset recovery in Chapter V include facilitating civil and administrative actions (Article 53), recognizing and taking action on the basis of foreign confiscation orders (Articles 54 and 55), returning property to requesting States in cases of embezzled public funds or other corruption offences, and returning property to its legitimate owners (Article 57). UNCAC provides a direct method of recovery in requiring State Parties to permit civil suits by other state parties in their courts and requires that State Parties recognize the judgments of other state party courts.

Article 52 calls for "know your customer" policies in financial institutions. It requires each State Party to take measures requiring financial institutions to verify the identity of customers and beneficial owners of funds and conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are or have been entrusted with prominent public functions, along with their family members and close associates. This applies to public officials not just of the government of the jurisdiction where the surveillance takes place but other countries. State Parties must require their financial institutions to report suspicious transactions, issue advisories and maintain adequate records. State Parties must also prevent the establishment of banks known as "shell banks," which have no physical presence and are not affiliated with a regulated financial group.

Article 53 requires each State Party to have a legal regime allowing another State Party to initiate civil litigation for asset recovery in its jurisdiction or to intervene or appear in proceedings to enforce their claim for compensation. State Parties are required to take measures to (i) permit another State Party to initiate a civil action in its courts to establish title to or ownership of property acquired through the commission of a Convention offence, (ii) permit its courts to order those who have committed offences to pay compensation or damages to another State Party that has been harmed, and (iii) allow its courts or authorities to recognize another State Party's claims as legitimate owner of property acquired through the commission of an offence.

UNCAC sets forth procedures for international cooperation in confiscation matters in Articles 54 and 55. These Articles create a basic regime for domestic freezing, seizure and confiscation. Article 54 provides that each State Party must take measures to:

(i) permit its authorities to give effect to an order of confiscation issued by a court of another State Party;

(ii) order confiscation by adjudication of an offence (must also *consider* allowing confiscation of property without a criminal conviction when the offence cannot be prosecuted by reason of death or flight);

(iii) permit its authorities to freeze or seize property upon an order issued by an authority of a requesting State Party concerning property eventually subject to confiscation; and

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(iv) permit its authorities to freeze or seize property upon request when there are sufficient grounds for taking such actions regarding property eventually subject to confiscation.

Article 55 implements mutual legal assistance between each State Party by providing a mechanism for responding to orders and requests from State Parties. It requires each state party to:

(i) submit the request for confiscation over corruption offences to its authorities;

(ii) submit the order of confiscation issued by a court of the requesting state party; and

(iii) take measures to identify, trace and freeze or seize proceeds of crime, property, etc., for confiscation by the requesting State or by themselves.

Article 55 also sets out the requirements for making a request for assistance. When a State Party receives a request for confiscation of proceeds of crime, the State Party must submit the request to its authorities for the purpose of obtaining an order of confiscation and shall take measures to identify, trace and freeze or seize the property. The request must include:

(i) a description of the property to be confiscated including the location if possible and the estimated value of the property and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law; and

(ii) if the request is based on a confiscation order, the requesting party must include a copy of the order, statement of facts and information, statement specifying the measures taken by the requesting party to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final.

The assistance sought by the requesting State Party may be refused if the requested State Party does not receive sufficient and timely evidence or if the property is of *de minimis* value.

The United Nations Convention against Transnational Organized Crime (UNTOC) also imposes international obligations on the signatories. Article 13(1) requires a State to act in response to requests for confiscation from other States to the "greatest extent possible within its domestic legal system." Note that the obligations under this convention apply only if the criminal act is carried out by an organized criminal group within the definition under Article 2(1). Article 14(2) requires the return of assets in order to "give compensation to the victims of crime or return such proceeds of crime to their legitimate owners."

Daniel and Maton point out that UNCAC's asset recovery provisions are based on the assumption that victim states will attempt to recover assets. [90] Daniel and Maton see this as a fundamental flaw. Fear, lack of political will, breakdown of political systems, or the corruption of current leaders in victim countries can easily frustrate UNCAC's asset recovery goals by preventing requests from victim countries. For example, after the death of Zaire's kleptocratic president, Mobutu Sese Seko, the Swiss authorities froze Mobutu's Swiss bank accounts. However, Zaire, by now the Democratic Republic of Congo, failed to request repatriation of the stolen funds, which allowed the money to be recovered by Mobutu's family. Similarly, Haiti failed to claim funds from a member of Haiti's kleptocratic Duvalier family during litigation in Switzerland. However, the day after a Swiss court ruled that the money would be remitted to "Baby Doc" Duvalier, Haiti experienced its 2010 earthquake. The Swiss government prevented the return of the money to Duvalier by passing a law that allows Switzerland to freeze assets if the rule of law has broken down in a victim country, incapacitating the victim state's ability to make requests (known as the "Duvalier law"). Because of UNCAC's reliance on action by victim states, Switzerland was obliged to pass a new domestic law to circumvent the retention of stolen funds by the Duvalier family. [91]

Further Reading

For an analysis of obstacles surrounding UNCAC's asset recovery provisions, as well as the potential of the provisions if used well, see Vlassis, Gottwald & Ji Won Park, "Chapter V of UNCAC: Five Years on Experiences, Obstacles and Reforms on Asset Recovery" in Zinkernagel, Monteith & Pereira, eds, *Emerging Trends in Asset Recovery* (Peter Lang AG, International Academic Publisher, 2013) 161–172.

3.2 OECD Anti-Bribery Convention

Parties to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions are required to provide mutual legal assistance to other jurisdictions investigating offences involving the bribery of public officials. Article 3 states that each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable. Proceeds are defined as the "profits or other

[90] Tim Daniel & James Maton, "Is the UNCAC an Effective Deterrent to Grand Corruption?" in Jeremy Horder & Peter Alldridge, eds, *Modern Bribery Law: Comparative Perspectives* (Cambridge University Press, 2013) at 293.
[91] *Ibid* at 316–22.

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benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery."

The implementation of the OECD Anti-Bribery Convention is monitored by the OECD Working Group on Bribery, composed of members of all State Parties. The Working Group compiled recommendations for State Parties published in the 2009 *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*. Recommendation XIII asks State Parties to consult and co-operate with authorities in other countries in investigations and other legal proceedings concerning specific cases of bribery, through such means as the sharing of information spontaneously or upon request, provision of evidence, extradition and the identification, freezing, seizure, confiscation and recovery of the proceeds of bribery of foreign public officials.[92]

3.3 Other Instruments

There are several other conventions and agencies that place asset recovery obligations on convention signatories and agency members. For example:

1. The Arab Forum on Asset Recovery (AFAR), established in 2012, is an initiative supporting asset recovery efforts of Arab countries. It brings together the G8, the Deauville Partnership and Arab countries for the return of stolen assets. The Deauville Partnership was launched in 2011 by the G8 in Deauville, France to support transition efforts of Arab countries. In May 2012, the G8 adopted an "Action Plan on Asset Recovery" as part of the Deauville Partnership. The partnership countries purport to commit to "a comprehensive list of actions aimed to promote cooperation, capacity building efforts and technical assistance in support of the efforts of Arab countries in transition in recovering assets diverted by past regimes": <http://star.worldbank.org/star/ArabForum/About>. At the Arab Forum on Asset Recovery in 2013, the United States announced that it would appoint two Department of Justice attorneys to specialize in the recovery of illicitly acquired assets in the Arab region.
2. The Busan Partnership for Effective Development Cooperation, created in 2011 under the auspices of the OECD, committed signatories to strengthening processes for the tracing, freezing and recovery of illegal assets.
3. The Financial Action Task Force is a policy-making body established to "set standards and pro-mote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system":

[92] OECD Working Group, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, (2009), online: <https://www.oecd.org/daf/anti-bribery/44176910.pdf>.

<http://www.fatf-gafi.org/about/>. The FATF develops recommendations and monitors the progress of its 36 members.

4. The Council of European Union Decision Concerning Cooperation Between Asset Recovery Offices of the Member States in the Field of Tracing and Identification of Proceeds from, or Other Property Related to, Crime (2007) requires member states set up a National Asset Recovery Office and cooperate with the recovery offices of member states: <http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/confiscation-and-asset-recovery/index_en.htm>.
5. The Council of the European Union Framework Decision on the Recognition and execution of Confiscation Orders (2006) purports to enable judicial decisions of European Union countries to be recognized and executed within deadlines: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006F0783&from=EN>.
6. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism (2005) requires parties to enable themselves to freeze, seize and confiscate proceeds of crime: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/198>.
7. The Council of the European Union Framework Decision on the Execution in the European Union of Orders Freezing Property or Evidence (2003) purports to establish rules under which a Member State is to recognize and execute in its territory a freezing order issued by another Member State in the framework of criminal proceedings: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003F0577>.
8. The Council of Europe Criminal Convention (1999) provides some support mechanisms for tracing, seizing and freezing assets: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173>.
9. The Council of Europe Civil Convention (1999) allows the payment of damages for bribery and similar offences recovered against anyone who has committed or authorized an act of corruption or failed to take reasonable steps to prevent such an act: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174>.
10. The European Convention on Mutual Assistance in Criminal Matters (1959) contains a framework for mutual legal assistance in European Union countries: <http://conventions.coe.int/ Treaty/en/Treaties/Html/030.htm>.
11. Commonwealth states have signed the Commonwealth of Independent States Conventions on Legal Assistance and Legal Relationship in Civil, Family and Criminal Matters (2002). These two multilateral conventions regulate criminal prosecution, extradition and mutual legal assistance: <http://cis-legislation.com/document.fwx?rgn=26119>.

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12. The Southeast Asian Mutual Legal Assistance in Criminal Matters Treaty signed in 2004 is "aimed at improving the effectiveness of the law enforcement authorities of the Parties to the MLA Treaty in the prevention, investigation and prosecution of offences through cooperation and mutual legal assistance in criminal matters." This treaty is a multilateral instrument and provides for many forms of mutual legal assistance: <http://www.asean.org/storage/images/archive/17363.pdf>
13. The African Union Convention on Preventing and Combating Corruption and Related Offences (2003) contains measures for mutual legal assistance and recovery of assets: <http://www.eods.eu/library/AU_Convention on Combating Corruption_2003_EN.pdf>.
14. The Southern African Development Community Protocol Against Corruption (2001) requires State Parties to seize, confiscate, provide mutual legal assistance and judicial cooperation: <http://www.sadc.int/documents-publications/show/>.

4. STATE-LEVEL ASSET RECOVERY REGIMES

4.1 US

The following excerpt from a 2011 StAR/World Bank publication, entitled *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action*, starts with a summary of mutual legal assistance provisions in the US, since MLA is usually essential to the pursuit of asset recovery in large-scale corruption cases.[93]

BEGINNING OF EXCERPT

United States

A. MLA Legal Framework and Preconditions to Cooperation (General)

A.1. Relevant Laws, Treaties, and Conventions Dealing with or Including a Component Relevant for MLA and Asset Recovery

- The United States provides assistance directly based on bilateral and multilateral treaties, letters of request, and letters rogatory. The types of assistance available are very broad but, with regard to asset recovery, depend on the provisions of the applicable treaty or convention to a specific case.

[93] Kevin M Stephenson et al, "Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action" (StAR/World Bank, 2011) at 175–179, online: <http://documents.worldbank.org/curated/en/2011/01/14571139/barriers-asset-recovery-analysis-key-barriers-recommendations-action>.

- The United States has entered into bilateral MLA treaties with more than 70 jurisdictions, namely: Anguilla; Antigua and Barbuda; Argentina; Aruba; Australia; Austria; the Bahamas; Barbados; Belgium; Belize; Brazil; British Virgin Islands; Bulgaria; Canada; Cayman Islands; China; Colombia, Cyprus; Czech Republic; Denmark; Dominica; Arab Republic of Egypt; Estonia; Finland; France; Germany; Greece; Grenada; Guadeloupe; Hong Kong SAR, China; Hungary; India; Ireland; Israel; Italy; Jamaica; Japan; Republic of Korea; Latvia; Liechtenstein; Lithuania; Luxembourg; Malaysia; Malta; Martinique; Montserrat; Mexico; Morocco; Netherlands; Netherlands Antilles; Nigeria; Panama; the Philippines; Poland; Romania; Russian Federation; Singapore; Slovak Republic; St. Kitts and Nevis; St. Lucia; St. Vincent and the Grenadines; Slovenia; South Africa; Spain; Sweden; Switzerland; Thailand; Trinidad and Tobago; Turkey; Turks and Caicos Islands; Ukraine; United Kingdom; Uruguay; and República de Bolivariana Venezuela. An agreement was also entered into on June 25, 2003, between the United States and the European Union concerning mutual legal assistance that, among other things, provides a mechanism for more quickly exchanging information regarding bank accounts held by suspects in criminal investigations.
- The United States has ratified the Merida Convention and may therefore grant MLA directly based on the provisions of the convention. The United States has also ratified the Inter-American Convention on Mutual Legal Assistance of the Organization of American States; the Vienna, Palermo, and the Financing of Terrorism conventions; the Inter-American Convention against Terrorism; the Inter-American Convention on Letters Rogatory and the Additional Protocol to the Convention; the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and the Inter-American Convention against Corruption.
- The United States responds to requests in the form of letters of requests and letters rogatory, as well as to MLA requests, pursuant to US Code Title 28 Section 1782 and US Code Title 18 Section 3512 even in the absence of a treaty relationship. The United States is able to provide broad assistance in response to requests from foreign authorities.

A.2. Legal Preconditions for the Provision of MLA

- Most bilateral MLA treaties do not generally require dual criminality. Some but not all of them require dual criminality with respect to coercive measures. When dual criminality is required, technical differences between the categorization of the crime in the United States and requesting state do not affect the provision of the requested assistance because the qualification of the offense is irrelevant, as long as the underlying acts are punishable in both states.

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- Many forms of assistance based on letters of request or letters rogatory, including the issuance of compulsory measures, do not require dual criminality.

A.3. Grounds for Refusal of MLA

- Grounds for refusals are set out in the applicable bilateral and multilateral agreements, such as Article 7 of the Vienna Convention, Article 18 of the Palermo Convention, and Article 46 of the Merida Convention.

B. MLA General Procedures

B.1. Central Authority Competent to Receive, Process, and Implement MLA Requests in Criminal Matters

- The Office of International Affairs of the Department of Justice (OIA) is the U.S. central authority for all requests for MLA and coordinates all international evidence gathering.
- OIA has attorneys and support staff with responsibilities and expertise in various parts of the world and in different substantive areas. The OIA executes MLA requests through competent law enforcement authorities, such as the United States Attorney's Offices, ICE (Immigration and Customs Enforcement), USSS (United States Secret Service), FBI (Federal Bureau of Investigation), the USMS (United States Marshall's Service), Interpol, and others. Requests for freezing, seizing, or confiscation of assets are executed in close cooperation with the Department of Justice's Asset Forfeiture Money Laundering Section.

B.2. Language Requirements

- English is the preferred language for requests. Requesting jurisdictions could incur translation costs if the request is submitted in any other language.

C. Asset Recovery Specific

C.1. Stage of Proceedings at Which Assistance may be Requested

- Most bilateral treaties allow for the provision of MLA during the investigative stage. Equally, OIA may apply to the courts for a production order or a search, freezing, or seizing warrant once an investigation has commenced in the requesting country, depending on the provisions of the MLA treaty or convention at issue.

Tracing

C.2. Available Tracing Mechanisms

- The types of measures available with respect to MLA requests by a specific country and with respect to a specific offense depend on the provisions of the applicable multilateral and bilateral treaties. In general, bilateral treaties allow for a substantial range of measures, including taking the testimony or statements of persons; providing documents, records, and other items; locating or identifying persons or items; serving documents; transferring persons in custody for testimony or other purposes; executing searches and seizures; assisting in proceedings related to immobilization and forfeiture of assets and restitution; collection of fines; and any other form of assistance not prohibited by the laws of the requested state.
- For requests based on letters of request or letters rogatory, OIA, based on US Code Title 18 Section 3512 or Title 28 Section 1782, may request the district court to order any person to give a testimony or statement or to produce a document or other thing for use in proceedings in a foreign tribunal, including in the course of criminal investigations conducted before the filing of formal accusations. Furthermore, OIA may apply to a federal judge for issuance of search warrants and other compulsory measures.

C.3. Access to Information Covered by Banking or Professional Secrecy

- Information covered by financial secrecy may be provided, if necessary by a court order.
- Information subject to professional legal privilege is protected from disclosure.

Provisional Measures (Freezing, Seizing, and Restraint Orders)

C.4. Direct Enforcement of Foreign Freezing and Seizing Orders

- For requests based on a treaty or agreement that provides for assistance in forfeiture (for example, the Merida Convention), US Code Title 28 Section 2467 allows for the registration and subsequent direct enforcement of foreign restraining orders to preserve property that is or may become subject to forfeiture or confiscation. Recent case law has called into question the viability of this option in the prejudgment context, and the Department of Justice is considering the need for a statutory amendment to clarify the congressional intent to enforce foreign prejudgment restraining orders.
- Requests for enforcement of foreign orders have to be submitted, along with a certified copy of the foreign order, to the U.S. attorney general, who will make a final decision on whether to grant the request.

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C.5. Issuance of Domestic Provisional Measures upon Request by a Foreign Jurisdiction

- **Legal basis:** US Code Title 28 Section 2467
- **Procedure:** OIA, often in conjunction with the Asset Forfeiture and Money Laundering Section, may apply to the courts for issuance of a restraining order on behalf of the requesting country.
- **Evidentiary requirements:** The United States may initiate domestic seizing proceedings if the requesting country can establish through written affidavit that an investigation or proceeding is under way and that there are reasonable grounds to believe that the property to be restrained will be confiscated at the conclusion of such proceedings. The request has to be made pursuant to a treaty or agreement that provides for mutual assistance in forfeiture, and the foreign offenses that give rise to confiscation also have to give rise to confiscation under U.S. federal law.
- **Time limit:** None, if a permanent restraining order was issued in foreign state. If the requesting country has arrested or charged somebody, property that might become subject to confiscation may be restrained for 30 days even without the requirement to establish probable cause, but upon the expectation the United States will file its own *in rem* confiscation action against the proceeds or instrumentalities of foreign crime based upon probable cause evidence that will be provided by the requesting state at a later date. This 30-day order can be extended for cause shown, for example, a delay in gathering or translating the foreign evidence.

Confiscation

C.6. Enforcement of Foreign Confiscation Orders

- **Legal basis:** US Code Title 28 Section 2467.
- **Procedure:** Requests for enforcement of foreign orders, including a copy of the foreign order, have to be submitted to the U.S. attorney general, who will in turn make a final decision on whether the request should be granted. If the request is granted, the attorney general may apply to the district court for enforcement.
- **Evidentiary requirements:** The requested state must provide a certified copy of the judgment and submit an affidavit or sworn statement by a person familiar with the underlying confiscation proceedings setting forth a summary of the facts of the case and a description of the proceedings that resulted in the confiscation judgment, as well as showing that the jurisdiction in question, in accordance with the principles of due process, provided notice to all persons with an interest in the property in sufficient time to enable such persons to

defend against the confiscation and that the judgment rendered is in force and is not subject to appeal.

C.7. Applicability of Non-Conviction Based Asset Forfeiture Orders

- The United States can seek the registration and enforcement of a foreign forfeiture judgment whether it is for specific property or an order to pay a sum of money, whether conviction based or non-conviction based.

C.8. Confiscation of Legitimate Assets Equivalent in Value to Illicit Proceeds

- Both domestic and foreign confiscation orders may be executed toward legitimate assets of equivalent value to proceeds or instrumentalities of crime.

D. Types of Informal Assistance

- Assistance may be provided by the Financial Crimes Enforcement Network (Fin-CEN) (http://www.fincen.gov/), as well as U.S. regulatory, supervisory, and law enforcement authorities. However, all requests have to be channeled through Fin-CEN, which serves as the primary portal through which information may be shared.
- The United States does maintain and use law enforcement attaché offices in foreign jurisdictions primarily by the FBI, ICE, and DEA. The FBI has over 75 offices serving 200 countries. For details, visit http://www.fbi.gov/contact/legat/legat.htm. ICE has offices serving over 40 countries: Argentina; Austria; Brazil; Canada; Caribbean; China; Colombia; Denmark; Dominican Republic; Ecuador; Arab Republic of Egypt; El Salvador; France; Germany; Greece; Guatemala; Honduras; Hong Kong SAR, China; India; Italy; Jamaica; Japan; Jordan; Republic of Korea; Mexico; Morocco; Netherlands; Pakistan; Panama; the Philippines; Russian Federation; Saudi Arabia; Singapore; South Africa; Spain; Switzerland; Thailand; United Arab Emirates, United Kingdom; República Bolivariana de Venezuela; and Vietnam. For details, see http://www.ice.gov/international-affairs/.[94]

END OF EXCERPT

[94] [98] Practitioners should contact the nearest United States embassy to determine the appropriate attaché office.

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The following excerpt is from a 2011 paper by Weld entitled "Forfeiture Laws and Procedures in the United States of America":[95]

BEGINNING OF EXCERPT

III. Overview of Current U.S. Forfeiture Processes

A. Preference for Administrative Forfeiture

Each year, the majority, generally over 60 percent, of federal forfeitures in the U.S. are obtained through administrative forfeiture. The reason is that most seizures are not contested. This may seem strange at first, but when one considers that most of the property seized for forfeiture in the U.S. constitutes large bundles of cash, it is readily apparent why many seizures are not challenged, particularly if the person from whom the cash was seized is not arrested or later indicted. No one really wants to come forward to swear that he or she has an interest in such large amounts of generally quite unexplained U.S. currency.

Administrative forfeiture is not used for real property or businesses. Since 1990, the Customs laws (19 U.S.C. § 1607, et seq.) have permitted administrative forfeiture of currency and monetary instruments[96] without limit, and of other personal property up to a value of $500,000.

An administrative forfeiture usually begins when a federal law enforcement agency seizes an asset identified during the course of a criminal investigation.[97] The investigation may be a purely federal one, or may be a task force which also involves state and/or local law enforcement agencies. The asset seizure must be based upon "probable cause" to believe that the property is subject to forfeiture. Once the asset is seized, attorneys for the seizing agency are required by CAFRA [Civil Asset Forfeiture Reform Act of 2000] to send notice to any persons whom the government has reason

[95] Jean B Weld, "Forfeiture Laws and Procedures in the United States of America" in UNAFEI Resource Materials Series No. 83 (UNAFEI, 2011) at 20–26, online: <http://www.unafei.or.jp/english/pdf/RS_No83/No83_06VE_Weld1.pdf>.

[96] [3] Monetary instruments include such items as bank checks, traveller's checks, money orders, and bearer paper, but not bank or other financial accounts.

[97] [4] In the U.S., as in most countries, each agency is responsible for the enforcement of a different category of criminal laws: for example, the Drug Enforcement Administration ("DEA") investigates drug crimes; the Federal Bureau of Investigation ("FBI") investigates most white collar crime and terrorism; and the Immigration and Customs Enforcement ("ICE") and Customs and Border Patrol ("CBP") of the Department of Homeland Security investigate smuggling violations, intellectual property violations, human trafficking, passport fraud, drug violations at the border and bulk cash smuggling. Note that not all federal law enforcement agencies have administrative forfeiture authority.

to believe may have an interest in the property. Such notice must be sent within 60 days of the seizure if a federal agent seized the property. An administrative forfeiture can also be based upon an "adoptive seizure," where a state or local officer has seized the property under the authority of state or local law, but then transfers it to federal custody for forfeiture. In that case, the federal adopting agency has 90 days after the seizure within which to send notice. Notice is usually sent by Certified Mail or Federal Express, so that the agency has proof of delivery. The agency must also publish its intent to forfeit for three successive weeks in a newspaper of general circulation in the area where the property was seized, or via a government internet publication website. A person receiving notice has 30 days within which to file a sworn claim with the seizing agency, asking for one of two types of relief: (1) the opportunity to challenge the forfeiture in court; or (2) remission or mitigation from the forfeiture. In the second option, the property owner is basically acknowledging the forfeiture, but claiming some mitigating circumstance. If a timely claim is filed under the first option, the seizing agency refers the matter to the appropriate U.S. Attorney's Office to file a judicial forfeiture action in the case. If no one files a claim after the deadlines provided in the notice and publication expire, the property is summarily forfeited to the United States. Remission or mitigation may be provided if certain guidelines are met.

B. Civil (Non-Conviction Based) Judicial Forfeiture in the U.S.

In the United States, non-conviction based ("NCB") forfeiture is known as "civil forfeiture." This judicial process may be brought at any time prior to or after criminal charges are filed, or even if criminal charges are never filed. It is an action filed in court against a property, not against a person.[98] Once the U.S. Attorney's Office receives a referral from a seizing agency of a seized asset case, that office has 90 days to either file a civil judicial case or include the seized asset in a criminal indictment and name it for criminal forfeiture. 18 U.S.C. § 983(a)(3)(A). If a civil case is not filed within those 90 days, the CAFRA "death penalty" will prevent the United States from ever filing a civil forfeiture case. 18 U.S.C. § 983(a)(3)(B). If the asset is included in an indictment and the defendant is later acquitted or has a conviction reversed on appeal, the property cannot be forfeited. For this reason, many U.S. prosecutors choose to file a timely civil forfeiture action and include the property for criminal forfeiture in an indictment. The law also allows the prosecutor or the claimant to obtain a "stay" of the civil forfeiture case while a criminal investigation is pending. Thus, if the defendant is convicted of an offence which will give rise to

[98] [5] This is why civil forfeiture actions in the U.S. have names like United States v. One Sixth Share , 326 F.3d 36 (1st Cir. 2003) (because civil forfeiture is an in rem proceeding, the property subject to forfeiture is the defendant); United States v. All Funds in Account Nos. 747.034/278, 295 F.3d 23 (D.C. Cir. 2002) (civil forfeiture actions are brought against property, not people).

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the forfeiture, the forfeiture may be obtained more easily in the criminal case, although it will not be final until all appeals are exhausted.

Because civil forfeiture does not depend upon a conviction, it may be filed at any time. Often the case will be filed under seal before criminal charges are brought, providing for Warrants of Arrest in Rem to be issued for the assets which may be served by the law enforcement officers at any time. These warrants are similar to seizure warrants, and are issued by the presiding judge in the civil forfeiture case. Rule G(8) of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Rule G(8)") prescribes the procedures which must be followed in a civil forfeiture action, which include: (1) notice to all potential claimants, even if notice was already provided in an administrative process; and (2) full publication notice by either newspaper or internet. Claimants have 30 days from when they are notified to submit a sworn claim indicating the basis for asserting an interest in the property (even if a claim was already submitted in an administrative case), and must, within 20 days after a Claim is filed, file an Answer with the court directly responding to the allegations in the prosecutor's judicial complaint. If those deadlines are not met, the prosecutor can seek a "default" judgment of forfeiture, which will generally be granted, particularly if the claimant is represented by counsel who blew the deadlines!

If a timely claim is filed, the case will follow the Federal Rules of Civil Procedure in U.S. District Court. Civil discovery in the nature of interrogatories and depositions may take place. Prior to discovery, either side may file for a judgment on the pleadings. Following discovery, either side may file for summary judgment on legal issues supported by uncontested facts. If the case survives this "motions practice," either side may request a trial by civil jury of nine persons, of whom a majority must agree on a verdict of forfeiture in order for the property to be civilly forfeited to the United States. The government has to prove by a "preponderance of the evidence" that the property is linked to the underlying crime as alleged.[99] In the United States, civil forfeiture is not available for any type of "value-based" forfeiture judgment, money judgment, or property which is equivalent to the criminally-derived or involved property. Such forfeitures require that the defendant be bound by in personam jurisdiction. Because the jurisdiction in civil forfeiture is in rem, U.S. law requires a "nexus" to the crime – either as proceeds or instrumentality, or – in the case of money laundering – an "involvement in" the crime in some manner.

A Claimant in a civil forfeiture case may take one or both of two approaches to defending a forfeiture: (1) he or she may challenge the government's ability to sustain its burden to prove the property has a "nexus" to the crime; and/or (2) he or she may

[99] [6] The "preponderance of the evidence" standard is also known in the United States as "more likely than not" and abroad is frequently referred to as a "balancing of the probabilities."

assert an "innocent owner" status which would deny forfeiture even if the government proves forfeitability. If the Claimant asserts "innocent owner" status, he or she has the burden to prove that defence by a "preponderance of the evidence". A civil forfeiture judgment may be appealed from the U.S. District Court to the U.S. Court of Appeals of that federal circuit. The appeal is first heard by a three judge panel; and, the losing party may seek rehearing by the panel or by the entire en banc panel of the circuit's appellate judges. If the case involves a novel issue or one which has created a conflict between any of the eleven federal circuits, then certiorari may be granted by the U.S. Supreme Court.

C. Ease of Criminal Judicial Forfeiture in the U.S.

As previously noted and as in most countries providing for criminal forfeiture, criminal forfeiture in the United States is dependent upon a conviction of a defendant for a crime which provides a basis for the forfeiture. For example, if a defendant is charged with securities fraud and income tax evasion, and is convicted of the tax evasion charges, but not the fraud offences, there can be no forfeiture because U.S. law does not provide for forfeiture based upon tax evasion. Over the years, United States criminal forfeiture laws have gradually expanded, and in 2000, CAFRA added 28 U.S.C. § 2461(c) which provides that if any law provides for civil forfeiture, then the prosecutor may also include a criminal forfeiture for the property in a criminal indictment. Now prosecutors often seek parallel civil and criminal proceedings against the same property.

Criminal forfeiture is in personam, against the defendant. One drawback to this type of forfeiture under U.S. law is that only property in which the defendant has a true interest may be forfeited criminally. Property which is held by "nominees" or straw owners on behalf of the defendant may be forfeited criminally, but the government must prove that the defendant is the true owner. Any property which is truly owned by other parties who are not convicted as part of the criminal case, such as a spouse or other family member or business partners, may not be forfeited criminally. Such property may be forfeited only in an in rem civil action.

The greatest advantage which criminal forfeiture holds for prosecutors in the U.S. is that it affords the possibility of a money judgment for the amount of the proceeds of the crime, and property involved in the crime. If that property – for example, the direct proceeds obtained by a fraudulent scheme or the mansion which was used to store narcotics – is no longer owned by or in the possession of the defendant, the government can get a judgment against the defendant for an amount equivalent to the value of that property. Rule 32.2 of the Federal Rules of Criminal Procedure permits the government to seek forfeiture of "substitute assets" belonging to the defendant. The procedure for obtaining criminal forfeiture is a bifurcated process. First, the defendant must be found guilty by proof "beyond a reasonable doubt" by either a

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judge (if the defendant elects) or by a unanimous twelve person jury. Or the defendant may decide to plead guilty to the charged crimes. Following the entry of a guilty verdict or plea which will support forfeiture, the judge or jury will consider whether the government has shown the required "nexus" between the property named for forfeiture and the crime of conviction. If forfeiture is ordered, a Preliminary Order of Forfeiture is entered against the defendant, which becomes final at sentencing. This order may be appealed, along with the defendant's convictions. Appeal is taken to the court of appeals for the relevant circuit, and beyond that to the U.S. Supreme Court if the issues are sufficiently important.

The Preliminary Order of Forfeiture must be served on anyone whom the prosecutor has reason to believe may have an interest in the property, and must be published unless it is a money judgment alone. Any interests asserted by third parties are heard in a separate part of the criminal case called an "ancillary proceeding," which is held after a guilty verdict or plea against the defendant. To the extent that any third party proves by a preponderance of the evidence that he or she has an interest in the forfeited property which is superior to the defendant's, the court must carve out that interest from the final order of forfeiture.

D. Strategy of Using Criminal vs. Civil Forfeiture Processes

1. Pros and Cons of Civil Forfeiture

(i) Pro: Lower standard of proof of the crime and no need for conviction.

The entire case in a civil forfeiture proceeding need be proven only by a "preponderance of the evidence" to a majority of a jury of nine. Thus, if there are proof problems which may make it difficult to prove the criminal conduct beyond a reasonable doubt to a unanimous jury of twelve, a civil proceeding may be the best venue for the forfeiture. If there are other impediments to obtaining a criminal conviction, such as the absence, death or incapacity of the defendant, a civil forfeiture proceeding will permit the forfeiture of the criminally linked property. This mechanism is exceedingly important in seizures of property, such as currency, where often the prosecutor cannot prove the exact crime which may have generated the unusual amount of cash, but has some evidence of criminal activity – such as a canine alert or ion scan[100] positive hit for the presence of narcotic solvent or drugs on the

[100] [7] An ion scan is a portable, state-of–the-art mass spectrometry device which ionizes chemical compounds, generating charged molecules whose mass-to-charge ratios can be measured. Ion scans are used to detect the presence of explosives, drugs and drug residue in parts per billion. Scans can detect the particulate residue of over twelve types of narcotic drugs. In addition to scanning currency for seizure, ion scans are used to inspect cargo containers and luggage, to identify hidden compartments, and for passenger security at many airports.

money, and perhaps previous criminal activity by the property owner which may explain the cash. Because of the lower burden of proof, forfeiture may be available in these cases. Also, if a criminal conviction is reversed on appeal, a civil forfeiture proceeding (which may have been stayed during the course of the criminal case) may rescue the forfeiture.

(ii) Pro: Property belonging to non-defendant parties may be forfeited

In a civil case, the prosecutor does not have to prove that the property owner committed or participated in the commission of the underlying criminal activity. As long as there is proof that the property is sufficiently linked to a crime, and the owner cannot satisfy the test for "innocent owner" by a preponderance of the evidence, the property may be forfeited.

The "innocent owner" definition in the U.S. code depends upon when the owner acquired an interest in the property. For persons having an interest in the property at the time the crime was committed, the claimant must show that he or she did not know of the criminal conduct or upon learning of it "did all that reasonably could be expected under the circumstances to terminate such use of the property."[101] For property which is acquired after the crime occurred (for example, proceeds of the crime), he or she must prove by a preponderance that he or she : (1) was a bona fide purchaser for value; and (2) did not know or was reasonably without cause to believe that the property was subject to forfeiture. 18 U.S.C. § 983(d)(A). A hardship provision is included which guarantees that third parties will retain a minimum shelter needed for survival as long as the property was not criminal proceeds. Only a bona fide purchaser for value without notice or knowledge can defeat a civil forfeiture of criminal proceeds.

(iii) Cons: Deadlines, duplicated resources, and liability for attorney's fees

The CAFRA "death penalty" mentioned earlier means that if any of the filing deadlines are missed for a seizing agency giving notice, and the prosecutor filing an action, a civil forfeiture action is forever barred. Criminal forfeitures are not subject to any deadlines. If a stay is not granted on the civil case, the discovery and motions practice can create not only extra work for the prosecutor's office, but also potentially interfere with the criminal prosecution which is proceeding along a different time frame, under different rules of court procedure. Finally, as noted before, if a claimant

[101] [8] 18 U.S.C. § 983(d)(2)(B) provides that such action may include giving notice to the police, or doing all that was possible to prohibit the criminal from using the premises.

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succeeds at having property released in a civil judicial proceeding, the government may have to pay the claimant's reasonable attorney's fee.

2. Pros and Cons of Criminal Forfeiture

(i) Pro: Forfeiture is addressed as part of the same proceeding as the criminal offence

Successfully obtaining forfeiture of all of the property sought for forfeiture in the criminal case saves an enormous amount of prosecutorial and judicial resources. Quite often, the court in the civil case will grant a "stay" while the criminal case proceeds. If the defendant reaches a point in the criminal prosecution of entering into an agreement to plead guilty to any of the criminal charges, the prosecutor will obtain – as part of that agreement – an agreement which addresses all of the assets sought for forfeiture. If a plea agreement is not reached and the case proceeds to trial, a criminal forfeiture judgment (including a money judgment) may be obtained based upon the same evidence as produced in the criminal case. Thus, there is no need for extra witnesses, or another court proceeding or another trial in order to obtain the forfeiture. In drug cases, 21 U.S.C. § 853(d) provides a presumption that any unexplained wealth accumulated during the course of a drug crime (which can include a multiple-year conspiracy), combined with a lack of legitimate income may be considered forfeitable drug proceeds.

(ii) Pro: A money judgment forfeiture is available and no attorney fees

Most significantly, if the property generated from the crime or used to commit the crime is no longer available for forfeiture, the prosecutor may request that the judge or jury enter a money judgment which may be collected against the untainted assets belonging to the defendant.

This money judgment is available for collection for years after the criminal case concludes. Finally, if criminal forfeiture is not successful – either because the defendant is acquitted or because a third party succeeds in obtaining release of the property – the government is not liable for anyone's attorney's fees.

(iii) Con: Only the defendant's property may be forfeited

Because of this limitation, any legally recognized superior interest by a third party – even if that person knew of the criminal nature of the property – must be forfeited in a parallel civil forfeiture case, or it cannot be forfeited. Thus, often both proceedings are required in order to obtain the maximum forfeiture potential under U.S. law.

IV. PROPERTY SUBJECT TO FORFEITURE UNDER U.S. LAW

A. Proceeds Forfeitures

Although the U.S. forfeiture system provides robust measures which may be used to deprive criminals of their ill-gotten gains, and U.S. prosecutors aggressively use this system to its best advantage, the truth is that it is overly complicated even for American prosecutors and judges. Most countries have enacted generic asset forfeiture laws, such as the Proceeds of Crime Acts ("POCAs") found in many Commonwealth countries and threshold crimes forfeiture systems enacted in many civil law countries. In the United States, property which can be forfeited either civilly or criminally varies greatly from one offense to another. For some crimes, only the proceeds can be forfeited; for others, only instrumentalities and for others, property "involved in" the offense. There are still many felony crimes for which forfeiture is not provided. Yet, all property owned by individuals or organizations involved in any crime related to terrorism may be forfeited. 18 U.S.C. § 981(a)(1)(G). The Department of Justice has attempted several times to obtain passage of an all crimes approach with the introduction of Proceeds of Crime Act legislation. However, the bill has generally been dead-on-arrival in Congress because there is no apparent urgent need to obtain such a complete overhaul and because of general political ambivalence toward forfeiture. So, we work with our hodgepodge of statutes the best we can.

The closest to an "all crimes" approach to forfeiture of proceeds in the United States is 18 U.S.C. § 981(a)(1)(C) which authorizes the forfeiture of the proceeds of over 200 state and federal offences. Most of these are subject to forfeiture because they are "specified unlawful activities" ("SUAs") within the definition of 18 U.S.C. § 1956(c)(7). All of the UN Convention required crimes are included, such as terrorist financing, money laundering, arms smuggling, drug crimes, most varieties of fraud (except tax fraud), corruption, human trafficking, smuggling, counterfeiting, securities violations, violent crimes, and environmental crimes. Others are linked through cross-referencing the RICO law (18 U.S.C. § 1961) to state crimes such as gambling, arson, kidnapping, murder, obscenity and nearly all types of theft. U.S. courts have regarded "proceeds" as including any property, real or personal, tangible or intangible, which would not have been obtained "but for" the commission of the crime. The civil forfeiture law defines "proceeds" in several ways: (1) in cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term "proceeds" means property of any kind obtained directly or indirectly, as the result of the commission of the offence giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offence; (2) in cases involving lawful goods or lawful services that are sold or provided in an illegal manner, "proceeds" includes the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services; and (3) in cases involving bank or other financial fraud, "proceeds"

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for forfeiture purposes excludes any amount of fraudulent obligation which was repaid.

Under U.S. law, "proceeds" will also include any increase in value which has occurred to property generated from criminal activity. For example, if a house bought with drug proceeds increases in value 100 percent in ten years, the entire house is subject to forfeiture. "Proceeds" may also include the value of services and benefits received from criminal activity, such as human trafficking or forced labour, even if the defendant does not actually receive payment for those services. "Proceeds" forfeitures are strong medicine; however, they do require that the police and prosecutors trace the property obtained from the criminal activity, and in today's era of transnational criminal activity, that endeavour can be difficult, if not impossible, in many cases.

B. Facilitating Property Forfeitures

"Facilitating property" is considered to be any property which makes the criminal activity more likely to occur. This term is the United States' version of an "instrumentalities" of crime confiscation. Criminal and civil forfeiture of facilitating property has long been permitted in drug cases. Most of the forfeitures permitted under the more generic criminal forfeiture law, 18 U.S.C. § 982, and civil forfeiture law, 18 U.S.C. § 981, apply only to criminal proceeds. Immigration, telemarketing, identity theft, child pornography and alien smuggling are exceptions.

CAFRA added the requirement that in "facilitating property forfeitures", the prosecutor must prove, by a preponderance of the evidence, that the property had a "substantial connection" to the underlying offence. This test has been held to prohibit forfeiture of an entire residence based upon one telephone call from the property, or a vehicle which is used to transport someone to a meeting to discuss the crime. Such uses would be considered "incidental" and not "substantially connected" to the criminal activity.

C. Property "Involved In" Money Laundering

U.S. forfeiture law allows the criminal or civil forfeiture of any property which is "involved in" a money laundering offence. 18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1). This concept reaches further than "facilitating" or instrumentality property primarily because it allows the prosecutor to forfeit also untainted property which has been commingled with the criminally-related property. For example, if someone uses criminal proceeds to purchase real property in the name of a nominee family member, but half of the purchase price is paid for with legitimate funds, the entire property becomes subject to forfeiture. If tainted funds are used to purchase a business by one partner, but another partner uses untainted funds, the entire business becomes subject to forfeiture if the business partner cannot establish that he was a bona fide purchaser

for value. The money laundering forfeiture provision is a popular one among U.S. prosecutors.

The primary limitation to its use is the assertion of the 8th Amendment defence of "excessive fines and penalties." The 8th Amendment to the U.S. Constitution prohibits the government from imposing an excessive fine or penalty. In *Austin v. United States*, 509 U.S. 602, 622 (1993), the Supreme Court applied the 8th Amendment to civil forfeiture cases, determining that such forfeitures must be limited to property which is, in some way, "proportional" to the underlying crime committed. Such a measure is often difficult. Many courts have applied the test of comparing the value of the property sought to be forfeited to the maximum fine which Congress authorized for the underlying crime; however, this has not been adopted as a conclusive measure, and courts generally look to the entire circumstances of a case to determine what is grossly disproportional to the crime, and what is not, for forfeiture purposes.

V. PROVISIONAL RESTRAINT OF PROPERTY UNDER U.S. LAW

Prosecutors in the U.S. must generally determine whether they will seek to seize or restrain assets prior to the initiation of either a criminal or civil forfeiture proceeding. A seizure always precedes an administrative forfeiture proceeding. The law recognizes the obvious principle that if property can effectively be restrained during the pendency of a forfeiture case, restraint is generally preferable to an actual seizure, which often requires significant expenditure of maintenance and storage fees.

A. Restraining Orders

U.S. laws provide a three-stage procedure for obtaining restraining orders against assets sought for either civil or criminal forfeiture. Prior to the initiation of criminal charges, a temporary restraining order ("TRO") may be obtained for 14 days upon an ex parte application and without prior notice to anyone with an interest in the property. The prosecutor must establish in the application that there is probable cause to believe that the property is subject to forfeiture and that providing notice would jeopardize the availability of the property. The 14 day period may be extended upon good cause shown, permitting serial TRO's until law enforcement agents have completed their "take down" of a criminal operation. Prior to the expiration of the initial TRO, the prosecutor must serve the order upon any potential parties in interest.

After affected parties have received notice and been given an opportunity to request a hearing, the prosecutor must demonstrate that: (1) there is a substantial probability that the U.S. will prevail on forfeiture and that failure to enter the order could result in the property's becoming unavailable; and (2) the need to preserve the property outweighs hardship to the affected parties. The court may then grant a 90-day restraining order, which can be extended upon good cause.

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Once a criminal indictment or a civil forfeiture complaint is filed, the prosecutor may obtain a permanent pre-trial restraining order. The reason for this provision is that in either case, an independent entity has found probable cause to believe that the property will be forfeited, thus satisfying possible judicial concerns about violations of the U.S. Constitution's 4th Amendment protections against unreasonable searches and seizures. In a civil forfeiture, the judge makes that determination based on the civil complaint; in a criminal forfeiture, the grand jury makes the determination based upon allegations in the indictment. Except for a request to pay attorney's fees (which is not permitted in the U.S. from tainted property), no one is entitled to a hearing on a restraining order issued after an indictment or civil forfeiture complaint has been filed.

B. Seizure Warrants

Civil and criminal seizure warrants are both available, with slightly different standards. A civil seizure warrant may be issued by the court upon probable cause to believe the property is subject to forfeiture (18 U.S.C. § 981(b)), which is usually accomplished by an affidavit sworn to by a law enforcement officer. This seizure warrant is used for most administrative seizures.

A criminal seizure warrant requires not only a showing of probable cause for forfeiture, but also that a restraining order is insufficient to maintain the property (or its value) for forfeiture. This provision confirms that restraint during the course of a forfeiture proceeding is preferable; but if the government learns that property is being transferred, damaged, or destroyed, a criminal seizure warrant would be available.

C. Management of Restrained or Seized Assets

Though somewhat beyond the scope of this paper, issues of asset management should be considered when deciding whether and when to restrain or seize property subject to forfeiture. For example, most vehicles and other modes of transportation, such as boats, motorcycles, and recreational vehicles, are generally seized because of the depreciation in their value through continued use. Prior to seizure, a computation should be undertaken as to whether the overall costs of seizing, storing and maintaining the asset will be less than the anticipated sales price.

Real property and businesses present special challenges. A net equity computation of real property is essential, taking into account any liens or mortgages upon the property. As for business forfeitures, the U.S. Marshal's Service has a team of professionals who advise prosecutors on whether – and how best to – seek forfeiture of a business. U.S. law prohibits the seizure of real property before a final forfeiture judgment unless the prosecutor shows the attempted sale, destruction or unlawful use of the property; however, the filing of a lis pendens in the public land records office is

permitted, as is a restraining order setting forth certain conditions for continued occupancy of the property by its owners. Likewise, restraining orders are most useful in connection with preserving the value of most businesses until a final judgment is entered. If seizure is required, a business manager or receiver can be appointed by the court.

Most financial accounts should generally be simply restrained pending the outcome of the proceeding. Some investment accounts may need to be liquidated or converted with court approval to maintain their value.

D. Provisional Restraint of Assets Overseas

U.S. courts have extraterritorial jurisdiction over assets which are named in either a civil forfeiture action or a criminal indictment. The court may order a criminal defendant to "repatriate" any property named for criminal forfeiture. 18 U.S.C. §853(e)(4). Penalties for a failure to comply with a repatriation order can include a finding of contempt and/or a sentencing enhancement to the defendant for obstruction of justice. Civil forfeiture provisions do not have a repatriation option, but the court can take "any action to seize, secure …" the availability of property subject to civil forfeiture, which would include ordering any claimants to the case to take action with respect to foreign assets.[102]

END OF EXCERPT

The 2016 FATF Mutual Evaluation Report assessing anti-money laundering and combating the financing of terrorism (AML/CFT) in the US regime notes that the federal authorities aggressively pursue high-value confiscation in large and complex cases and in respect of assets located both domestically and abroad.[103] The law enforcement agencies at the federal level give high priority to both criminal and civil forfeiture and seek orders forfeiting property of equivalent value as a policy objective.[104] In 2014, the federal authorities recovered over $4.4 billion.[105] Although there is not much information available at state and local levels, it appears that civil forfeiture is actively pursued by some states.[106]

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[102][9] One caveat our prosecutors must keep in mind is that if they have made an MLAT request to a foreign country asking the government to restrain assets, that restraint must be lifted before a repatriation order can be complied with.

[103] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures – United States*, Fourth Round Mutual Evaluation Report (FATF, 2016) at 4, 50, online: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>.

[104] *Ibid* at 75.

[105] *Ibid* at 50.

[106] *Ibid* at 4.

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In the US, domestic asset repatriation and restitution are managed at the federal level by the Department of Justice Asset Forfeiture Funds (DOJ-AFF) and the Treasury Forfeiture Fund (TFF). In the 2014 fiscal year, the combined value of assets in the DOJ-AFF and the TFF was about $4.6 billion,[107] and between fiscal years 2010 and 2015, $2.9 billion in forfeited assets was distributed to victims from the DOJ-AFF.[108] During the 2014 fiscal year, the TFF paid $93.3 million in restitution to victims and shared $68.5 million with other authorities and $921,000 with foreign countries.[109] Asset recovery is facilitated by specialized units within the Department of Justice, such as the Asset Forfeiture and Money Laundering Section (AFMLS), the Kleptocracy Asset Recovery Initiative, and the Organized Crime Drug Enforcement Task Force (OCDETF) Proactive Asset Targeting Team (PATT).[110]

Table 5.1 Total Net Deposits to the Two Federal Forfeiture Funds, FY2012-2014 (in USD)

	FY2012	FY2013	FY2014
DOJ-AFF	9 536 078 674	2 037 205 905	4 416 227 025
TFF	173 255 617	1 052 796 355	204 500 384
Total	**9 709 334 291**	**3 090 002 260**	**4 620 727 409**

Source: Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures – United States*, Fourth Round Mutual Evaluation Report (FATF, 2016) at 79, [Mutual Evaluation Report (2016)] online: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>.

[107] *Ibid* at 79.
[108] *Ibid* at 80-81.
[109] *Ibid* at 81.
[110] *Ibid* at 77.

Table 5.2 DOJ-AFF- Distributions and Deposits (in USD)

Fiscal Year	Forfeiture Victim Compensation	Equitable Sharing Cash/Proceeds Distribution Amount to State and Law Enforcement	Assets Forfeiture Fund Deposits
2007	306 088 353	416 255 221	1 583 388 625
2008	451 672 140	440 432 098	1 327 604 903
2009	143 712 258	394 218 350	1 404 822 898
2010	298 622 572	389 842 469	1 600 370 705
2011	322 080 158	439 368 553	1 684 810 126
2012	1 496 270 214	446 368 553	4 221 909 505
2013	193 807 168	657 220 346	2 084 563 742
2014	294 600 487	425 261 026	4 473 669 260
Total	**3 506 853 487**	**3 609 261 435**	**18 381 139 764**

Source: Mutual Evaluation Report (2016) at 81.

The gaps in the US asset recovery legal framework include the fact that not all predicate offenses include the power to forfeit instrumentalities, as well as the lack of general power to obtain an order to seize or freeze property of corresponding/equivalent value which may become subject to a value-based forfeiture order.[111] The Report recommends ensuring that all predicate offenses include the power to forfeit instrumentalities; the law enforcement authorities are able to seize and freeze pre-conviction, non-tainted assets that are likely to be required to satisfy a value-based forfeiture order in criminal proceedings; and the anti-money-laundering proceeds recovery activities and statistics at the state level are more widely available.[112]

The case of Teodoro Obiang, Second Vice President of Equatorial Guinea, provides an example of successful asset recovery by the US Department of Justice. Civil forfeiture actions against various assets in the US were settled in October 2014. Under the settlement, Obiang was required to forfeit a house in California, Michael Jackson memorabilia and a Ferrari, collectively worth over $30 million. The case was brought under the Kleptocracy Asset Recovery Initiative, which was launched by the DOJ in 2010 and established a dedicated team of prosecutors, investigators and financial analysts for investigation and prosecution in asset recovery cases. In accordance with the Initiative's goals, the recovered funds were to be used for the benefit of the citizens of Equatorial Guinea. $20 million was set aside for a private charitable organization in Equatorial Guinea, while $10 million was to be forfeited to

[111] *Ibid* at 50, 78.
[112] *Ibid* at 51, 78.

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the US and used for the benefit of the people of Equatorial Guinea to the extent permitted by law.[113]

4.2 UK

In their book *Corruption and Misuse of Public Office*, Nicholls et al. summarize the various options for restraining and recovering the proceeds of crime in the UK in both the criminal and civil realms. The following is a summary based on their book.[114]

Criminal confiscation and restraint orders are used to assist asset recovery in criminal proceedings. The Crown Court exercises confiscation powers under *POCA 2003*. Confiscation in the UK is value-based, meaning a defendant must pay a sum equal to the value of the benefits accrued through criminal conduct. The prosecution might also request a compensation order for victims, since otherwise confiscated assets are forfeited to the Crown. The court may also decline to make a confiscation order if the victim intends to pursue proceedings against the defendant.

In confiscation proceedings, the court will consider whether the defendant has a criminal lifestyle, which reverses the burden of proof, requiring the defendant show that assets were acquired legitimately. A defendant will have a criminal lifestyle if they are convicted of offences in Schedule 3 of *POCA* (money laundering offences are included, but bribery offences are not), have committed an offence over a period of at least six months and benefitted from it, or have been convicted of a combination of offences that comprise a "course of criminal activity." If the defendant does not have a criminal lifestyle, the court will consider whether he or she benefited from particular criminal conduct when determining the recoverable amount.

Restraint orders are a key pre-confiscation tool that prevent dissipation of assets during criminal proceedings. Any property in which the defendant has a legal or beneficial interest, including jointly held property, will be targeted, as will tainted gifts to third parties. Reasonable living expenses are allowed for the defendant. Restraint orders may be accompanied by disclosure orders and repatriation orders, which may require, for example, repatriation of money in offshore accounts.

POCA also provides for non-conviction based forfeiture. The applicant must prove on a balance of probabilities that the assets were obtained through unlawful conduct, including conduct occurring abroad, and that the property is in fact held by the defendant. However,

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[113] Department of Justice, 14-1114, Press Release, "Second Vice President of Equatorial Guinea Agrees to Relinquish More Than $30 Million of Assets Purchased with Corruption Proceeds" (10 October 2014), online: <http://www.justice.gov/opa/pr/second-vice-president-equatorial-guinea-agrees-relinquish-more-30-million-assets-purchased>.

[114] Nicholls et al, *Corruption and Misuse of Public Office*, 2nd ed (Oxford University Press, 2011) at 244–266.

NCB forfeiture, unlike confiscation, does not have a mechanism for compensation orders for victims. However, a victim can claim a legitimate interest in recovered property, as claimed by Nigerian government in order to recover one million pounds in the *Alamieseigha* case in 2007.

In private actions, claimants have a variety of options to assist in the tracing and preservation of assets during proceedings. The most important is the freezing injunction, discussed in more detail below. Claimants can also apply for search and seizure orders, which will be carried out by the claimant's counsel and an independent solicitor, as well as bankers' books orders, which allow the claimant's legal team to inspect bank records without notice to the defendant. Finally, claimants in private actions can also seek injunctions to preserve assets and evidence.

The following excerpt from the 2011 StAR/World Bank publication entitled *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action* describes the use of restraint and recovery mechanisms when foreign jurisdictions are involved, with a focus on MLA procedures.[115]

BEGINNING OF EXCERPT

United Kingdom

A. MLA Legal Framework and Preconditions to Cooperation (General)

A.1. Relevant Laws, Treaties, and Conventions Dealing with or Including a Component Relevant for MLA and Asset Recovery

- The *Crime (International Co-operation) Act* (CICA) [updated link: http://www.legislation.gov.uk/ukpga/2003/32/contents] allows for the provision of mutual legal assistance to any country.
- The *Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005* (POC) [updated link: http://www.legislation.gov.uk/uksi/2008/302/contents/made] allows for the issuance of restraint warrants and the confiscation of assets upon request or based on an order issued by a foreign country in both conviction based and non-conviction based proceedings.

[115] Stephenson et al (2011) at 170–174, online: <http://documents.worldbank.org/curated/en/2011/01/14571139/barriers-asset-recovery-analysis-key-barriers-recommendations-action>.

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- The *Criminal Justice (International Cooperation) Act 1990 (Enforcement of Overseas Forfeitures) Order* (CRIJICA) [updated link: http://www.legislation.gov.uk/ukpga/1990/5/contents] regulates the restraining and forfeiture of the instrumentalities of crime upon request or based on an order issued by a foreign country.
- The United Kingdom has entered into 32 bilateral MLA agreements with Antigua and Barbuda; Argentina; Australia; Bahamas; Bahrain; Barbados; Bolivia; Canada; Chile; Colombia; Ecuador; Grenada; Guyana; Hong Kong SAR, China; India, Ireland; Italy; Malaysia; Mexico; Netherlands; Nigeria; Panama; Paraguay; Romania; Saudi Arabia; Spain; Sweden; Thailand, Trinidad and Tobago; Ukraine; United States; and Uruguay.
- The United Kingdom is a party to the following multilateral agreements, which include provisions on mutual legal assistance: the Merida, Vienna, and Palermo conventions; the European Convention on Mutual Legal Assistance in Criminal Matters and Additional Protocol; the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime; the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and Protocol to the Convention on Mutual Assistance in Criminal Matters between Member States of the European Union; and the Harare Scheme. However, the United Kingdom may provide MLA directly based only on domestic law and not on international treaties.

A.2. Legal Preconditions for the Provision of MLA

- Reciprocity is generally not required for the provision of MLA.
- Dual criminality is not required for most measures under the CICA. However, requests for search and seizure for evidentiary reasons as well as restraint and confiscation of assets are subject to dual criminality; that is, they cannot be executed unless the underlying criminal conduct would be an offense under U.K. law.

A.3. Grounds for Refusal of MLA

- Requests involving double jeopardy will not be executed.
- Requests relating to offenses punishable with the death penalty or relating to trivial offense may be refused.
- Requests that affect the U.K. national security or other U.K. essential interests may be declined.

B. MLA General Procedures

B.1. Central Authority Competent to Receive, Process, and Implement MLA Requests in Criminal Matters

- For assistance in England, Wales, and Northern Ireland, the U.K. Home Office, Judicial Cooperation Unit, is the central authority to receive all requests for MLA.
- For assistance in Scotland, the Crown Office, International Cooperation Unit, is the central authority to receive MLA requests.
- The central authorities ensure that requests meet the form requirements and the requirements under U.K. law and subsequently disseminate requests to the relevant domestic authorities for implementation.

B.2. Language Requirements

- Requests must be made in writing in English or be submitted with an English translation. If no translation is provided, the central authorities will ask for one, and the request will remain unexecuted until the translation is received.

C. Asset Recovery Specific

C.1. Stage of Proceedings at Which Assistance may be Requested

- Measures pursuant to CICA Sections 13–15 as well as account and customer information orders may be issued as soon as an investigation for an offense has been initiated in the requesting country.
- In Scotland, search and seizing warrants may be issued as soon as there are reasonable grounds to suspect that an offense under the law of the requesting country has been committed.
- Search and seizing orders in England, Wales, and Northern Ireland (CICA Section 17) may be taken only if criminal proceedings have been instituted or an arrest been made in the requesting country.

Tracing

C.2. Available Tracing Mechanisms

- Obtaining of Evidence (CICA Sections 13–15): Evidence gathering orders may be issued if a request is made in connection with criminal proceedings or a criminal investigation in the requesting state. In England, Wales, and Northern Ireland, suspects cannot be compelled to attend court or be coerced to provide evidence under oath for the purposes of MLA. In Scotland, both suspects and witnesses

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can be compelled to attend the court, but suspects cannot be compelled to provide evidence.

- CICA Section 17: Search and seizing warrants for England, Wales, and Northern Ireland may be issued if criminal proceedings have been instituted or an arrest has been made in the requesting country; if the conduct in question would constitute an arrestable offense had it been committed in the United Kingdom; and if there are reasonable grounds to suspect that evidence is in the United Kingdom relating to the offense. In Scotland, such warrants may be issued if there are reasonable grounds to suspect that an offense under the law of the requesting country has been committed and if the offense would be punishable with imprisonment under Scottish law had the conduct occurred domestically. Warrants may not be issued with respect to items or documents subject to professional legal privilege.
- Customer Information Orders (CICA Sections 32 and 37): Orders may be issued requiring a financial institution to provide any customer information it has relating to the person specified in the order if the specified person is subject to an investigation in the requesting country, if the investigation concerns serious criminal conduct, if the conduct meets dual criminality, and if the order is sought for the purposes of the investigation. A customer information order has effect regardless of any restrictions on the disclosure of information that would otherwise apply.
- Account Monitoring Orders (CICA Sections 35 and 40): Orders may be issued requiring a financial institution specified in the application to provide account information of the description specified in the order and at the time and in the manner specified if there is a criminal investigation in the requesting country and if the order is sought for the purposes of the investigation. It is an offense under U.K. law to tip off customers that an account monitoring order has been received by a financial institution. The monitoring period may not exceed 90 days.
- Interception of Telecommunication: This measure is available only to parties of the EU Convention on Mutual Legal Assistance in Criminal Matters.

C.3. Access to Information Covered by Banking or Professional Secrecy

- Customer or account information orders pursuant to CICA Sections 32, 37, 35, and 40 have effect regardless of any restrictions on the disclosure of information that would otherwise apply. Therefore, they may also be used to obtain information covered by banking secrecy.
- Information covered by legal privilege is protected and may not be subject to search and seizing warrants.

Provisional Measures (Freezing, Seizing, and Restraint Orders)

C.4. Direct Enforcement of Foreign Freezing and Seizing Orders

- **Legal basis:** Foreign freezing orders are executed through CICA Sections 17 and 18.
- **Procedure:** Direct application of foreign freezing orders through a decision by the territorial authority for the part of the United Kingdom in which the evidence to which the order relates is situated. Only orders relating to criminal proceedings or investigations for an offense listed in the CICA may be directly applicable. The court may decide not to give effect to a foreign freezing order that would be incompatible with the rights under the Human Rights Act 1998 or if the person whose conduct is in question, if he was charged under the law of the requesting state or the United Kingdom, would be entitled to be discharged based on a previous acquittal or conviction.

C.5. Issuance of Domestic Provisional Measures upon Request by a Foreign Jurisdiction

- **Legal basis:** POC Articles 8, 58, and 95.
- **Procedure:** Countries may apply for issuance of a restraint order by the Crown Court.
- **Evidentiary requirements:** An order may be issued if a criminal investigation has been started in the requesting country or proceedings for an offense have been initiated and not concluded in the requesting country and if there is reasonable cause to believe that the alleged off ender named in the request has benefited from his criminal conduct. The POC provides for the seizing order to extend to any "realizable property," which is defined to include any free property held by the defendant or by the recipient of a tainted gift.
- **Time limit:** A restraint order remains in force until it is discharged by a further order of the court on the application of either the U.K. authorities or any person affected by the order. The court must discharge the order if at the conclusion of the foreign proceedings no external confiscation order is made or if the external order is not registered for enforcement within a reasonable time.

Confiscation

C.6. Enforcement of Foreign Confiscation Orders

- **Legal basis:** POC Articles 21, 68, and 107.
- **Procedure:** Foreign conviction-based confiscation orders may be registered and subsequently directly enforced in the United Kingdom if the Crown Court is satisfied that the conditions of the POC are met.

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- **Evidentiary requirements:** A foreign confiscation order may be executed if it was made based on a conviction, if it is in force and final, if giving effect to the order will not violate any rights of the Human Rights Act of 1998, and if the property specified in the order is not subject to a charge under U.K. law.

C.7. Applicability of Non-Conviction Based Asset Forfeiture Orders

- POC Articles 143 ff. allow for the registration and implementation of (civil) forfeiture orders. Article 147 permits an application for a property freezing order to preserve property so that it is available to satisfy an external order enforced in the United Kingdom by means of civil recovery.

C.8. Confiscation of Legitimate Assets Equivalent in Value to Illicit Proceeds

- Criminal confiscation in the United Kingdom is value-based, that is, the defendant's proceeds of crime are calculated as a value and the defendant is then ordered to pay that amount. There-fore, equivalent-value confiscation is possible.

D. Types of Informal Assistance

- Informal assistance may be provided by the police; the Serious Organized Crime Agency (FIU) (http://www.soca.gov.uk/), and the Financial Services Authority (http://www.fsa.gov.uk/).
- The United Kingdom has attaché offices in France, Italy, Pakistan, Spain, and the United States.[116]

END OF EXCERPT

[116] [97] Practitioners should inquire with the nearest British High Commission to determine the nearest attaché.

The following is an excerpt from a 2009 publication by the Basel Institute on Governance entitled *Tracing Stolen Assets: A Practitioner's Handbook*:[117]

BEGINNING OF EXCERPT

II. FREEZING ORDERS

1. Background

The order takes its name from *Mareva Compania Naviera S.A. v International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509. The Civil Procedure Rules now refer to it as a freezing injunction (CPR 25.1(1)(f)). It developed as a form of recourse against foreign-based defendants with assets within the UK and consequently the early authorities assumed that the injunction was not available against English-based defendants. In the same vein an early judicial guideline for the grant of the order required claimants to establish a risk of the removal of assets from the jurisdiction.

Section 37(3) of the Supreme Court Act 1981 now provides that the injunction may be granted to prevent defendants from removing from the jurisdiction 'or otherwise dealing with' the assets. Section 37 forms the basis of the jurisdiction for granting freezing injunctions 'in all cases in which it appears to the court to be just and convenient to do so'. The Court of Appeal held in *Babanaft International Co. S.A. v Bassatne* [1990] Ch. 13 that the wording of subsection 3 did not restrict the scope, geographical or otherwise, of s.37(1). The Civil Procedure Rules currently provide that the injunction may be granted in relation to assets 'whether located within the jurisdiction or not' (CPR 25.1(1)(f)).

2. Purpose and effect

A freezing order prohibits D from unjustifiably dissipating his assets within the jurisdiction so that there are insufficient or no assets left to satisfy a judgment against him. To preserve assets pending enforcement, a freezing order can also be obtained post-judgment. If D has insufficient assets within the jurisdiction to meet the quantum of C's claim, the court can grant a worldwide freezing order.

[117] International Centre for Asset Recovery (2009) at 90–99, online: <https://www.baselgovernance.org/publications/421>.

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3. Penal notice

Freezing orders, as well as search orders, are endorsed with a Penal Notice, which warns that disobedience of it may be regarded as contempt of court the penalty for which may be imprisonment, a fine or seizure of assets. Contempt may extend to any third parties who are notified of the order and do anything which helps or permits a breach its terms. However, since the English court has no jurisdiction over third parties located abroad, the worldwide order has to be recognised, registered or enforced by the relevant foreign courts to be effective. This process is often described as 'domesticating' the English order.

The orders usually freeze assets up to a financial limit, calculated according the value of C's claim with likely legal costs and interest taken in to account. D can deal with any '*surplus*' assets that exceed the limit of the order as he sees fit. In addition payment of a sum equal to the value of the limit into court or providing security in that sum can discharge the freezing order.

A freezing order bites on the individual not his assets (*in personam*) and as such it does not grant any proprietary rights over the assets of D. It therefore does not confer on C any advantage in the event of D's insolvency. However, the position is different where proprietary rights are claimed over frozen assets (see Proprietary Injunctions below). A freezing order is an interim measure and therefore the standard form of order permits D to draw on frozen assets to pay a '*reasonable sum*' for legal expenses and to pay a pre-set sum (fixed by the court) to meet ordinary living expenses. C is given a measure of control over any increases in expenses in order to prevent D from depleting his assets improperly. For example any increase in expenses has to be agreed with C, or in the absence of agreement, approved by the court.

4. Asset disclosure

The standard freezing order requires D to give details of the value, location and details of assets within the jurisdiction or elsewhere, for a worldwide freezing order. This enables C to identify the whereabouts of the assets and notify third parties of the freezing order. D may refuse to provide some or all of this information if in providing it, he is likely to incriminate himself. The assertion of self incrimination privilege has been much curtailed in the United Kingdom (UK) by the Fraud Act 2006 – and in practical terms by the fact that reliance on the privilege is generally regarded as in effect an admission of liability. Forcing the fraudster defendant into an assertion of self incrimination privilege can be the first stage in victory for the claimant victim. Where there are concerns about the completeness of D's disclosure on affidavit, C can apply to have D cross examined in relation to those assets. In addition, the court can

grant orders requiring third parties (e.g., banks) to assist in identifying and locating assets and other relevant information.

5. Application and requirements

The application to the court for a freezing order, as well as a search order, is almost invariably made *without notice* to D (*ex parte*). The first time that D learns about the order should be when he is personally served with it (see below for more detail about Service). This is done so as not to '*tip off*' D and T about C's intention to commence proceedings or to take any legal steps to secure assets and/or evidence. The court may decide not to grant a freezing order if D has had notice of C's intentions because '*the court is unlikely to make orders which are futile*' (*Oaktree Financial Services v Higham* [2004] EWHC 2098 Ch [10]).

6. Grounds

In order to obtain a freezing order, C needs to show:

- A good arguable case; and
- A real risk of unjustifiable dissipation of assets; and
- That the order is just and convenient in all the circumstances

The court will not automatically conclude that because D is alleged to be dishonest he cannot be trusted not to dissipate his assets. Careful consideration should therefore be given in the evidence to the profile and background of D.

7. Cross-undertaking in damages

The court will require C to give a 'cross-undertaking in damages' which is a promise to comply with any order that it may make if it decides that the freezing order caused loss to D and that D should be compensated for that loss. This may include provision of security to fortify the cross-undertaking in damages.

8. Full and frank disclosure

On a *without notice* application the court is being asked to grant a hugely intrusive order against D who has not had a chance to be heard. Therefore C and his lawyers must give full and fair disclosure of all the material facts, including what D is likely to argue in his defence, or against C, or any facts likely to be relied upon. If there has not been full and frank disclosure, there is a real risk that the court will set aside the order.

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9. Service

Personal service is usually a precondition to committal for contempt of court for a breach of an order endorsed with a penal notice. However, the court does have an inherent discretion to vary the requirements for personal service (RSC Order 45.7(7)).

Where relevant and possible, service should be effected simultaneously on D and the third party asset holders.

III. PROPRIETARY INJUNCTIONS

If C contends that D is holding C's property (which can include cash) or the traceable proceeds of his property (the '*proprietary assets*') then the court can grant a proprietary freezing injunction. Its terms are typically more draconian than a standard (non-proprietary) freezing order and can restrain any dealings with the proprietary assets so that D cannot use them to pay for living or legal expenses. When applying for a proprietary injunction, C needs to show a good arguable case and that it is just and convenient that the order be granted. He does not need to establish a risk of dissipation, because the nature of C's claim is that D is holding his assets or the proceeds of those assets. As a result the proprietary injunction does give C priority over D's creditors on the asset pool.

IV. ANCILLARY ORDERS

The English courts have developed a number of orders to assist victims of fraud and corruption in their fight against those who attempt to delay and obfuscate. These include specific disclosure orders, which require disclosure of particular documents to help identify the nature and location of assets or passport orders requiring delivery up of all travel documents and prohibiting D from leaving the jurisdiction. A fraudster[118] suddenly deprived of the means of travel internationally is inevitably shocked by the severity of the civil court's powers and it immediately impacts particularly if he is an overseas national who cannot return home or leave the UK during the currency of the asset disclosure process. Third party disclosure (*Norwich Pharmacal*) orders require third parties who are mixed up in the wrongdoing (whether innocently or not) to disclose information that will assist in the identification of wrongdoers, allow assets to be traced and to establish the validity of proprietary claims against third parties or tracing assets into the hands of third parties. Banks

[118] [1] In this context a fraudster denotes a person who may have committed criminal offences but who, for the purposes of this chapter, is the subject of the full panoply of civil measures that are available in the UK and also possibly in other jurisdictions.

through which stolen funds are believed to have passed are an obvious target for such orders.

In addition, third party freezing orders can be obtained against third parties but only where there is good reason for believing that assets ostensibly held by third parties are in reality D's assets. This is known as the *Chabra* jurisdiction. These orders are particularly useful where D has structured his affairs through sham trusts or other opaque vehicles so as to give the impression that he has no interest in the assets in question.

A critical weapon for the claimants is to be found in section 25 of the Civil Jurisdiction and Judgments Act 1982. Section 25 allows an English court to grant interim relief in aid of proceedings elsewhere. These are commonly invoked where assets are located in England, but D is located outside the jurisdiction, in the place where the substantive proceedings are being conducted. It is not necessary for foreign proceedings to have been commenced as long as they will be commenced. One can obtain relief in England – subject to demonstrating a sufficient geographical nexus – which cannot be obtained in the location of the substantive action.

…

3. General

As technology advances daily, the English Courts have shown themselves, time and again, to be adept and creative in assisting the victim claimant to recover the proceeds of fraud and corruption. The last years have seen an explosion of applications made under Section 25 Civil Jurisdiction and Judgment Acts (see section IV, last paragraph) – this enables the Courts on application without notice by the victim to utilise the panoply of weaponry available to the Court to assist a foreigner with jurisdiction in its pursuit of the fraudster or corrupt official. The dictator, the businessman, the ex-politician or the 419 crook against whom proceedings have been started or are about to be started in a host domestic state – wherever in the world that may be – can find themselves the subject of International Freezing and Tracing Order relief where proceedings are commenced in England on the basis that there is sufficient nexus with England and Wales to justify it. The nexus can be in terms of the location of property, perhaps a small shareholding in an operating company in which the defendant has a claimed beneficial interest, even if owned offshore but beneficially by him, or by the simple expedient of him being present in England and Wales at a particular time so that service upon him, *in personam*, can be effected.

The Section 25 jurisdiction is far reaching and often causes amazement to those unaware of its implications – witness for example a defendant with no apparent connection with England who is served with a freezing order requiring the worldwide

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disclosure of his assets issued by an English Court in ancillary support of proceedings in an European Union country relating to his alleged breach of duty while the director of an international conglomerate. Failure to make worldwide disclosure of his assets to an English Court, even though the subject matter of the fraud or corruption arose in a different jurisdiction, represents a contempt of Court punishable by imprisonment or segregation of assets. This where the subject matter of the alleged fraud or corruption has nothing whatsoever to do with England. The jurisdiction is secured by the expedience of property or *in personam* jurisdiction.

Technological advance in future years will doubtless enable the Courts to devise orders directed at the recovery of proprietary information held by internet servers providers and mobile phone operators (so that SMS messages can be retrieved aside from e-mail). Aside from the fund flows through the banking systems, developments of this kind enable the claimant lawyer to steal yet another march on the misapplication of laundered funds by the criminal – and this a civil process, though one that co-exists and operates very effectively as we have seen in the Banco Noroeste case with a parallel criminal investigation, prosecution and jail for the wrongdoer.

END OF EXCERPT

In 1980, the *Bankers Trust* case[119] introduced a new type of disclosure order which requires a bank to furnish information about assets and transactions normally protected by the bank's duty of confidentiality. In the case involving Nigeria's last military dictator General Sani Abacha, a UK court was requested to issue a Bankers Trust order requiring named banks to disclose copies of bank statements, account opening forms, customer information, debit and credit notes, as well as internal bank memoranda regarding the operation of the accounts.[120] As a result, disclosure was obtained from about twenty banks on approximately 100 Abacha family members, associates and corporate entities.[121]

The following is an excerpt from a 2009 StAR/ World Bank publication entitled *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture*:[122]

[119] *Bankers Trust v Shapira*, [1980] 1 WLR 1274 (CA).
[120] For more details about the so-called "Abacha loot" see Section 6.11 of this Chapter.
[121] UN Digest (2015) at 40-41.
[122] Theodore S Greenberg et al, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (StAR/World Bank, 2009) at 120, online: <https://star.worldbank.org/star/publication/good-practice-guide-non-conviction-based-asset-forfeiture>.

BEGINNING OF EXCERPT

The Assistance of U.K. Law Enforcement

When trying to trace, freeze, and recover the illicit gains of a corrupt official found either to be in or to have been laundered through the United Kingdom, a foreign state may do one of the following:

- Invoke the mechanism of mutual legal assistance, and working with a U.K. law enforcement agency either
  - restrain assets[123] (during a criminal investigation) and having obtained a criminal conviction in the foreign state, enforce its own recovery order in England and Wales[124]; or
  - freeze assets and having obtained either an NCB or conviction based asset recovery order in the foreign state, give effect to that order by means of an NCB asset forfeiture order in England and Wales (known in the United Kingdom as civil recovery).[125]
- Invite a U.K. law enforcement agency to adopt the case for investigation with a view to bringing in England and Wales
  - a criminal prosecution in the United Kingdom (if that is feasible) and if a conviction is obtained, seek a criminal confiscation order;
  - cash detention and forfeiture (if applicable); or
  - NCB asset forfeiture proceedings (civil recovery) and seek a civil recovery order.

If a criminal confiscation order is obtained, a compensation order (in favor of a victim) may also be made in the same case. A foreign state may also, therefore, intervene in criminal confiscation proceedings and seek a compensation order. A criminal confiscation order requires the defendant to pay back the value of the benefit from a

[123] [212] Requests will go through the United Kingdom Central Authority (with the exception of requests seeking enforcement via the NCB route, which should go through the High Court of England and Wales), which passes it to the appropriate law enforcement agency, such as the Serious Organised Crime Agency (SOCA), the Crown Prosecution Service (CPS), Her Majesty's Revenue and Customs (HMRC), or the Serious Fraud Office (SFO).

[124] [213] *Proceeds of Crime Act 2002* (United Kingdom) Part 11 and Order in Council 2005/3181 Parts 2, 3, and 4 re cooperation in the recognition and enforcement of foreign, conviction-based asset recovery orders.

[125] [214] *Proceeds of Crime Act 2002* (United Kingdom) Part 11 and Order in Council 2005/3181, Part 5 re the cooperation in the recognition and enforcement of foreign, NCB asset recovery orders.

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given crime (the proceeds).[126] If there are insufficient funds with which to fulfill both a criminal confiscation order and a compensation order, the court can require a proportion of the realized assets under the criminal forfeiture order to be used to discharge the compensation order.[127] A detailed consideration of this area is outside the scope of this contribution.

In proceedings for NCB asset forfeiture, the true owner of property is entitled to seek a declaration from the civil court that he has a valid claim to the property (or property which it represents) because it was unlawfully taken from him.[128]

If either a conviction based confiscation or NCB asset forfeiture order is registered and enforced in England, the recovered property (or money equivalent) is not automatically transmitted to the foreign state and the English court has no power with which to remit the property to the foreign jurisdiction. Instead, the proceeds of the recovered property (or money equivalent) are placed in the U.K. Government's Consolidated Fund. Some countries have entered into asset-sharing agreements with the United Kingdom in respect of conviction based confiscation cases. These, however, are not thought to apply to NCB asset forfeiture. The United Kingdom is taking steps to enter into either bilateral treaties or memoranda of understanding with foreign states with regard to NCB asset forfeiture. Asset sharing agreements may also be entered into on a case-by-case basis. With respect to corruption cases, the United Kingdom has ratified UNCAC, and as such is mindful of its obligations under that Convention.

END OF EXCERPT

[126] [215] *Proceeds of Crime Act 2002* (United Kingdom), Section 6, and *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 24. In confiscation proceedings it is not necessary to link a particular crime to a particular benefit. The court can, therefore, assume that all of the defendant's properties held over the previous six years are the proceeds of crime. This is known as the option of "general criminal conduct confiscation." Prior to the making of the confiscation order a restraint order may be obtained from the court to prevent the dissipation of assets that may later need to be sold to satisfy the confiscation order.

[127] [216] *Proceeds of Crime Act 2002* (United Kingdom), Section 13 (5)–(6).

[128] [217] *Proceeds of Crime Act 2002* (United Kingdom), Section 281.

Further Reading

For more on the UK, see: <http://star.worldbank.org/star/sites/star/files/UK-Guide-to-Asset-Recovery.pdf>.

For recent updates on and evaluation of confiscation and civil recovery law in the UK, see Peter Alldridge, "Proceeds of Crime Law since 2003 – Two Key Areas" (2014) Crim L Rev 171.

4.3 Canada

The following excerpt from a 2011 StAR/World Bank publication, entitled *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action*, starts with a summary of mutual legal assistance provisions in Canada, since MLA is usually essential to the pursuit of asset recovery in large-scale corruption cases:[129]

BEGINNING OF EXCERPT

Canada

A. MLA Legal Framework and Preconditions to Cooperation (General)

A.1. Relevant Laws, Treaties, and Conventions Dealing with or Including a Component Relevant for MLA and Asset Recovery

- The *Mutual Legal Assistance in Criminal Matters Act* (MLACMA) [updated link: http://laws-lois.justice.gc.ca/eng/acts/M-13.6/] [as amended *Protecting Canadians from Online Crime* Act[130]] allows for the provision of MLA. Canada may not provide MLA directly based on multilateral conventions but only pursuant to the provisions of the MLACM.
- The *Canada Evidence Act* (EA) [updated link: http://laws-lois.justice.gc.ca/eng/acts/C-5/] Section 46 allows for the provision of certain forms of MLA, including certain coercive measures, based on letters rogatory if criminal proceedings are pending abroad.

[129] Stephenson et al (2011) at 113–116.
[130] SC 2014, c 31. Section 41 provides that production orders for obtaining bank information, transmission data or tracking data described in the *Code* may be used by Canadian authorities who receive assistance requests from their international partners.

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- Canada has entered into bilateral treaties with 33 countries, namely Argentina; Austria; Australia; Bahamas; Belgium; China; Czech Republic; France; Greece; Hong Kong SAR, China; Hungary; India; Israel; Italy; Republic of Korea; Mexico; Netherlands; Norway; Peru; Poland; Romania; Russian Federation; South Africa; Spain; Sweden; Switzerland; Thailand; Trinidad and Tobago; Ukraine; United Kingdom; United States; and Uruguay.
- Canada has ratified the Merida Convention, the Inter-American Convention on Mutual Legal Assistance in Criminal Matters, the Vienna and Palermo Conventions, the Organization of American States Inter-American Convention on Mutual Assistance in Criminal Matters, and the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

A.2. Legal Preconditions for the Provision of MLA

- Dual criminality is generally not required for requests based on bilateral or multilateral treaties. Administrative agreements with non-treaty states may be concluded only for indictable offenses under Canadian law and thus require dual criminality.
- Foreign restraint and seizing orders may be enforced directly in Canada only if they relate to an indictable offense under Canadian law.
- Reciprocity is required and assumed for countries that have signed a relevant treaty, convention, or administrative agreement with Canada. Administrative agreements may be entered into for specific cases and in the absence of an applicable treaty.

A.3. Grounds for Refusal of MLA

Pursuant to MLACMA Section 9.4, the minister of justice must refuse requests if there are:

- Reasonable grounds to believe that the request has been made for the purpose of punishing a person by reason of his or her race, sex, sexual orientation, religion, nationality, ethnic origin, language, color, age, mental or physical disability, or political opinion.
- Enforcement of the order would prejudice an ongoing proceeding or investigation.
- Enforcement of the order would impose an excessive burden on the resources of federal, provincial, or territorial authorities.
- Enforcement of the order might prejudice Canada's security, national interest, or sovereignty.
- Refusal of the request is in the public interest.

Further grounds for refusal may be contained in applicable bilateral, multilateral, or administrative agreements.

B. MLA General Procedures

B.1. Central Authority Competent to Receive, Process, and Implement MLA Requests in Criminal Matters

- The Ministry of Justice is the central authority to receive any requests for MLA.
- In practice, the ministry performs its function as central authority through the International Assistance Group (IAG), which reviews and coordinates the implementation of MLA requests. The IAG may receive requests either through diplomatic channels or directly from the central authority of the requested entity or state.

B.2. Language Requirements

- Requests have to be submitted in English or French.

C. Asset Recovery Specific

C.1. Stage of Proceedings at Which Assistance may be Requested

- Tracing measures under the MLACM are available once a criminal investigation has been initiated in the requesting country.
- The measures under the EA, including direct enforcement of foreign freezing and seizing orders, are available only after formal charges have been brought before a foreign court or tribunal. It is not required that a conviction has been obtained.

Tracing

C.2. Available Tracing Mechanisms

- Under MLACMA Section 11 and 12, search warrants may be issued by a Canadian court if there are reasonable grounds to believe that an offense has been committed under the law of the requesting country, evidence of the commission of the offense or information on the whereabouts of a suspect will be found in the place to be searched, and it would not be appropriate to issue a production order. The person executing the search warrant may seize any thing he believes will afford evidence of, has been obtained by, is intended to be used, or has been used in the commission of an offense.

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- Under MLACMA Section 18, a Canadian judge may issue a production order if there are grounds to believe that an offense has been committed under the law of the requesting country, and evidence of the commission of the offense or information on the whereabouts of the suspect will be found in Canada. Items or documents subject to privilege or nondisclosure under Canadian law cannot be compelled. EA Section 46 also allows for the issuance of production orders and for the compelled testimony of witnesses by Canadian courts if criminal charges have been brought in the requesting country.
- Other measures provided for under the MLACMA and the EA include video or audio-link of a witness in Canada to proceedings in a foreign jurisdiction, an order for the lending of exhibits that have been tendered in Canadian court proceedings, an order for the examination of a place or site in Canada, the transfer of a sentenced prisoner to testify or assist in an investigation, and service of documents and account monitoring orders.

C.3. Access to Information Covered by Banking or Professional Secrecy

- Privileged information can be obtained pursuant to an MLAT search warrant if any information over which privilege is claimed is sealed and filed with the court.

Provisional Measures (Freezing, Seizing, and Restraint Orders)

C.4. Direct Enforcement of Foreign Freezing or Seizing Orders

- MLACMA Section 9.3 allows for the direct enforcement of foreign restraint or seizing orders if a person has been charged with an offense in the requesting jurisdiction and if the offense would be an indictable offense in Canada.
- Upon approval by the minister of justice, the attorney general may file the order with the Superior Court of Criminal Jurisdiction of the relevant province. The order is then entered as an order of that court and may be executed in Canada.

C.5. Issuance of Domestic Provisional Measures upon Request by a Foreign Jurisdiction

- **Legal basis:** There are no provisions that permit domestic provisional measures within the Criminal Code to be used by a foreign state.
- **Procedure:**
- **Evidentiary requirements:**
- **Time limit:**

Confiscation

C.6. Enforcement of Foreign Confiscation Orders

- **Legal basis:** MLACMA Section 9.
- **Procedure:** Subject to approval by the minister of justice, MLACMA Section 9 allows for the direct enforcement of foreign confiscation judgments in Canada. Upon approval by the minister, the attorney general may file the judgment with the Superior Court of Criminal Jurisdiction of the relevant province. The order is then entered as the judgment of that court and may be executed in Canada pursuant to domestic law.
- **Evidentiary requirements:** Foreign confiscation judgments may be enforced in Canada if the affected person has been convicted of an offense in the requesting country, if the offense would be an indictable offense under Canadian law, and if the judgment is final. The judgment may extend to any offense-related property or any proceeds of crime.

C.7. Applicability of Non-Conviction Based Asset Forfeiture Orders

- Some but not all provinces in Canada can enforce civil forfeiture orders.

C.8. Confiscation of Legitimate Assets Equivalent in Value to Illicit Proceeds

- A foreign confiscation order may be enforced under MLACMA section 9 (see C.6.).

D. Types of Informal Assistance

- Informal assistance may be provided by the FINTRAC (FIU and FI Supervisor) (http://www.fi ntrac.gc.ca/), the Office of the Superintendent of Financial Institutions (http://www.infosource.gc.ca/inst/sif/fed04-eng.asp), provincial securities regulators, and the police.
- MOUs are required only by FINTRAC (both as supervisor and as FIU). All other authorities are empowered to provide decentralized types of assistance also in the absence of MOUs.
- Canada maintains and uses attaché offices.[131]

END OF EXCERPT

[131] [92] Practitioners should contact the nearest Canadian embassy to determine the appropriate attaché office.

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(1) *Freezing Assets of Corrupt Foreign Officials Act*

a) Preconditions for a Freezing Order or Regulation

The *Freezing Assets of Corrupt Foreign Officials Act* (*"FACFOA"*) was introduced in 2011 to respond to the aftermath of the fall of several dictatorships in the Middle East during the Arab Spring. The legislation allows the Minister of Foreign Affairs to quickly freeze the assets of a foreign political figure upon the request of a foreign government. The law requires that a foreign state make a written request to the Government of Canada to freeze the assets of an individual. The foreign state must also assert that the individual "has misappropriated property of the foreign state or acquired property inappropriately by virtue of their office or a personal or business relationship."[132] The *Act* defines a "foreign state" as a state other than Canada and includes any government or political subdivision of the foreign state as well as any agency or department of the government or political subdivision.[133]

Once the foreign state has made a request, the Governor in Council (i.e., the Cabinet) must ensure that three preconditions are fulfilled before making an order or regulation that freezes a person's assets. First, the Governor in Council must be satisfied that any persons targeted for asset seizure qualify as "politically exposed" foreign persons.[134] The *Act* defines a "politically exposed foreign person" as a person who holds or who has held one of several enumerated offices in a foreign state. The list includes specific offices such as "head of state" and "military officer with the rank of general or above." However, the definition also includes a residual clause specifying that the "holder of any prescribed office or position" would also fall under the definition of "politically exposed foreign person."[135] This residual clause is important because it allows the Governor in Council to prescribe other government positions as politically exposed foreign persons in regulations under *FACFOA*. This power ensures that it would be possible for *FACFOA* to target corrupt officials who do not hold an enumerated title, such as former Colonel Gaddafi of Libya (although he has never actually been the target of an order or regulation under *FACFOA*).[136] The definition of "politically exposed foreign person" also includes "any person who, for personal or business reasons, is or was closely associated with such a person [a person holding an enumerated or prescribed office as defined above], including a family member."[137] This language further expands the category of person who may be the subject of an order or regulation. Second, before issuing an order or regulation, the Governor in Council must also be satisfied that "there is internal turmoil, or an uncertain political situation, in the foreign state." Finally, the Governor in

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[132] *Freezing Assets of Corrupt Foreign Officials Act*, SC 2011, c 10, s 4(1). See the *Legislative Summary of Bill C-61: The Freezing of Assets of Corrupt Foreign Officials Act*, [Leg Summary Bill 61] online: <http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c61&Parl=40&Ses=3>.
[133] *Ibid* at s 2(1).
[134] *Ibid* at s 4(2)(a).
[135] *Ibid* at s 2(1).
[136] Martin Asser, "The Muammar Gaddafi Story", *BBC News*, online: <http://www.bbc.com/news/world-africa-12688033>.
[137] *Freezing Assets of Corrupt Foreign Officials Act*, SC 2011, c 10, s 2(1).

Council must be satisfied that "the making of the order or regulation is in the interest of international relations."

Concerns with the preconditions

The major concern is the lack of evidence required for the Governor in Council to make an asset seizure regulation under *FACFOA*. During the review of the proposed legislation by the Standing Committee on Foreign Affairs and International Development, the Hon. Bob Rae noted that a requesting government does not "have to give you any court judgments. They don't have to give you any evidence with respect to exactly what this [person] has done. They simply have to say, 'We're giving you a request', and in response to that request, you can pass a regulation to seize that person's property." He also noted that the additional preconditions were vague in their wording.[138] These concerns are a large part of why the current five-year review in section 20 of *FACFOA* was added.[139] Witnesses in the current review have continued to identify the lack of evidence provided by requesting foreign governments as an issue. In particular, Ms. Maya Lester, QC, criticized both the European and Canadian frameworks for accepting the word of post-revolution regimes such as Tunisia or Egypt "without standards that Canada or the United Kingdom certainly would regard as complying with the rule of law."[140]

The current act allows for persons affected by an order or regulation under section 4 to apply for ministerial reconsideration of their status as a "politically exposed person."[141] However, the only way to otherwise contest the substantive or procedural validity of an order or regulation under *FACFOA* is to apply for judicial review under section 18.1 of the *Federal Courts Act*.[142]

b) "Freezing" Regulations under *FACFOA*

To date, there are two regulations created to freeze assets under *FACFOA*. The first regulation, in 2011, targeted foreign officials from Tunisia and Egypt,[143] and the second, in 2014, targeted foreign officials from Ukraine.[144] The original numbers of persons listed in those regulations was 123 for Tunisia, 148 for Egypt, and 18 for Ukraine. The Tunisia and

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[138] Proceedings of House of Commons Standing Committee on Foreign Affairs and International Development (7 March 2007) at 1630-1635.
[139] Leg Summary Bill 61 at 10. That five-year review began in the Fall of 2016 and is called "Statutory Review of the *Special Economic Measures Act* and the *Freezing Assets of Corrupt Foreign Officials Act* of the House of Commons Standing Committee on Foreign Affairs and International Development."
[140] Proceedings of House of Commons Standing Committee on Foreign Affairs and International Development (2 November 2016) at 1555.
[141] *Freezing Assets of Corrupt Foreign Officials Act*, SC 2011, c 10, s 13.
[142] Leg Summary Bill 61 at 10.
[143] *Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations*, SOR/2011-78, online: <http://canlii.ca/t/52p9g>.
[144] *Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations*, SOR/2014-44, online: <http://canlii.ca/t/527c6>.

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Egypt regulation has been amended several times. The current numbers of listed persons are 8 for Tunisia and 18 for Ukraine.[145] According to media reports, under the Tunisia and Egypt regulation, the government targeted residential property valued at $2.55 million and bank accounts containing $122,000.[146] However, it is not clear how much of that money was returned to the people of Tunisia. The *Act* itself does not provide a mechanism for the return of assets. Hugh Adsett from the Department of Foreign Affairs, Trade and Development testified on this point before the Standing Committee in the current review, saying, "what happens under the act is that the assets are frozen. If the foreign state wishes to have the return of those assets, they need to take a further step to be able to have the assets returned. That usually will be in the nature of a mutual legal assistance request in order to have assets returned."[147]

c) Duties to Disclose and Offences for Non-Disclosures

Section 8 of *FACFOA* imposes a duty on banks and other enumerated or prescribed entities to determine, on an ongoing basis, whether they are in possession or control of property that they have reason to believe belongs to a politically exposed foreign person who is the subject of an order or regulation under section 4. Section 9 of *FACFOA* imposes an obligation on any Canadian or person in Canada to report any property that they know to be in their possession, or knowledge of a property transaction, that is the subject of an order or regulation under section 4.

Section 10 of *FACFOA* creates hybrid offences for willfully contravening orders made under section 4 or the duties imposed by sections 8 and 9. In both cases, the maximum penalties are five years in prison for an indictable offence, or, for a summary conviction, a fine of $25,000 and a maximum of one year in prison.

d) Economic and Logistical Costs

Witnesses before the Standing Committee in the current five-year review expressed several concerns about the economic and logistical burdens individuals and entities face under *FACFOA*. Dr. Charron, Director of the Centre for Security Intelligence and Defence Studies at Carleton University, pointed out that the complexity of Canada's multiple legislation governing sanctions means that Canadian companies and banks have to spend a large amount of money to ensure compliance.[148] She notes that *FACFOA* applies to property within

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[145] Proceedings of House of Commons Standing Committee on Foreign Affairs and International Development (17 October 2016) at 1605.
[146] Jim Bronskill, "Canada Froze Billions in Assets to Support Arab Spring: RCMP", *The Globe and Mail* (15 July 2012), online: <http://www.theglobeandmail.com/news/national/canada-froze-billions-in-assets-to-support-arab-spring-rcmp/article4417551/>.
[147] Proceedings of House of Commons Standing Committee on Foreign Affairs and International Development (17 October 2016) at 1555.
[148] Proceedings of House of Commons Standing Committee on Foreign Affairs and International Development (19 October 2016) at 1540.

Canada and as such could impose a particularly onerous burden on companies or banks involved in domestic real estate transactions.[149] However, it is not clear how onerous the burden on companies of tracking asset transactions of a relatively small group of individuals really is or whether the money banks and companies have to spend on compliance goes beyond the simple cost of doing business in a heavily-regulated industry.

Government institutions currently provide informational support to institutions affected by *FACFOA.* While the Office of the Superintendent of Financial Institutions does not have a legislated role under *FACFOA*, they provide notice and some guidance to federally regulated financial institutions about duties and expectations under incoming regulations under *FACFOA.* For example, they provided a notice when the Ukraine regulations were released under the Act.[150]

(2) *Special Economic Measures Act*

The *Special Economic Measures Act* (*SEMA*) allows the Governor in Council to make orders or regulations taking economic measures against a foreign state. The Governor in Council can do this in order to implement a call for sanctions from an association of states of which Canada is a member or "where the Governor in Council is of the opinion that a grave breach of international peace and security has occurred that has resulted or is likely to result in a serious international crisis." The Governor in Council can also order the freezing or seizure of property belonging to the foreign state, to individuals in that foreign state, or to nationals of that foreign state not normally residing in Canada.[151] Whereas the function of *FACFOA* is to aid foreign governments in freezing assets held by members of corrupt former regimes, *SEMA* allows Canada to act on its own to further the effectiveness of multilateral sanctions.

(3) *Sergei Magnitsky Law*

Sergei Magnitsky was a well-respected tax lawyer in Russia. Bill Browder, founder and CEO of Hermitage Capital Management LTD (the largest foreign investment fund in Russia at the time) was Magnitsky's client. In response to the fraudulent taking of some of Browder's assets, Magnitsky investigated and discovered a $230 million tax fraud by senior Russian officials. Once the incident became public, Magnitsky, Browder and others, were investigated by Russian officials on suspicion of tax fraud. Browder and the others fled Russia before they could be arrested. But Magnitsky refused to leave Russia because he knew he had done nothing wrong, and because he wanted to have the senior Russian officials actually involved in the theft and tax fraud brought to justice. He was arrested in October 2008 and grossly tortured and maltreated until his death in prison on November 16, 2009. Why? Because he refused to recant his allegations of official corruption and falsely confess to tax evasion himself. As Browder has stated, "Sergei Magnitsky was killed for his ideals.

[149] *Ibid* at 1615.
[150] See <http://www.osfi-bsif.gc.ca/Eng/fi-if/amlc-clrpc/snc/facfo-bbde/Pages/2014-03-05-RAFACFOUR.aspx>.
[151] Leg Summary Bill 61 at 6.

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He was killed because he believed in law. He was killed because he loved his people, and because he loved Russia."[152]

Since Sergei's death, Browder has devoted his life to getting justice for Sergei. One of those manifestations of justice has been the enactment in the US of the *Sergei Magnitsky Rule of Law Accountability Act of 2012*, which after a long and suspenseful political ride became law in December 2012.[153] The law authorizes the President to impose visa bans and freeze and seize the assets of Russians responsible for gross violations of human rights and significant acts of corruption. In 2016, the Act was expanded to include all foreign officials – Russian or otherwise.[154]

In October 2017, Canada followed suit by enacting the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*.[155] The Act authorizes visa bans and freezing and seizing of assets of foreign officials from any country who are responsible for gross human rights violations and significant corruption. In early November 2017, Canada issued its first round of sanctions listing 52 human rights violators in Russia, Venezuela, and south Sudan.

(4) *Criminal Forfeiture of Proceeds of Crime*

Canada's *Criminal Code* also deals with the proceeds of crime:

- Section 462.32 provides search and seizure powers of the proceeds of crime;
- Section 462.33 provides for restraint and freezing of the proceeds of crime; and
- Section 462.37 provides for the forfeiture of proceeds of crime.

When the property is forfeited under section 462.37, it is forfeited to the government that prosecuted the offender unless a third party has a valid and lawful interest in the property. In that case, the property would be returned to that person under section 462.41. This third party could include a requesting state in the case of corruption of foreign public funds. Section 462.37(2.1) can be used to issue forfeiture orders for property located outside Canada, but the order can only be enforced through a request to the foreign state's government.

Where the offender is convicted of an offence and has subsequently died, or been at large for more than six months, offence-related property can also be forfeited to the government of Canada under section 490. This property is available for return through the sharing with another State under section 11 of the *Seized Property Management Act*, provided there is a

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[152] Bill Browder, *Red Notice: A True Story of High Finance, Murder and One Man's Fight for Justice* (Simon & Schuster, 2015) at 278. Browder gives a lively, detailed account of his experiences in Russia, of Magnitsky's arrest, detention, torture, and death, and the subsequent events leading to the enactment of the Magnitsky Act in the US.

[153] Public Law 112-208, 112th Congress, 126 Stat. 1496, Dec. 14, 2012.

[154] *Global Magnitsky Human Rights Accountability Act*, Subtitle F, Public Law 114-328, 2nd Session, 114th Congress.

[155] Stats. Can. 2017, c.21.

reciprocal bilateral agreement.[156] For a detailed practical summary of Canada's proceeds of crime forfeiture laws, see Justice Selwyn Romilly, "Proceeds of Crime: The Basics of Part XII-2 of the Criminal Code" in *Anti-Money Laundering Conference Materials* (CLE BC, 27 May 2011) at Part 4, 1-49.

(5) *Effectiveness and Challenges*

The 2016 FATF Mutual Evaluation Report assessing the Canadian anti-money laundering and combating the financing of terrorism (AML/CFT) regime notes that asset recovery is generally low, although some provinces, such as Quebec, seem to be more effective in recovering assets linked to crime.[157] Canada has made some progress since its last evaluation in terms of asset recovery, but the fact that assets of equivalent value cannot be recovered hampers the recovery of proceeds of crime, and confiscation results do not adequately reflect Canada's main money laundering risks.[158] The Report recommends an increase in timeliness of access by competent authorities to accurate and up-to-date beneficial ownership information; use financial intelligence to a greater extent to investigate money laundering and trace assets; ensure that asset recovery is pursued as a policy objective throughout the territory of Canada; and make a greater use of the available tools to seize and restraint proceeds of crime other than drug-related assets and cash, especially proceeds of corruption, including foreign corruption and other major asset generating crimes.[159]

Transparency International released a report in 2014 outlining the difficulties in recovering assets following the Arab Spring, including problems repatriating assets after they were frozen under schemes such as *FACFOA* in Canada. Problems include premature *Mutual Legal Assistance Act* requests, lack of evidence-gathering capacity in requesting countries, and insufficient use of informal channels in requesting assistance.[160]

The 2014 StAR report *Few and Far: The Hard Facts on Stolen Asset Recovery* indicates that between the years 2006 and 2012 Canada only froze assets totaling $2.6 million and that no assets were thus far reported as returned (most likely owing to the long lag time between freezing and repatriating assets).[161] StAR released another report in the same year entitled *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, which discusses the implications of cases being settled rather than proceeding to trial and

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[156] *Seized Property Management Act*, SC 1993, c 37.
[157] Financial Action Task Force, (2016) at 3, 6, 36, online: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Canada-2016.pdf>.
[158] *Ibid* at 36.
[159] *Ibid* at 9, 36-37.
[160] Maíra Martini, "Lessons Learnt from Recovering Assets in Egypt, Libya, and Tunisia" (Transparency International, 2014), online: <http://www.transparency.org/files/content/corruptionqas/Lessons_Learnt_in_recovering_assets_from_Egypt_Libya_and_Tunisia_2014.pdf>.
[161] Gray et al (2014).

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whether the settlement money is returned to those harmed by the corrupt practices.[162] It includes an analysis of Canada's practices in settling bribery cases.

Public Safety Canada released a report in 2013 examining the use of civil forfeiture regimes internationally. The report includes an examination of whether Canada might be able to implement a law allowing for civil forfeiture pursuant to unexplained wealth orders (used in Australia), which reverse the burden of proof and force the respondent to justify the lawful origin of their property.[163]

China Pressures Canada to Facilitate Extradition of Corrupt Officials and Return of Stolen Assets

It appears that Canada is one of the key destinations for fugitive Chinese corruption suspects. Of the top-100 most wanted Chinese nationals for economic crimes, Chinese authorities believe that 26 may be in Canada. From 2009 to 2015, Canada sent back home some 1,400 Chinese people but most of them for immigration law violations.[164] In 1994, Canada and China concluded a treaty on mutual legal assistance in criminal matters.[165] The scope of mutual legal assistance pursuant to this treaty includes measures related to the proceeds of crime and the restoration of property to victims.[166] In particular, a State party may, upon request, ascertain whether any proceeds of a crime committed in the other State party are located within its jurisdiction and shall notify the other Party of the results of its inquiries.[167] Where the suspected proceeds of crime are found, the requested State party shall take measures to freeze, seize and confiscate such proceeds.[168] To the extent permitted by its law, the requested State party may transfer to the requesting State party such proceeds of crime, but the transfer shall not infringe upon the rights of a third party to such proceeds.[169]

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[162] Oduor et al (2014).
[163] Elaine Koren, "Civil Forfeiture Regimes in Canada and Internationally" (Public Safety Canada, 2013) online: <https://www.publicsafety.gc.ca/lbrr/archives/cn63313146-eng.pdf>.
[164] Nathan Vanderklippe, "China Pressuring Canada to Ease Return of Corruption Suspects", *The Globe and Mail* (6 June 2016), online: <http://www.theglobeandmail.com/news/world/china-pressuring-canada-to-ease-return-of-corruption-suspects/article30283903/>; Nathan Vanderklippe, "China's Fox Hunt in Canada Strains Trust that an Extradition Treaty is Possible", *The Globe and Mail* (23 September 2016), online: <http://www.theglobeandmail.com/news/world/chinas-fox-hunt-in-canada-strains-trust-that-an-extradition-treaty-is-possible/article32042306/>.
[165] *Treaty Between Canada and the People's Republic of China on Mutual Legal Assistance in Criminal Matters*, 29 July 1994, CTS 1995 No 29, online: <http://www.treaty-accord.gc.ca/text-texte.aspx?id=101640>.
[166] *Ibid*, art 2(i).
[167] *Ibid*, art 17(1).
[168] *Ibid*, art 17(2).
[169] *Ibid*, art 17(3).

Furthermore, the State parties shall assist each other, to the extent permitted by their respective laws, in proceedings related to restitution to the victims of crime.[170]

There is, however, no extradition treaty in force between Canada and China. The 2016 FATF Mutual Evaluation Report cites this as an indication of Canada's particular vulnerability to laundering the proceeds of crime by Chinese officials, notably through the real estate sector in Vancouver, and the Chinese government has already listed Canada as a country that it wishes to target for recovering the proceeds of Chinese corruption.[171]

At present, the Chinese government seems to rely on its secret agents to find fugitive suspects abroad and pressure them to return home. In particular, Operation Fox Hunt, commenced by China in 2014, resulted in the repatriation of some 700 suspected economic fugitives globally, and Operation Skynet saw the return of another 857 persons in 2015.[172] Meanwhile, China seeks to conclude extradition treaties with Western democracies, including Canada. On September 12, 2016, the inaugural meeting of the Canada-China High-Level National Security and Rule of Law Dialogue was held in Beijing. The parties determined that the short-term objectives for the bilateral cooperation shall include, among others, starting discussions on an Extradition Treaty and a Transfer of Offenders Treaty, as well as finalizing negotiations of a one-year memorandum of understanding on the Pilot Project between the Canada Border Services Agency and the Bureau of Exit and Entry Administration where Chinese experts will be invited to assist in the verification of the identity of inadmissible persons from mainland China in order to facilitate their return from Canada.[173]

Some commentators, however, oppose the contemplated extradition treaty citing human rights concerns and the possibility that repatriated suspects may be subject to

[170] *Ibid*, art 17(5).
[171] Financial Action Task Force, (2016) at 16, online: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Canada-2016.pdf>.
[172] Affan Chowdhry, "China's Corruption Crackdown Ruffles International Feathers", *The Globe and Mail* (20 September 2016), online: <http://www.theglobeandmail.com/news/world/chinas-corruption-crackdown-ruffles-international-feathers/article31979594/>.
[173] Prime Minister of Canada, "1st Canada-China High-Level National Security and Rule of Law Dialogue – Joint Communiqué" (13 September 2016), online: <http://pm.gc.ca/eng/news/2016/09/13/1st-canada-china-high-level-national-security-and-rule-law-dialogue>.

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torture or death penalty upon their return to China.[174] Others point out that Canada already has extradition treaties with the United States, Japan, Zimbabwe, Singapore and the Maldives, all of which have capital punishment, and that a treaty with China would send a clear signal that Canada is not a safe haven for money launderers.[175] In any event, in October 2016, Canadian ambassador to China Guy Saint-Jacques explained that so far Canada and China have agreed only to "discussions" on an extradition treaty, a step removed from negotiations, and "it could be years" before formal negotiations of the treaty text begin.[176]

China was more successful in pressuring Canada to cooperate in the recovery of stolen assets. During the official visit of the Chinese Premier Li Keqiang to Canada from September 21 to September 24, 2016, the parties signed the Agreement on Sharing and Return of Forfeited Assets as well as the Memorandum of Understanding on Cooperation in Combating Crime between the RCMP and the Ministry of Public Security of China.[177] The deal on return of stolen assets is the first agreement of this kind China has signed with another country. It provides that forfeited assets are to be returned to their legitimate owners or, if the origin of such funds cannot be identified, both countries will share the assets in proportion to each country's contribution to the investigation.[178]

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[174] "China Wants an Extradition Treaty. Ottawa Should Say No", Editorial, *The Globe and Mail* (20 September 2016), online: <http://www.theglobeandmail.com/opinion/editorials/china-wants-an-extradition-treaty-ottawa-should-say-no/article31975466/>; Michael Byers, "Extradition Treaty with China Would Be an Affront to Human Rights", *The Globe and Mail* (20 September 2016), online: <http://www.theglobeandmail.com/opinion/extradition-treaty-with-china-would-be-an-affront-to-human-rights/article31968585/>.

[175] Christine Duhaime, "An Extradition Treaty with China Sends a Message about Corruption", *The Globe and Mail* (26 September 2016), online: <http://www.theglobeandmail.com/report-on-business/rob-commentary/an-extradition-treaty-with-china-sends-a-message-about-corruption/article32043651/>.

[176] Nathan Vanderklippe, "Extradition Talks with China Could Take Years, Canadian Diplomat Says", *The Globe and Mail* (6 October 2016), online: <http://www.theglobeandmail.com/news/world/extradition-talks-with-china-could-take-years-canadian-diplomat-says/article32270628/>.

[177] Prime Minister of Canada, "Joint Statement Between Canada and the People's Republic of China" (23 September 2016), online: <http://pm.gc.ca/eng/news/2016/09/23/joint-statement-between-canada-and-peoples-republic-china>.

[178] Zhuang Pinghui, "China and Canada Seal Deal on Return of Assets Stolen by Fugitive Corruption Suspects", *South China Morning Post* (23 September 2016), online: <http://www.scmp.com/news/china/policies-politics/article/2021977/china-canada-sign-treaty-return-assets-stolen-fraud>.

Further Reading

For more on Canada, see <http://star.worldbank.org/star/sites/star/files/Canada's-Asset-Recovery-Tools-A-Practical-Guide.pdf>.

4.4 A Typical Example of the Asset Recovery Process

Below is an excerpt from a 2009 publication by the Basel Institute on Governance entitled, *Tracing Stolen Assets: A Practitioner's Handbook*:[179]

BEGINNING OF EXCERPT

1. Suspicious Transaction Report

The government of country A has just received an official letter from the Swiss government advising that one of their banks has received suspicious electronic funds transfers in excess of USD 8 million to an account held by the son of country A's Deputy Minister of Internal Development. The account was opened 14 months ago. Under the Swiss bank's money laundering controls with regard to Politically Exposed Persons (PEP), the transaction had been flagged as suspicious and a temporary freeze put on the funds. The letter stated that no additional information concerning this account can be disclosed at this time. However, upon receipt of an official mutual legal assistance (MLA) request, the account details may be provided following disclosure proceedings. The letter indicated that the request should include the nature of any criminal investigation being conducted in country A, the potential criminal violations, a summary of the investigative efforts and all additional MLA requirements. There have been rumours for many years that the Deputy Minister lives beyond his means but no investigation has ever been undertaken.

2. Investigation planning and strategy

Is the information from the Swiss government important? What should be done first? Can a MLA request immediately be filed with the Swiss government to seize the bank account? Should the Deputy Minister be placed under investigation? These are all questions that need to be answered very quickly. The facts of each case will vary, and the investigative decisions and actions will depend on the individual circumstances.

[179] International Centre for Asset Recovery (2009) at 51–59, online: <https://www.baselgovernance.org/publications/421>.

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The legal system, criminal procedures code and investigative practices for each country will, to some degree, dictate the process to follow. However, to the extent possible, the decisions, based on the facts stated above, should be made quickly and coordinated through a multi-agency approach.

The first question that some may ask is 'Can we seize the money and have it returned to our country?' This would be a mistake to attempt to seize the money at this stage. One has no information that the money was illegally obtained. If a request is sent to the Swiss government to seize the funds, it would most likely be rejected because there has been no investigation and, in fact, there are not even any allegations – only rumours – that the Deputy Minister is living beyond his means. This request would only result in the loss of valuable time.

The letter from the Swiss government indicated that a temporary freeze had been placed on the account. The first step would be to immediately contact the sender of the letter and ask some questions to clarify a few issues. What are the issues and who should make the call? The most important issue is how long will the temporary freeze be held on the account. The second key question would be: Has the Swiss government opened an official money laundering investigation? Once one knows how long the funds will remain frozen and whether extensions are possible, then one can more accurately plan one's investigative steps and strategy. Knowing if the Swiss government has opened an official investigation will immediately tell the investigator if he or she has a partner in this potential investigation. This will lead to a more efficient sharing of information and evidence in the months to come.

Who should make this initial call? The answer will depend on who received the letter – the central authority for MLA, the Ministry of Justice, the Foreign Affairs Office or some other agency. The executive structure of the government will certainly dictate the answer to this question. The important point is that a decision should be made to determine the appropriate person very quickly. Time is of the essence. These funds may only be frozen for five days or possibly for 90 days but the investigator needs this information so a call must be made. In this instance, one would place the phone call and speak with the prosecutor of the Confederation or of a Canton (a Swiss administrative subdivision of the country) who sent the letter. The investigator is informed that the freeze is for 60 days; eight days have already passed; the freeze can be extended for another 60 days if additional evidence is provided through proper legal channels. The investigator also learns that the prosecutor has opened an official money laundering investigation. The prosecutor advises the investigator that he cannot provide any additional details of the account until he receives an official MLA request which contains information to the effect that country A has taken investigative steps. He further states that the request must contain new information or evidence

that has been gathered in country A. Simply returning the same information that he has provided in his letter in the first instance will not suffice.

3. Pre-investigative steps

A preliminary investigation should now be initiated by the lead agency – possibly the anti-corruption unit or some other appropriate agency depending on the structure of the government. This lead agency should quickly gather all available information during this pre-investigative stage. This will generally include information that can be obtained without making overt investigative inquires that would alert the public. All national law enforcement and commercial databases would be checked; inquiries would be made to other government and investigative agencies; the financial intelligence unit would be queried for suspicious transactions; and limited surveillance may be conducted to determine additional property that the Deputy Minister may own. The results of these pre-investigative inquiries disclosed the following:

- The Deputy Minister's government income is approximately USD 120,000 per year.
- His required wealth disclosure statement indicates that he maintains a domestic bank account in the capital city of your country.
- His wife is unemployed and drives a Mercedes valued at USD 80,000.
- He resides in a house that was purchased two years ago for USD 850,000 that currently has a mortgage of USD 300,000.
- He has two sons who both attend universities in the United Kingdom (UK).
- His office has awarded 23 sole source contracts in the last three years for infrastructure development projects totally in excess of USD 195 million.

Based on these facts, the Director of the lead agency initiates a full investigation.

(1) Communication with foreign counterparts

The pre-investigation stage took 40 days to complete. Now that a full investigation has been authorised, what steps should be immediately taken? What is the status of the frozen funds in Switzerland? In 12 days' time, the freeze will be lifted and the funds can be moved around the world in a matter of minutes through electronic funds transfers. The preparation of a formal MLA request, processing it through the central authority, transmitting it to the central authority of Switzerland and having it forwarded to the prosecutor will take at least one month. What options does the investigator have to prevent the freeze from being lifted and the funds disappearing? The answer is simple. It is again based on communication and developing a relationship with your foreign counterparts. The prosecutor in Switzerland had

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previously advised that the freeze could be extended for an additional 60 days, based on new evidence. A telephone call should be placed to the prosecutor, asking him for advice on the best way forward. The investigator then learns that the prosecutor will accept a letter stating that an investigation is underway in country A, additional information has been obtained on the Deputy Minister and that the investigator is in the process of filing a formal MLA request. He advises that once this letter is received, he can extend the freeze on the account. He also states that the freeze can be continued as more evidence is developed. This letter must now be prepared and immediately sent to the Swiss prosecutor to protect the assets from being moved.

(2) Compilation of MLA request

At the same time, a formal MLA request must be prepared and submitted to the Swiss government. What format should be used for this request? How should it be transmitted? What actions should be requested?

Format of request

The answer to the first question is relatively easy. There are 192 member countries of the United Nations and a few other countries with limited international recognition. So how would one know what MLA format each country needs? Again, communication is the key to fast and efficient international cooperation. Prior to drafting the MLA request, place a call to the central authority of the requested country and ask for their MLA template, explain the request, seek advice and finally inquire if an advance email copy of the MLA request can be sent to them for their review. Most jurisdictions will be pleased to assist an investigator with the formatting, substantive requirements and general guidance. Without taking this very simple step, one risks losing months of valuable time if one's MLA request is rejected and returned for corrections.

Transmittal of request

The second question, namely, how should it be transmitted, is critical. The courts in many jurisdictions will not allow evidence obtained from a foreign country to be admitted unless it is obtained through the proper channels. Each country should have a central authority. This is the designated government body that is authorised to send and receive MLA requests. For example, the United Nations Convention against Corruption (UNCAC) (Article 46 paragraph 13) requires that 'Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution.'

The Article continues to explain that 'The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each

State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties.'

Nature of requested actions

The third question, namely, what actions should be requested, is also of great importance. The investigator knows that there is a bank account in Switzerland that is held in the name of the son; there are incoming electronic funds transfers into the account in excess of USD eight million; the Deputy Minister has two sons, both of whom are students; and the account is currently frozen. One may want to confiscate the funds in the account and have them immediately repatriated to your country but it is probably premature to request these actions. There are two main activities that one should request. Firstly, based on the limited evidence that has been gathered through one's pre-investigation, one would like to have the freeze order extended on the account while the full-scale investigation progresses. Secondly, the records of the bank account should be requested for a specific period of time – in this case, from the opening of the account 14 months ago to the present. What records should be requested? This is a critical question. One's request should be very specific and also provide for follow-up inquires if appropriate. When requesting the specific documentation, the investigator may want to consider using language such as 'including but not limited to'. This gives the receiver of the request a definite list of required documents but allows them to provide additional related documents of which you may not have been aware. In this case, one will want to request items such as the following:

- The account opening documentation (know your customer information) and any due diligence that may have been conducted as a result of the PEP rules that are in place
- Information from the bank explaining why the transactions were considered to be suspicious
- All bank account periodic statements
- The details of all items credited to the account. This would include the specifics of all electronic funds transfers, showing the original bank and account name and number. Knowing the specific source of each deposit is extremely critical
- The details of all debit items. Again, this would include the ultimate beneficiary of any electronic funds transfers
- All correspondence files. This is often where the best evidence is obtained, particularly if an account manager is assigned to the client. Small notes or formal documentation that may have been placed in the file by the account

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manager could disclose personal relationships, the purpose of transactions or false statements concerning the person's background or business. These false statements can later be used as evidence to proof the concealed purpose of the account activities

- Loan Files. This may be the source of numerous additional leads. If the person obtained a loan from the bank, there will probably be a loan application that lists the source of income, assets, personal references and other loans
- Credit card statements, application and payment history. This information often needs to be requested specifically. The bank may not routinely provide credit card information when bank records are requested. The payment history on credit cards may be of particular interest. Payments on the account may originate from cash, another account or a seemingly unrelated company

The MLA request should also ask that any leads to other accounts, persons or entities within the country's jurisdiction be followed. Communication is again the key to this type of extended request. Discussions with the central authority or prosecutor prior to filing the MLA request will provide the investigator with information relating to how far he or she can expand the request. It will also strengthen one's relationship with the authorities in the foreign jurisdiction, and provide the basis for future collaboration on additional investigative action. For example, the bank information may lead to large payments being made to a person in the same country. If the MLA request covered the possibility of following leads, then an interview may be conducted with the recipient of the funds, and one could be closely involved either through the submission of a detailed list of questions or even participation in the interview if so invited by the requested country.

Regarding the requested bank records, in most cases, the investigator will not know the volume of records contained in the account until the bank researches its files. It is usually advisable to request all possible records that may be pertinent to the case but to control the delivery of these records to the investigator as he or she assesses their relevance. For example, if the account turns out to be in respect of an active business, it may contain hundreds or thousands of records for each month, many of which may not be of interest to your investigation. If possible, start by asking the bank to provide one with only the bank statements and significant transactions such as the large electronic transfers. The bank will still be under *subpoena* or a compulsion order to supply all records but they will only be asked to research the records as one determines the need. This will allow the investigator to quickly study the summary records (bank statements) and make an investigative decision on what records he or she would like to review next. If one asks to receive all records at once, one may wait

months for the bank to gather these records and then find out that one is in possession of thousands of documents, many of which have little value.

(3) Prioritisation of leads

With the guidance of the central authority in Switzerland, the investigator has now prepared and filed a complete and accurate MLA request. What is the next investigative step that should be taken? There are a number of leads that can be followed, based on the information that was discovered during the pre-investigation stage. It would be advisable to prioritise this information and select which leads may result in the development of the most significant evidence in a timely manner.

Personal residence

How shall the investigator now proceed? The personal residence is a very interesting situation because it was purchased just two years ago for USD 850,000 and the current loan balance is only USD 300,000. Therefore, USD 550,000 has been paid toward the purchase price of the house, either through large payments in the past two years or as a very large initial payment at the time of purchase. The detailed financial information relating to the purchase may be fairly easy to obtain because the house was purchased through a licensed Notary Public and the loan (mortgage) was obtained at a major bank. This bank may maintain detailed records of the transaction since they financed a significant amount and should have conducted due diligence which may have included the source of the initial payment. The Notary Public may also have records of the complete transaction. In some countries, it is customary to use 'title companies' or 'closing agents' that act as an escrow agent or middleman to facilitate the purchase of the property between the buyer and seller. These entities also maintain complete records of all money flows between the buyers, sellers, taxing authorities and financial institutions. The seller of the property should also be interviewed to obtain the complete details of the transaction, including the method of payment for the house.

Cash flow analysis

The Deputy Minister maintains a bank account at a domestic financial institution. The records of this account should be requested very early in the investigation because it may require a significant amount of time for the bank to research the records. The same type of records should be requested for this account as was indicated for the Swiss account above. If the government salary of the Deputy Minister has been deposited into this domestic account, it will be important to perform a complete analysis to establish how his legitimate salary has been spent. A cash flow analysis relating to any cash withdrawals or deposits should also be prepared. Once these financial flows have been analysed, it will create a complete picture of the distribution of his legal funds and show how much cash was available for purchases. This may be

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very significant if expenditures are later identified from unknown or illegal funds. Large cash payments or purchases from unknown sources may be an important piece of evidence at trial.

Corruption cases are often difficult to prove through direct evidence because the perpetrators are skilled and devious schemers who may utilise the services of lawyers and accountants to disguise the trail of the funds. Painting the complete financial picture of the corrupt official and isolating his legal income to more clearly identify expenditures from unknown sources can be important facts when presented at trial. This type of circumstantial evidence will, of course, have to be combined with other evidence – pieces of the puzzle – to demonstrate that the money flows from unknown sources came from illegal or corrupt activities. The Organisation for Economic Cooperation and Development (OECD) has stated

> 'Proving the requisite intention is not always an easy task since direct evidence (e.g., a confession) is often unavailable. Indeed, bribery and trading in influence offences can be difficult to detect and prove due to their covert nature, and because both parties to the transaction do not want the offence exposed. Therefore, the offender's mental state may have to be inferred from objective factual circumstances.'

University education

Preliminary information in the case relating to the Deputy Minister indicated that he has two sons attending universities in the UK. Further inquires disclose that the oldest son attends the London School of Economics (LSE) and the younger son is a student at Oxford University. Is there further information that the investigator would want to pursue regarding the education of these boys? What investigative action would be most efficient and beneficial? There is a very good chance that the Deputy Minister is not able to afford the tuition, living expenses and travel relating to his sons' education. The boys may be receiving scholarships and attending the universities at no cost. There is only one way to determine the true facts. The universities must be contacted, the expenditures documented and the source of payments identified.

What is the best way to pursue this investigative inquiry at the universities? An MLA request can certainly be prepared and submitted to the central authority in the UK. This process should again begin with communication by way of a telephone call to an appropriate official in the UK. The same steps as described above with the Swiss MLA request should be followed. A telephone call to the central authority asking advice on the best way forward should be the first step. However, in this situation the investigator may want to explore other options during his or her call. It may be possible that the police, the money laundering section or the asset forfeiture unit have the ability to request the desired information from the universities on an informal

basis. If they do not have this ability, one has wasted approximately two minutes asking the question. But, if the answer is that they do have this ability, then one may possibly have saved four months of valuable investigative time.

How could the investigator have saved this amount of time? Let's explore two different possibilities. In the first scenario, the police obtain the information informally from the university as a result of their many years of working together. The payment records indicate that the tuition was paid directly from the Deputy Minister's domestic bank account in your country. This will save one the time and effort of filing an MLA request with the UK because one has already traced the payments to the domestic account to which one has access. In the second scenario, the payment information obtained informally indicates that the tuition was paid by a subsidiary company of a corporation that was awarded a USD 35 million contract through the Deputy Minister's office. The subsidiary company is located in a third jurisdiction. How has the investigator saved a significant amount of time? One can now file an MLA request with the UK to obtain this evidence through a formal process to assure its admissibility as evidence at trial. Simultaneously, an MLA request can be submitted to the third jurisdiction where the subsidiary company is located. Instead of waiting possibly four months for the return of the MLA request to the UK, one immediately has the information which leads one to the third jurisdiction. We will return to this scenario later to determine what evidence should be requested.

Vehicle ownership

Another major lead that one has from the pre-investigation activities is the ownership of an USD 80,000 Mercedes by the wife. The fact that the Deputy Minister's wife owns an expensive automobile is an indication that he may be living above his means. However, the more important question is how the USD 80,000 was paid. This will involve first tracing the ownership of the car to determine the prior owner. In this case, one determines that the vehicle was purchased from the local Mercedes dealership. The records of this transaction indicate that the Deputy Minister was the purchaser and the date of the purchase. Is this enough information? The answer is no. The most important piece of evidence is to establish the source of the payment. If the payment were made by bank cheque, the dealership may have a copy of the cheque. However, if the files do not contain a copy, it may be necessary to obtain this information from the dealership's bank where the cheque was deposited. If the payment was made by cash, this is a an interesting piece of evidence since one's cash analysis of his bank account established that he did not have available cash in the amount of USD 80,000 from his legitimate sources of income.

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Award of sole source contracts

The pre-investigation also disclosed that the Deputy Minister's office has awarded 23 sole source contracts in the last three years for infrastructure development projects, totalling in excess of USD 195 million. The government procurement rules for country A require competitive bids on all contracts over USD 100,000 unless certain conditions are met that are provided in the exception rules which are very strict. Each of the 23 sole source contracts will need to be analysed to determine how they qualified for the exception, who approved the contracts, how other potential bidders were disqualified and the personal involvement of the Deputy Minister in each situation. This will often require employing the services of someone who is an expert in government contracting procedures to assist in the analysis of these files. If managers below the Deputy Minister's level approved the contracts, it may be necessary to analyse their promotion history and perform a brief review of their assets. For example, if the person approving the contracts received three promotions by the Deputy Minister in the past two years, this could be an indication that he owes favours to the Deputy Minister. This situation would require further investigation. In another instance, it may be discovered that the approving official has acquired assets that are beyond the scope of his legal income. It may be fruitful to trace the purchases of these assets to determine the source of the payments. Possibly the Deputy Minister is providing funding for the subordinates' asset acquisitions. All possibilities must be considered to determine the reason for the sole source contract awards.

IV. Results of the investigative inquiries

The Deputy Minister's personal residence was purchased just two years ago, and he has over USD 500,000 in equity. How did this occur? The investigation has disclosed that the Deputy Minister made an initial down payment in the amount of USD 540,000 on the house. This payment was received from a lending institution in the United States (US). Did the Deputy Minister really obtain a loan from a US company? What collateral did he give for such a large loan? Further investigation through the MLA process reveals that the loan was actually guaranteed by a company that received a large contract through the office of the Deputy Minister. This company, which is located in country A, has also been making each of the monthly loan payments. What questions should be asked when the representative of this company is required to submit to an interview? One area of great importance is to determine how the company recorded these payments to the loan company in the US in its internal records. There are very few legitimate reasons why a company that was awarded a large contract through the Deputy Minister's office is making payments on a loan for the benefit of the Deputy Minister. These payments certainly have the appearance of a potential bribe. There is a high probability that the company records will disclose a false accounting entry such as listing the payments as a 'bonus' or 'research cost' or

'consultant fees'. Further investigation of the company records and related interviews should prove the true nature of these 'bribe' payments.

Information from the universities in the UK also yielded interesting information. The police in London were able to obtain informal intelligence that the tuition payments were made by a subsidiary company of a corporation that was awarded a USD 35 million contract through the Deputy Minister Deputy Minister's office. This company is located in a separate jurisdiction that will require a formal MLA request to compel testimony from the company officials and to obtain copies of their accounting records. Prior to submitting this MLA request, a preliminary call should be placed to the officials in this country to establish the communication links. It would also be advisable to ask if law enforcement officials from country A could participate in the interview with the company officials. The investigator will have the most information about the details of his or her case and is best prepared to ask follow up questions and to pursue leads developed through the answers provided. The investigator's presence at the interview in this foreign jurisdiction will, of course, only be possible through invitation by that country.

The Mercedes was purchased for USD 80,000 and the payment came from a loan company in Guernsey. Subsequent investigative efforts through MLA requests revealed that the loan company was merely a shell entity with a bank account. Deposits to this account came from another corporation that was awarded a contract by the Deputy Minister's office.

V. Conclusions

The investigation is certainly not complete at this point. There are many additional inquiries that need to be made. All payments from companies to the benefit of the Deputy Minister must be pursued. Company officials will be interviewed, accounting records analysed and all banking transactions completely traced. This will most likely identify additional assets acquired by the Deputy Minister, many of which will be in nominee names or hidden in corporate structures. Following the money will lead the investigator to these.

The investigation also disclosed that personal expenses for university costs were paid by similar companies. Taking further investigative steps following the money trail will yield additional evidence of apparent bribe payments. These money trails will not always lead directly from the private sector bribe giver to corrupt government officials. Sometimes, the payments will be clouded by numerous shell companies, trusts and nominees. However, the concept of following the money will usually lead to the beneficial owner of the assets and the maze of companies, trusts and nominee owners can be pierced through the complete financial investigative process. Hidden assets will generally not be identified through commercial database searches and open

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source information. The information that the corrupt official wants to hide will often be concealed through complex financial structures established by skilled lawyers and accountants. In most cases, the financial investigation will be the best method of identifying the proceeds of corruption and making the connection to the corrupt activity.

END OF EXCERPT

5. EFFECTIVENESS OF ASSET RECOVERY REGIMES

5.1 Overview of Existing Data

The following is an excerpt from a 2014 OECD publication entitled *Illicit Financial Flows from Developing Countries: Measuring OECD Responses*:[180]

BEGINNING OF EXCERPT

5.1 ASSET RECOVERY EFFORTS BY OECD MEMBER COUNTRIES: TAKING STOCK

In preparing for the Fourth High-Level Forum on Aid Effectiveness in Busan, Korea (December 2011), the OECD and the Stolen Asset Recovery (StAR) initiative surveyed OECD countries to take stock of their commitments on asset recovery. The survey measured the amount of funds frozen and repatriated to any foreign jurisdiction between 2006 and 2009. It found that during this time, only four countries (Australia, Switzerland, the United Kingdom and the United States) had returned stolen assets, totalling USD 276 million, to a foreign jurisdiction. These countries, plus France and Luxemburg, had also frozen a total of USD 1.225 billion at the time of the survey.

In 2012, the OECD and StAR launched a second survey measuring assets frozen and returned between 2010 and June 2012. In this time period, a total of approximately USD 1.4 billion of corruption-related assets had been frozen. In terms of returned assets, a total of USD 147 million were returned to a foreign jurisdiction in the 2010-June 2012 period. This is a slight decrease from the USD 276 million recorded from the last survey round.

[180] Kjetil Hansen et al, *Illicit Financial Flows from Developing Countries: Measuring OECD Responses* (OECD, 2014) at 88–90, online: <http://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf>.

[**Table 5.3** OECD Countries that Have Frozen or Recovered Stolen Assets]

	2006-2009		2010-June 2012	
COUNTRY	**Assets frozen (USD million)**	**Assets returned (USD million)**	**Assets frozen (USD million)**	**Assets returned (USD million)**
Switzerland	67	146	786	20
UK	230	2	451	67
US	412	120	112	60
Canada	0	0	3	0
Luxembourg	508	0	27	0
Australia	7	8	0	0
France	1	0	0	0
Portugal	0	0	18	0
Netherlands	0	0	1	0
Belgium	0	0	0.3	0
TOTAL	1.225 billion	276 million	1.398 billion	147 million

[*Note*. This table has been constructed by us from Figures 5.1 and 5.2 of the report]

Also, during 2010-June 2012, the majority of returned assets and 86% of total assets frozen went to non-OECD countries while in the 2006-09 period asset recovery mainly benefited OECD countries.

Freezing stolen assets

Figure 5.1 [see table above] shows the volume of frozen assets during the two survey periods for OECD countries. During the latter period (2010-June 2012), Switzerland accounted for the largest volume of frozen assets (56%), followed by the United Kingdom (32%) and the United States (8%). These countries all have large financial centres and have made asset recovery a political priority. Belgium, Canada, Luxembourg, the Netherlands and Portugal had also frozen some assets during this period. Many OECD countries have not frozen any corruption-related assets to date. While this may be due to legal and policy obstacles, it may also be that few illicit assets had been placed in these countries to start with.

Recovered stolen assets

Figure 5.2 [see table above] examines the USD 147 million in stolen assets that were returned to a foreign jurisdiction between 2010 and June 2012, and the USD 276 million returned between 2006 and 2009. From 2006 to 2009, four OECD member countries reported the return of corruption-related assets. More than half, 53%, was returned by Switzerland, and another large share, 44%, by the United States, while Australia (with 3%) and the United Kingdom (with 1%) accounted for much smaller returned amounts. Only three OECD countries had returned corruption-related assets

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between 2010-June 2012: the United Kingdom (45% of total assets returned) followed by the United States (41%) and Switzerland (14%).

5.2 ASSET RECOVERY IN THE CONTEXT OF THE ARAB SPRING

The Arab Spring has helped focus attention on international asset recovery. As long-standing governments began to tumble in Tunisia, Egypt and Libya in early 2011, banks and governments the world over started freezing billions of dollars held by these countries' previous leaders and their associates. For example, a mere hour after Egypt's ex-president Hosni Mubarak stepped down in February 2011, the Swiss government ordered its banks to freeze his assets held in Switzerland on suspicion that they were the proceeds of corruption. Other OECD member countries followed suit. The European Union ordered an EU-wide freeze of assets linked to Tunisia's ex-president Zine El Abidine Ben Ali in January 2011, and of assets linked to ex-President Hosni Mubarak in March the same year. Despite the heightened attention to asset recovery following the Arab Spring, relatively few assets have to date been returned to the affected countries, and the process of recovering the stolen assets is proving to be both long and cumbersome (Cadigan and Prieston, 2011). The main obstacle to returning stolen assets to these countries is being able to provide solid enough proof that the assets were gained through corruption.

As a response to these challenges, several OECD member countries have aided the process of bringing forth asset recovery cases and delivering such proof. Switzerland has sent judicial experts to both Egypt and Tunisia; US investigators and prosecutors have visited Egypt, Libya and Tunisia to work directly with their requesting country officials; and Canada has provided assistance on asset recovery to Tunisian officials.

In addition, some governments have taken steps to strengthen domestic inter-agency co-operation. For example, in 2012 the United Kingdom launched a cross-government task force on asset recovery to Arab Spring countries. To date, the multi- agency task force has visited Cairo to forge links with their counterparts in the Egyptian authorities, and has posted a Crown Prosecution Service prosecutor and a Metropolitan Police Financial Investigator to Egypt. In the near future, the United Kingdom will post a regional asset recovery adviser to the region to assist the authorities in Egypt, Libya and Tunisia (United Kingdom Parliament, 2012). In November 2012, the European Union announced that its member countries had amended legislation to facilitate the return of the frozen assets formerly belonging to former presidents Mubarak and Ben Ali and their associates to Egypt and Tunisia respectively. The new legislative framework authorises EU member countries to release the frozen assets on the basis of judicial decisions recognized in EU member countries. It also facilitates the exchange of information between EU Member States

and the relevant Egyptian and Tunisian authorities to assist in the recovery of assets to these countries (European Commission, 2012).

END OF EXCERPT

Further Reading

For a discussion of asset recovery in the context of the Arab spring, see Gretta Fenner Zinkernagel, Charles Monteith & Pedro Gomes Pereira, eds, *Emerging Trends in Asset Recovery* (International Academic Publishers, 2013) 3.

5.2 Continuing Challenges to Effective Asset Recovery

After analyzing the data from 2006 to 2012 on asset recovery cases in OECD member countries, the StAR report *Few and Far: The Hard Facts on Stolen Asset Recovery* concludes that "a huge gap remains between the results achieved and the billions of dollars that are estimated stolen from developing countries."[181] The report also criticizes OECD members for the "disconnect between high-level international commitments and practice at the country level" due to lack of interest and prioritization.[182] According to the report, inadequate progress has been made.

In the conclusion to their book, Zinkernagel, Monteith and Pereira offer a mixed, but optimistic, assessment of the progress made to date in asset recovery. They note that:

> [T]he efforts to prosecute international corruption and money laundering cases and to successfully recover stolen assets have made considerable progress over the last five years. However, not all challenges have been overcome and, apart from a handful of cases, little money has effectively been recovered, especially in international cases. This has led to frustrations among citizens at large, as in the Egypt-Mubarak cases, as well as among concerned authorities in requesting and requested states.
>
> On the other hand, we have seen a clear increase in action: cases under investigation with assets at stake have increased exponentially. Ten years ago, there were fewer than 60 foreign bribery offenses under investigation, with the vast majority of them conducted by the US (which, in these cases alone, recovered over USD 5 billion of assets and disgorged profits). Today there are over 500 ongoing investigations being conducted by over 50

[181] Gray et al (2014) at 2.
[182] *Ibid.*

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> different countries. By way of example, since 2008 the Serious Fraud Office of the UK has recovered nearly USD 150 million of assets, with the UK as a whole freezing over USD 150 million in 2011-2012. Germany too has recovered millions and other countries, like South Korea and Hungary, are quickly scaling up their investigations in spite of all the difficulties they encounter.[183]

Other commentators are more critical! For example, Sarlo states:[184]

> In the context of anti-corruption, the role of the World Bank in StAR, an asset-recovery program, is a continuation of its role as a lender – advice-driven and inefficacious. "[A]sset recovery is *undertaken by states* using legal procedures, which means that StAR does not investigate cases, prosecute cases or request mutual legal assistance." StAR is oxymoronic because it results in the World Bank instructing corrupt governments about how to recoup stolen loans, even though the governments themselves are probably complicit in the peculation [theft] of the loans. The situation is like advising the fox that was in the henhouse about how later to return the eggs. Even when a government is not involved in the theft of a loan and has legitimate interest in its return, prospects for asset recovery are dim because the process is a slog, laden with formidable obstacles – twenty-nine to be exact, by the World Bank's count.[185] "[Asset recovery] requires hacking through thickets of international law. It cuts across criminal, civil and administrative justice. It relies on cooperation between countries (and between agencies within countries) that are often unable or unwilling to share information."[186]
>
> Although, for instance, countries had frozen the funds that former Philippine president Ferdinand Marcos had stolen from the Philippines in 1986, various legal complexities prevented them from returning the money to the Philippine government until 2002. And today a dozen countries are still hunting all over – in the United States, Antigua, and Europe – for the $200 million that Pavlo Lazarenko, the former prime minister of Ukraine, embezzled from his country in the 1990s. With these impediments to asset recovery, the slogan for StAR should be "[e]asy to steal, easier to keep." Although asset recovery may become less arduous in the future, countries could have to depend on StAR – with all its legal expenses, political red tape,

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[183] Gretta Fenner Zinkernagel, Charles Monteith & Pedro Gomes Pereira, "Conclusion" in Zinkernagel, Monteith & Pereira, eds (2013) 347 at 347–348.

[184] Paul Sarlo, "The Global Financial Crisis and the Transnational Anti-Corruption Regime: A Call for Regulation of the World Bank's Lending Practices" (2014) 45 Geo J Intl L 1293.

[185] [103] "Recovering Stolen Assets: Making a Hash of Finding the Cash," *The Economist* (May 11, 2013) at 63.

[186] [104] Ibid.

> and general complications – much less if the World Bank were to perform due diligence before making loans. [some footnotes omitted]

Two main challenges identified in the earlier chapters of *Emerging Trends in Asset Recovery* deal with the complications inherent in transnational legal cooperation and the difficulties in determining the beneficial ownership of corporations and trusts. Each of these challenges is briefly discussed below.

5.2.1 Transnational Communication and Cooperation

Transnational criminal law is a complex area. Successfully prosecuting corruption offences, including money laundering and recovering assets held in other jurisdictions, requires efficient communication and close cooperation between all states involved. However, in a chapter entitled "Proactive cooperation within the mutual legal assistance procedure," Wyss argues that in practice mutual legal assistance frequently falls short of this standard. Instead, in many cases "a strange desire to preserve a country's own domestic legal system coupled with a passive attitude at the beginning of MLA challenges disregard the keyword 'assistance' in mutual legal assistance procedures."[187] Wyss explains that:

> The traditional perception of the roles of the requesting and requested States often results in a passive attitude on the part of the requested State. Some requested States do not even answer requests that seem at first glance to have little chance of being accepted. In cases in which responses are provided to the requesting State, sometimes after a long period of time, the response usually includes a long enumeration of the missing elements in the request. Such attitudes and delays on the part of judicial authorities is in sharp contrast to the speed with which business transactions can be carried out by criminals. In a number of countries complicated channels of transmission for MLA requests are still in place. Consequently, not only is time lost before the request can reach the hands of the competent magistrates but sometimes the whole case-file is lost.
>
> Other requested countries' practice is to send a standard model of a 'perfect' MLA request to the requesting magistrate who finds it difficult to understand the model, because it is written from the sole viewpoint of the requested State and generally does not take into account the legal differences of the requesting countries. Requesting States are bombarded with manuals, guidebooks and links to Internet pages none of which bring any further concrete assistance. From experience, these usually well-intended tools can sometimes lead instead to a great deal of confusion

[187] Rudolf Wyss, "Proactive Cooperation within the Mutual Legal Assistance Procedure" in Zinkernagel, Monteith & Pereira, eds (2013) 105 at 107.

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> amongst the investigating authorities or can even discourage them from taking further steps or actions.[188]

Strengthening both official and informal channels of communication between states is necessary if the MLA process is to function as intended.

The settlements in the VimpelCom corruption scandal offer an example of successful international cooperation in a foreign bribery case. On February 18, 2016, Amsterdam-based VimpelCom Limited, an issuer of publicly traded securities in the United States, and its wholly owned Uzbek subsidiary Unitel LLC, admitted to a conspiracy to pay more than $114 million in bribes to a government official in Uzbekistan to enable them to operate in the Uzbek telecommunications market.[189] Pursuant to its agreement with the US Department of Justice, VimpelCom agreed to pay a criminal penalty of more than $230 million to the US, including $40 million in forfeiture. On the same day, the Department of Justice filed a civil complaint seeking forfeiture of more than $550 million held in Swiss bank accounts, which constitute bribes made to the Uzbek official or funds involved in the laundering of those payments. This action follows an earlier civil complaint filed by the Department of Justice on June 29, 2015, which sought forfeiture of more than $300 million in bank and investment accounts held in Belgium, Luxembourg, and Ireland. In that case the US District Court for the Southern District of New York entered a partial default judgment (on January 11, 2016) against all potential claimants, other than the Republic of Uzbekistan. In its verified claim filed on January 26, 2016, Uzbekistan indicated that on July 20, 2015 the Tashkent Regional Criminal Court issued a final criminal judgment confirming the rightful ownership of the assets in question by Uzbekistan.[190] In its press release on the resolution of the criminal case, the US Department of Justice acknowledged that law enforcement professionals from the Public Prosecution Service of the Netherlands, the Swedish Prosecution Authority, the Office of the Attorney General in Switzerland and the Corruption Prevention and Combating Bureau in Latvia provided significant cooperation and assistance in this matter, while law enforcement colleagues in Belgium, France, Ireland, Luxembourg, and the United Kingdom provided valuable assistance. The case is also an example of extensive domestic cooperation between law enforcement agencies in the United States, including not only the Department of Justice and the Securities and Exchange Commission, but also Immigration and Customs Enforcement's Homeland Security Investigations and the Internal Revenue Service Criminal Investigation Division.

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[188] *Ibid* at 106–107.

[189] United States Department of Justice, "VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme" (18 February 2016), online: <https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million>.

[190] "Settlements and Other Alternative Mechanisms in Transnational Bribery Cases and their Implications for the Recovery and Return of Stolen Assets", Conference of the States Parties to the UNCAC, CAC/COSP/WG.2/2016/2 (18 July 2016) at para 36, online: <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-25-26/V1604599e.pdf>.

5.2.2 The Need for Mandatory Public Disclosure of Beneficial Ownership

In addition to the difficulties raised by mutual legal assistance, the international financial system creates its own challenges. Corrupt officials, criminals and those they employ have created many ingenious ways to disguise the beneficial ownership of illicit funds using trusts, shell companies and other vehicles. As pointed out by Sharman, shell companies in most countries can be set up easily and inexpensively online, without any connection required between the beneficial owner's location and the jurisdiction of incorporation.[191] This allows true owners of proceeds of crime to frustrate investigations by ensuring the corporate service provider, beneficial owner and jurisdiction of incorporation are each in separate jurisdictions. Out of date company registries, particularly in developing countries, add further difficulty to tracing the beneficial owner.[192] While significant gains have been made in financial regulation, driven in part by the Financial Action Task Force, this greater regulation has sparked new innovations by criminals. As Schulz explains:

> For decades, banks and financial institutions have identified beneficial owners as part of their AML [anti-money-laundering] program. Therefore, those years of experience should make it easy to identify beneficial owners. The challenges, however, have not much changed over the years. If anything, it may be even harder today to identify beneficial ownerships than it was in the past. People who have something to hide, like money launderers, corrupt politicians, rogue employees and fraudsters, seek to channel illegitimate funds through the system. At the same time as banks and financial institutions have increased their efforts to make it harder to abuse the system, criminals are getting smarter at exploiting the system.[193]

Schulz recommends an improved system for identifying politically exposed persons (PEPs) as well as regulations requiring company registers to maintain a record of beneficial ownership.[194] Sharman recommends the establishment of "a new global standard mandating that all registries contain the identity of all beneficial owners and that this information be publicly accessible to all."[195] The Global Organization of Parliamentarians Against Corruption (GOPAC) also advocates for further transparency through the identification of

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[191] Jason Sharman, "Shell Companies and Asset Recovery: Piercing the Corporate Veil" in Zinkernagel, Monteith & Pereira, eds (2013) 67.
[192] *Ibid* at 68–69.
[193] Markus E Schulz, "Beneficial Ownership: The Private Sector Perspective" in Zinkernagel, Monteith & Pereira, eds (2013) 75 at 75.
[194] *Ibid* at 80–81.
[195] Sharman (2013) 67 at 70.

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beneficial owners. GOPAC recommends requirements for financial institutions to demand a declaration of beneficial ownership and impose strict "know your customer" measures.[196]

A significant development in the global movement towards mandatory disclosure of beneficial ownership was implemented through the Extractive Industries Transparency Initiative (EITI). EITI is briefly discussed in Chapter 8, Section 8.2.1. In December 2015, the EITI Board decided that disclosure of the beneficial ownership of companies involved in the extractive industries must be mandatory.[197] The EITI Standard was reissued in February 2016 and now requires disclosure of beneficial ownership. The second requirement of the EITI Standard sets out the timeline and requirements for how the beneficial ownership disclosure will be gradually implemented beginning in 2017.[198]

Global concern about the use of shell corporations, trusts, nominee directors, and shareholders to hide beneficial ownership of criminal proceeds has reached a new level of concern. For asset recovery and anti-money laundering regimes to be effective, authorities must be able to identify the natural persons who actually own and benefit from a given corporation's bank account, real property, or other assets. In 2013, the G8 set forward a commitment for transparency of company ownership, and in 2014 the G20 adopted 10 high-level principles on beneficial ownership transparency.[199] Transparency International in a recent evaluation has shown, on the other hand, that most G20 countries have been in no rush to implement the 10 Beneficial Ownership Principles.[200] The TI Report entitled "Just for Show?" evaluates the extent to which each G20 country's legal framework for beneficial ownership transparency conforms to the G20's 10 Beneficial Ownership Transparency Principles. The results are presented in Table 5.4.

Table 5.4 Transparency of Beneficial Ownership

Ranking	Number	Country
Very Strong Framework	1	UK
Strong Framework	3	Argentina, France & Italy
Average Framework	9	Germany, India, Indonesia, Japan, Mexico, Russia, Saudi Arabia, S. Africa & Turkey
Weak Framework	6	Australia, Brazil, Canada, China, S. Korea & US
Very Weak Framework	0	

[196] "Transparency Through Beneficial Ownership Declarations" (September 2013) GOPAC Position Paper, Vol 1, Issue 1, online: <http://gopacnetwork.org/Docs/PositionPapers/PP_GTFAML_EN_WEB.pdf>.
[197] Kjerstin Andreasen and Victor Ponsford, eds, *2016 Progress Report: From Reports to Results* (EITI, 2016) at 5, online: <https://eiti.org/sites/default/files/documents/progressreport.pdf>.
[198] Dyveke Rogan, ed, *The EITI Standard 2016* (EITI International Secretariat, 2016) at 17-21, online: <https://eiti.org/sites/default/files/documents/english-eiti-standard_0.pdf>.
[199] See *G20 High-Level Principles on Beneficial Ownership Transparency*, online: <http://star.worldbank.org/star/sites/star/files/g20_high-level_principles_beneficial_ownership_transparency.pdf>.
[200] "Just for Show? Reviewing G20 Promises on Beneficial Ownership" (TI, November 2015), online: <http://www.transparency.org/whatwedo/publication/just_for_show_g20_promises>.

As the above table shows, UK has a very strong framework, and Canada and USA have a weak framework.

Further Reading

For more on the use of corporate vehicles to hide stolen assets, see Phyllis Atkinson, "The Use of Corporate Vehicles to Conceal Illegal Assets" in *Tracing Illegal Assets – A Practitioner's Guide* (Basel Institute on Governance, International Centre for Asset Recovery, 2015) at 95-111.

For a detailed guide to finding the beneficial owner, including recommendations, see: Emile van der Does de Willebois et al., *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* (The World Bank, 2011).

5.2.2.1 UK

In 2015, the UK government enacted Part 7 of the *Small Business, Enterprise & Employment Act 2015* (*SBEE*),[201] which amended the *Companies Act 2006*[202] "to require companies to keep a register of people who have significant control over the company (PSCs)."[203] The *SBEE* inserted Part 21A of the *Companies Act 2006*, which identifies which companies are required to maintain a register. The only companies exempted from the register are "DTR5 issuers" and companies exempted by regulation. These exempt companies are companies which "are bound by disclosure and transparency rules (in the UK or elsewhere) broadly similar to the ones applying to DTR5 issuers."[204] DTR5 issuers are "principally companies whose shares are traded on the Main Market of the London Stock Exchange and AIM."[205] Thus, UK companies that are not subject to transparency and disclosure rules will now be subject to the mandatory public disclosure of persons with significant control over the company. *The Limited Liability Partnerships (Register of People with Significant Control) Regulations 2016* (UK)[206] also require some Limited Liability Partnerships to keep a registry of persons with significant control. Persons with significant control, which include, amongst other things, persons with 25% or more of the shares in a company, are fully defined in the *Companies Act 2006* Schedule 1A:[207]

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[201] *Small Business, Enterprise and Employment Act 2015* (UK), c 26, part 7.
[202] *Companies Act 2006* (UK), c 46.
[203] *Small Business, Enterprise and Employment Act 2015* (UK), c 26, part 7, s 81.
[204] *Companies Act 2006* (UK), c 46, part 21A.
[205] "Companies Act 2006: New Rules on People with Significant Control" (Dentons, 2016), online: <http://www.dentons.com/en/insights/newsletters/2016/january/26/uk-corporate-briefing/uk-corporate-briefing-winter-2016/companies-act-2006-new-rules-on-people-with-significant-control>.
[206] 2016 No 340, Schedule 1.
[207] *Companies Act 2006* (UK), c 46, Schedule 1A.

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Introduction

This Part of this Schedule specifies the conditions at least one of which must be met by an individual ("X") in relation to a company ("company Y") in order for the individual to be a person with "significant control" over the company.

Ownership of shares

The first condition is that X holds, directly or indirectly, more than 25% of the shares in company Y.

Ownership of voting rights

The second condition is that X holds, directly or indirectly, more than 25% of the voting rights in company Y.

Ownership of right to appoint or remove directors

The third condition is that X holds the right, directly or indirectly, to appoint or remove a majority of the board of directors of company Y.

Significant influence or control

The fourth condition is that X has the right to exercise, or actually exercises, significant influence or control over company Y.

Trusts, partnerships etc

The fifth condition is that—

(a) the trustees of a trust or the members of a firm that, under the law by which itis governed, is not a legal person meet any of the other specified conditions (in their capacity as such) in relation to company Y, or would do so if they were individuals, and

(b) X has the right to exercise, or actually exercises, significant influence or control over the activities of that trust or firm.

The beneficial ownership registry also applies to "Politically Exposed Persons" who hold a share of 5% or more of a company.

Under the new rules instituted under the *SBEE*, companies are required to keep a registry of people with significant control beginning April 6, 2016. They are also required to declare that information in their registry to Companies House with their annual statement beginning June 30, 2016. Thus, Companies House should have a complete register of PSCs by June 29, 2017.[208] The Companies House registry will be available to law enforcement officials

[208] UK, House of Commons Library, "Shining a Light on Beneficial Ownership: What's Happening in the UK and

investigating money laundering or engaged in criminal asset recovery. Failure to keep a registry of persons with significant control or to file an annual report with Companies House are subject to penalties of fines, imprisonment, and freezing of assets or interests.

5.2.2.2 US

The lack of beneficial ownership laws is one of the most significant loopholes in the anti-money launder-ing and counter terrorism financing laws in the US. The Department of Treasury recently introduced the Customer Due Diligence Final Rule to close this gap. The Final Rule became effective July 11, 2016, and institutions must comply by May 11, 2018.

As the Department of Treasury states:

> The CDD Final Rule adds a new requirement that financial institutions – including banks, brokers or dealers in securities, mutual funds, futures commission merchants, and introducing brokers in commodities – collect and verify the personal information of the real people (also known as beneficial owners) who own, control, and profit from companies when those companies open accounts. The Final Rule also amends existing Bank Secrecy Act (BSA) regulations to clarify and strengthen obligations of these entities.[209]

There are three core requirements introduced by the rule:

> (1) identifying and verifying the identity of the beneficial owners of companies opening accounts;
> (2) understanding the nature and purpose of customer relationships to develop customer risk profiles; and
> (3) conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information.[210]

Under the Final Rule, beneficial owners can stem from two prongs. The "ownership prong" includes every individual who directly or indirectly owns 25 percent or more of a company. Under the "control prong," a beneficial owner is a single individual with significant

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Elsewhere?" (Briefing Paper No 07616) by Gabrielle Garton Grimwood (London: House of Commons Library, 2016) at 4, online: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7616>.

[209] United States, Department of Treasury, "Treasury Announces Key Regulations and Legislation to Counter Money Laundering and Corruption, Combat Tax Evasion" (5 May 2016), online: <https://www.treasury.gov/press-center/press-releases/Pages/jl0451.aspx>.

[210] *Ibid.*

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responsibility to control, mange or direct the legal entity.[211] Each company will therefore have between one and five beneficial owners.

The Final Rule does not apply retroactively, meaning it only applies to accounts opened on or after May 11, 2018.[212]

5.2.2.3 Canada

Canada currently lags behind in adopting beneficial ownership laws. As Transparency International Canada (TI Canada) notes, "[i]n Canada, more rigorous identity checks are done for individuals getting library cards than for setting up companies."[213] TIC rates Canada's compliance with the G20 principle as being weak or very weak in 7 of 10 principles, as shown below:

Table 5.5 Canada's Ranking on G20 Beneficial Ownership Principles

G20 Principles	Ranking
1. Definition of beneficial owner	Weak
2. Risk assessment relating to legal entities and arrangements	Strong
3. Beneficial ownership information of legal entities	Very Weak
4. Access to beneficial ownership information of legal entities	Very Weak
5. Beneficial ownership information of trusts	Average
6. Access to beneficial ownership information of trusts	Weak
7. Roles and responsibilities of financial institutions and businesses professions	Very Weak
8. Domestic and international cooperation	Weak
9. Beneficial ownership information and tax evasion	Average
10. Bearer shares and nominees	Very Weak

Source: Transparency International Canada, *No Reason to Hide - Unmasking the Anonymous Owners of Canadian Companies and Trusts* (2016) at 12 online: <http://www.transparencycanada.ca/wp-content/uploads/2017/05/TIC-BeneficialOwnershipReport-Interactive.pdf>.

[211] Convington & Burling LPP, "FinCEN Releases Final Rule on Beneficial Ownership and Risk-Based Customer Due Diligence" (10 May 2016), online: <https://www.cov.com/-/media/files/corporate/publications/2016/05/fincen_releases_final_rule_on_beneficial_ownership_and_risk_based_customer_due_diligence.pdf>.

[212] Jacqueline M Allen, Elizabeth A Khalil & Jesse Tyner Moore, "FinCEN Releases Long-Awaited Beneficial Ownership Final Rule", *Consumer Financial Services Law Blog* (16 May 2016), online: <http://www.cfs-lawblog.com/fincen-releases-long-awaited-beneficial-ownership-final-rule_051616>.

[213] Transparency International Canada, *No Reason to Hide: Unmasking the Anonymous Owners of Canadian Companies and Trusts* (TI Canada, 2016) at 6, online: <http://www.transparencycanada.ca/wp-content/uploads/2016/08/TIC-BeneficialOwnershipReport-Interactive.pdf>.

As TI Canada reports, "[a] recent study found that of 60 countries around the world – including known tax havens and secrecy jurisdictions—only in Kenya and a select few US states is it easier to set up an untraceable company than it is in Canada."[214] Further, TI Canada notes "[a]s a testament to the secrecy afforded in Canada, the law firm at the centre of the Panama Papers leak, Mossack Fonseca, marketed Canada to its clients as an attractive place to set up anonymous companies."[215] Canada currently has approximately 3.4 million business corporations[216] and is estimated to have millions of trusts.[217] Trusts are treated as private contracts and can be guarded by attorney-client privilege, trusts provide even a greater degree of anonymity to beneficial owners than corporations.[218] This level of secrecy is a huge hindrance to law enforcement efforts. In 2011, the RCMP noted a suspect can only be identified in 18% of money laundering cases.[219]

Nominees are individuals or entities appointed to act on behalf of a beneficial owner; they add another layer of secrecy to companies.[220] Nominee owners are a common means of money laundering and hiding crime proceeds through real estate. TI Canada notes that a study in 2004 found that "of 149 proceeds of crime cases successfully pursued by the RCMP … nominee owners were used in over 60 percent of real estate purchases made with laundered funds."[221] TI Canada notes that of the 42 high-end properties sold in Vancouver in the previous 5 years, 26% were bought by students or homemakers with no visible known income or wealth.[222]

A beneficial ownership regime is crucial for Canada to have an effective, proactive regime to combat corruption, money laundering, as well as offences such as drug trafficking and fraud, and to assist in the recovery of proceeds of corruption and other crimes. TI Canada and FATF have both noted various ways in which the Canadian laws currently fail in this regard. Canada's Report includes a number of recommendations to bolster Canada's beneficial ownership framework. The key recommendation made by TI Canada is that:

> The Government of Canada should work with the provinces to establish a central registry of all companies and trusts in Canada, and their beneficial owners. The registry should be available to the public in an open data format.

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[214] *Ibid* at 15, citing Sharman et al, "Global Shell Games: Testing Money Launderers' and Terrorist Financiers' Access to Shell Companies" (2013).
[215] *Ibid* at 15.
[216] *Ibid* at 17. As there is no central registry for corporations in Canada, TIC contacted each provincial and territorial registry, noting the basic data was not readily available to registry employees in most parts of Canada.
[217] *Ibid* at 18.
[218] *Ibid* at 18.
[219] *Ibid* at 24, citing Julian Sher, "Money Laundering Going Largely Unpunished in Canada", *The Globe and Mail* (27 June 2011).
[220] *Ibid* at 19.
[221] *Ibid* at 27.
[222] *Ibid* at 31.

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> Corporate directors and trustees should be responsible for submitting beneficial ownership information and keeping it accurate and up to date.[223]

Other recommendations made include the following:

- Nominees should be required to disclose that they are acting on another's behalf, and the beneficial owners they represent should be identified.
- Corporate registries should be given adequate resources and a mandate to independently verify the information filed by legal entities, including the identities of directors and shareholders.
- Beneficial ownership information should be included on property title documents, and no property deal should be allowed to proceed without that disclosure.
- The Government of Canada should make it mandatory for all reporting sectors – including real estate professionals – to identify beneficial ownership before conducting transactions.
- All government authorities in Canada should require beneficial ownership disclosure as a prerequisite for companies seeking to bid on public contracts.[224]

In an earlier report, TI Canada noted another problem Canada may face in requiring mandatory disclosure of beneficial ownership.[225] TI Canada noted that in *Reference re Securities Act*,[226] the Supreme Court of Canada found that a national securities commission would be unconstitutional. As a result, TI Canada voiced concerns regarding Canada's ability to reach a national consensus or impose a national requirement on beneficial ownership transparency requirements.

In December 2017, the Canadian arm of Publish What You Pay (PWYP) published Mora Johnson's detailed study entitled *Secret Entities: A Legal Analysis of the Transparency of Beneficial Ownership in Canada*.[227] Johnson states in her introduction:

> Financial institutions and other designated non-financial businesses and professions (DNFBPs) such as accountants, casinos, real estate agents, and

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[223] *Ibid* at 37.

[224] *Ibid* at 7. For a full list of recommendations, see *ibid* at 38-39.

[225] Transparency International Canada [TI Canada], *Review of Canada's Implementation of UNCAC* (October 2013) at 14. For a very short summary of the report, see Sabrina Bandali, "Transparency International Canada Inc, - UNCAC Implementation Review – Civil Society Organization Report" (October 2013), online: <https://www.bennettjones.com/Publications/Articles/Transparency_International_Canada_Inc__-_UNCAC_Implementation_Review_-_Civil_Society_Organization_Report>.

[226] *Reference re Securities Act*, 2011 SCC 66.

[227] Online: <http://www.pwyp.ca/images/documents/BOT%20Report.pdf>.

> dealers in precious gems and stones have anti-money-laundering and terrorism financing obligations because they may handle large cash transactions, which are susceptible to misuse. Despite a certain level of implementation of these obligations in Canada, this report will demonstrate that there are numerous ways to legally remain anonymous in business transactions and to hide beneficial ownership information from law enforcement authorities, financial institutions, and DNFBPs. In addition to the FATF obligations, in 2014, the G20 Leaders committed to lead by example and improve the transparency of beneficial ownership in their respective jurisdictions. In striving to meet these commitments, the UK and other European countries have taken clear steps to improve public beneficial ownership information, including establishing public registries of beneficial owners. Public beneficial ownership registries will ensure that civil society organizations, businesses, customers, law enforcement agencies, tax collection authorities, and others are able to discern the true owner or the person who ultimately benefits or controls the entity or property in question. Registries, alongside complementary efforts to require that agents and nominees disclose their status and the identities of those they represent, are critical to creating a transparency beneficial ownership system that can allow law enforcement to fight crime.[228]

In her conclusion, Johnson states:

> This report identifies several shortcomings relating to the transparency of beneficial ownership information of legal entities, trusts and business arrangements in Canadian law. Implementation of proposed recommendations in this report would enable Canada to possess a more rigorous and effective AML/TF regime, as well as meet our G20 and FATF commitments as they relate to beneficial ownership information. Most importantly, proposed changes would help Canadian law enforcement more effectively and efficiently fight crime in this country.[229]

5.2.3 Other Challenges to Effective Asset Recovery

Developing countries face additional challenges due to a lack of resources, expertise, investigative experience, foreign contacts and institutional stability for pursuing complex transnational asset recovery proceedings and MLA requests. The MLA system is particularly impossible for failing states. Section 4 of Canada's *Freezing Assets of Corrupt Foreign Officials Act*, enacted in the wake of the Arab Spring, aims to deal with failed states by allowing the freezing of assets on request from countries experiencing "internal turmoil" or "an uncertain

[228] *Ibid* at 4-5.

[229] *Ibid* at 40.

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political situation."[230] The "Duvalier law" in Switzerland represents another attempt to fill in the gaps of the international asset recovery framework in relation to states where the rule of law has broken down (see Section 3.1 above for more on the "Duvalier law").[231]

Political immunity presents another barrier to asset recovery. In some states, immunities have been extended to protect various public officials, who are then able to use immunities to block or delay investigation and prosecution for corruption or money laundering.[232]

Vlasic also pointed out that lack of political will often hinders asset recovery; "often, when states compare the costs of pursuing an asset recovery agenda to uncertain benefits, the risk of stepping outside the status quo is more than they are willing to take on."[233] As pointed out by Kingah, requesting countries must hire an "army of attorneys" and expensive firms specializing in asset tracing.[234] To make matters worse, many jurisdictions allow the owner of seized or restrained assets to deplete those assets for their own legal fees, which are often exorbitant.[235] This dissipation of assets can discourage originating countries from pursuing asset recovery proceedings.

Returned assets may be further reduced by asset sharing agreements with the requested country. As Stephenson points out, although Article 57(5) of UNCAC requires states to enable the return of all confiscated property, Article 14(3)(b) of UNTOC allows states to consider negotiating case-by-case asset sharing agreements.[236] Originating countries may lack the resources for these lengthy negotiations and may find themselves in a weak negotiating position since the requested country has custody of the confiscated assets.

The authors of *Barriers to Asset Recovery* also point out that inadequate enforcement of AML measures, particularly regulation of gateways into financial centres, prevents the interception of stolen assets.[237] In the StAR publication *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, the authors outline asset recovery challenges resulting from the increasingly dominant use of settlements, as opposed to full

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[230] Robert J Currie & Dr Joseph Rikhof, *International & Transnational Criminal Law,* 2nd ed (Irwin Law, 2013) at 367.
[231] For further discussion of challenges faced by developing countries, see Jesse Mwangi Wacanga, "Hurdles in Asset Recovery and Fighting Corruption in Developing Countries: The Kenya Experience" in Gretta Fenner Zinkernagel, Charles Monteith & Pedro Gomes Pereira, eds, *Emerging Trends in Asset Recovery* (International Academic Publishers, 2013) 147.
[232] Silvio Antonio Marques, "Political Immunities: Obstacles in the Fight against Corruption" in Zinkernagel, Monteith & Pereira, eds (2013) 93.
[233] Mark V Vlasic, "Fighting Corruption to Improve Global Security: An Analysis of International Asset Recovery Systems" (2010) 5:2 Yale J Intl Affairs 106 at 112.
[234] Stephen Kingah, "Effectiveness of International and Regional Measures in Recovering Assets Stolen from Poor Countries" (2011) 13 U Botswana LJ 3.
[235] Stephenson et al (2011) at 94–95.
[236] *Ibid* at 77–78.
[237] *Ibid* at 33–34.

trials, in foreign bribery cases.[238] In 365 settlements between 1999 and mid-2012, sanctions amounting to $6 billion were imposed by countries other than the corrupt official's country. Of that $6 billion, only $197 million (3.3%) was returned to the corrupt official's country. Between mid-2012 and the end of April 2016, monetary sanctions totalling $4 billion were imposed, but only $7 million (0.18%) was returned to the corrupt official's country.[239] That pitiful figure arose from just one case in which a settlement (a deferred prosecution agreement) was entered into by the Serious Fraud Office of the UK and Standard Bank in November 2015 and required the latter to pay $6 million in compensation and $1 million in interest to Tanzania.[240] Also, between 1999 and mid-2012, roughly $556 million was returned or ordered returned in cases where the jurisdiction of enforcement and the jurisdiction of the corrupt foreign officials were the same, whereas between mid-2012 and the end of April 2016 this sum amounted to just $137,325.[241] It is worth mentioning that since April 2014 the Office of the Attorney General of Switzerland (OAG) has opened some 60 investigations in relation to the Petrobras corruption scandal, resulting in $800 million in assets being frozen, and in March 2016 the OAG announced that $70 million of frozen assets were to be unblocked and returned to Brazil.[242]

According to the authors of *Left out of the Bargain*, settlements are often lacking in transparency with negotiations taking place behind closed doors. Further, affected countries are often unaware of ongoing cases in other countries until they are over. Even when affected countries have the opportunity to participate in negotiations elsewhere, for example as a *partie civile*, they often lack the resources and knowledge of other legal systems to follow through. The authors suggest that countries pursuing settlements inform affected countries of the facts of the case and legal avenues to asset recovery, such as seeking a restitution

[238] Settlements include "any procedure short of a full trial," such as plea agreements, deferred prosecution agreements and non-prosecution agreements: Oduor et al, (2014) at 1.
[239] "Settlements and Other Alternative Mechanisms in Transnational Bribery Cases and their Implications for the Recovery and Return of Stolen Assets", Conference of the States Parties to the UNCAC, CAC/COSP/WG.2/2016/2 (18 July 2016) at paras 21, 33, online: <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-25-26/V1604599e.pdf>.
[240] Serious Fraud Office, "SFO Agrees First UK DPA with Standard Bank" (30 November 2015), online: <https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/>.
[241] "Settlements and Other Alternative Mechanisms in Transnational Bribery Cases and their Implications for the Recovery and Return of Stolen Assets", Conference of the States Parties to the UNCAC, CAC/COSP/WG.2/2016/2 (18 July 2016) at para 34, online: <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-25-26/V1604599e.pdf>.
[242] Office of the Attorney General of Switzerland, "Petrobras Affair: Further USD 70 Million of Frozen Assets to be Unblocked and Returned to Brazil" (17 March 2016), online: <https://www.admin.ch/gov/en/start/dokumentation/medienmitteilungen.msg-id-61034.html>.

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order.[243] As mentioned above in Section 2.1.2, in relation to the BOTA Foundation, StAR also recommends that States permit third parties to be included in settlement agreements in foreign bribery cases.

Finally, the desire to respect civil liberties presents another obstacle to crafting effective asset recovery regimes. As explained by Bacio-Terrancino, asset recovery initiatives have the potential to infringe property rights and the presumption of innocence, as well as rights to privacy and a fair trial during investigation and other rights in relation to the offence of illicit enrichment (see below).[244]

Further Reading

For a discussion of potential issues regarding the right to a fair trial in transnational asset recovery proceedings, see Radha Dawn Ivory, "The Right to a Fair Trial and International Cooperation in Criminal Matters: Article 6 ECHR and the Recovery of Assets in Grand Corruption Cases" (2013) 9:4 Utrecht L Rev 147.

For more on forfeiture and the presumption of innocence, see Johan Boucht, "Civil Asset Forfeiture and the Presumption of Innocence under Article 6(2) of ECHR" (2014) 5:2 New J European Crim L 221.

5.3 Emerging Tools in Asset Recovery

StAR found that OECD members are increasingly turning to less traditional avenues of asset recovery. Instead of waiting for slow mutual legal assistance requests from corrupt officials' jurisdictions, some jurisdictions have initiated their own investigations.[245] Although criminal confiscation is generally considered the most obvious tool in asset return, many cases analyzed by StAR used administrative actions for freezing assets, NCB confiscation, reparation payments, and settlement agreements to facilitate the return of assets.[246]

Some other new techniques for pursuing asset recovery have emerged in recent years and are discussed below.

[243] If a third party can show direct and proximate damage resulting from a crime, prosecutors in common law countries will act on their behalf. For example, in the Oil-for-Food bribery scandal in Iraq, the company Vitol SA was ordered to pay $13 million to the Iraqi people after pleading guilty (*ibid* at 93).
[244] Julio Bacio-Terracino, "Lurking Corruption and Human Rights" (2010) 104 American Society of Intl Law Proceedings 245.
[245] Gray et al (2014) at 2.
[246] *Ibid*.

(1) Illicit Enrichment Offences

The offence of illicit enrichment assists in asset recovery by relaxing proof burdens. Prosecutors only need to prove that a defendant cannot justify their illicit funds through legitimate income sources. Article 20 of UNCAC requests States to consider establishing a criminal offence of illicit enrichment. Because the offence has the potential to deteriorate the presumption of innocence and the privilege against self-incrimination, critics discourage creation of the offence in states with a weak rule of law and weak governance. Canada has stated it will not implement an illicit enrichment offence because such an offence would violate the presumption of innocence in its Constitution.[247] Prosecutorial discretion also makes the offence vulnerable to abuse.[248] For a detailed analysis of illicit enrichment, see the following StAR publication: Lindy Muzila et al., *On the Take: Criminalizing Illicit Enrichment to Fight Corruption* (The World Bank, December 2012).

(2) Unexplained Wealth Orders

The UK government recommended the creation of a system of unexplained wealth orders in the *Criminal Finances Bill* introduced in the UK House of Commons on October 13, 2016.[249] Australia already has a system for making unexplained wealth orders in five of its six states and all of its territories.[250] The UK Bill was enacted as the *Criminal Finances Act 2017*, and the unexplained wealth order provisions came into force on January 31, 2018.[251] The UK *Criminal Finances Act 2017* is aimed at targeting the revenue generated by organized crime, with a particular focus on money laundering and terrorist finance.[252] Perhaps the most novel and potentially controversial power introduced by the Act is the introduction of unexplained wealth orders, which place a burden on individuals whose assets are disproportionate to their income to explain the origin of their wealth.[253] The Act amends the *Proceeds of Crime Act 2002* (POCA) to allow a court to make an UWO.[254] An enforcement authority such as the Crown Prosecution Service or the Serious Fraud Office can make an application to the High Court for an UWO. The Court must be satisfied that the respondent has property valued over £100,000. The Court must also be satisfied that "there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property." Finally,

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[247] Currie & Rikhof, (2013) at 367.
[248] L Muzila et al, "Illicit Enrichment: An Emerging Tool in the Asset Recovery Process" in Zinkernagel, Monteith & Pereira, eds (2013) 245.
[249] Bill 75, *Criminal Finances Bill*, 2016-2017 sess, 2016.
[250] Koren (2013).
[251] *Criminal Finances Act 2017* (UK), c 22, online: <https://services.parliament.uk/bills/2016-17/criminalfinances.html>.
[252] UK, House of Commons Library, "Criminal Finances Bill" (Briefing Paper No 07739) by Joanna Dawson et al
(London: House of Commons Library, 2016) at 4, online:
<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7739>.
[253] *Ibid*.
[254] *Proceeds of Crime Act 2002* (UK), c 29.

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the Court must be satisfied either that there are reasonable grounds to suspect that the respondent, or a person connected with the respondent, are involved in serious criminal activity, or that the respondent is a "Politically Exposed Person" (PEP). A PEP is defined as a person who has been "entrusted with prominent public functions by an international organisation or by a State other than the United Kingdom or another EEA State," or a family member or close associate of such a person.[255]

If granted, an UWO places a requirement on the respondent to explain the source of their assets within a specified period of time.[256] If the respondent fails to respond in the specified period, the assets will then be considered "recoverable property" and subject to civil forfeiture under Part 5 of the *POCA*. If a respondent purports to comply with the UWO, the enforcement agency may undertake further enforcement or investigatory proceedings. The Act also makes it an offence to knowingly or recklessly make "a statement that is false or misleading in a material particular" when purporting to comply with a UWO. Statements made when attempting to comply with an UWO would not be admissible as evidence against a respondent in criminal proceedings.[257] Section 2 of the Act amends the *POCA* to provide for freezing of assets identified in an UWO, while Section 3 amends *POCA* to allow for enforcement of UWOs overseas.[258]

Transparency International assessed the Act while it was at the Bill stage for its possible human rights impact and came to the conclusion that there are sufficient safeguards included in the legislation to prevent UWOs from being abused. The factors that weighed in favour of TI's assessment are as follows:

- The UWO is a civil – not criminal – measure and is laid against the asset, not the individual. Civil actions against property are an altogether different proposition to deprivation of liberty and actions taken against individuals.
- The measure has a specific remit and its use is limited to illicit assets owned by foreign government officials or those who have links to serious crime.
- A reasonable level of evidence is required before applying to the High Court for a UWO, and the approval of a High Court Judge is required before a UWO can be served. This element of the process provides an opportunity to rebut the measure if there are concerns.

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[255] *Criminal Finances Act 2017* (UK), c 22, s 1.

[256] UK, House of Commons Library, "Criminal Finances Bill" (Briefing Paper No 07739) by Joanna Dawson et al
(London: House of Commons Library, 2016) at 4, online:
<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7739>.

[257] *Criminal Finances Act 2017* (UK), c 22, s 1.

[258] *Ibid*, ss 2-3.

- TI has been reassured by… legal advice that use of UWOs is compatible with the UK's international obligations on safeguarding human rights.[259]

(3) Other Measures

The *Criminal Finances Bill* also introduced five other measures aimed at criminal proceeds in addition to the UWO regime:

(a) Disclosure Orders

Sections 7 and 8 of the Act grant law enforcement the power to require "anyone that they think has relevant information to an investigation, to answer questions, provide information or to produce documents. They are used to gather the information required for a successful criminal investigation, although the compelled evidence may not be used in criminal proceedings against the person who gave the information." This power has not previously been available when investigating money laundering.[260]

(b) Changes to Strengthen the Suspicious Activity Report Regime

The Act allows for an extension of moratorium periods on suspicious transactions beyond the 31 days previously allowed, giving agencies more time to investigate.[261] The Act also allows investigative agencies to follow up on suspicious activity reports where further information is needed. Finally, the Act permits firms in the regulated sector to share information amongst themselves to create better protections against being used by money launderers.[262]

(c) Proceeds of Crime Recovery

The Act creates new civil powers that allow law enforcement agencies to seize proceeds of crime that are stored in bank accounts or in non-cash valuables such as jewels or precious metals.[263]

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[259] Rachel Davies Teka, "Unexplained Wealth Orders" (Transparency International, 2016), online: <http://www.transparency.org.uk/publications/uwos-criminal-finances-bill-2016/>.
[260] UK, House of Commons Library, "Criminal Finances Bill" (Briefing Paper No 07739) by Joanna Dawson et al (London: House of Commons Library, 2016) at 49, online: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7739>.
[261] *Ibid*.
[262] *Criminal Finances Act 2017* (UK), c 22, s 11, online: <https://services.parliament.uk/bills/2016-17/criminalfinances.html>.
[263] *Ibid*, ss 14-16.

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(d) Terrorist Financing Powers

The Act extends powers of disclosure and civil recovery to law enforcement in the investigation of terrorist property or financing.[264]

(e) Corporate Offences of Failure

The Act creates the new offence of corporate failure to prevent facilitation of tax evasion.[265] This new offence allows for the prosecution of employers if they fail to prevent individual employees from facilitating tax evasion.[266]

(4) New Forms of Civil Damages

New measures of damages provide another useful tool in asset recovery. As pointed out by van der Does de Willebois in his article "Using civil remedies in corruption and asset recovery cases," those who pay bribes are rarely caught, which could encourage the perception that compensation orders are merely a cost of doing business.[267] Punitive damages would increase deterrence and encourage plaintiffs to bring actions. The emerging concept of social damages provides another recourse for victims of corruption and is already employed in Costa Rica. The concept is explained by van der Does de Willebois:

> To ensure full compensation and deterrence when punitive damages are not applicable, other jurisdictions have tried to use the concept of social damages. In some jurisdictions, a social damage may be defined as the loss that is not incurred by specific groups or individuals but by the community as a whole. This could include damages to the environment, to the credibility of the institutions, or to collective rights including health, security, peace, education, good governance, and good public financial management. It is different from damages to collective rights, which belong to a restricted and identifiable group of individuals or legal entities. Social damage can be pecuniary and nonpecuniary.

(5) Financial Disclosure for Public Employees

Messick points out that financial disclosure requirements for public employees are also useful in asset recovery. Disclosure can provide evidence of a predicate offence if discrepancies exist between an official's disclosed finances and other records. Messick

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[264] UK, House of Commons Library, "Criminal Finances Bill" (Briefing Paper No 07739) by Joanna Dawson et al (London: House of Commons Library, 2016) at 55-56, online: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7739>.

[265] *Ibid* at 56-57.

[266] *Criminal Finances Act 2017* (UK), c 22, ss 44-46, online: <https://services.parliament.uk/bills/2016-17/criminalfinances.html>.

[267] van der Does de Willebois & Brun (2013) at 648.

recommends that States create a criminal offence around non-reporting to support asset recovery actions. He also recommends following Trinidad's example in making forfeiture of an asset automatic when an official knowingly omits the asset from disclosure statements.[268]

(6) Donor Assistance to Assist Poor Countries in Pursuing Asset Recovery

Finally, Mason recommends that aid agencies contribute resources to asset recovery proceedings in donor countries as a means to assisting development in donee countries, since donees often lack the resources to carry out MLA requests and transnational proceedings.[269] StAR echoes this recommendation, advising development agencies to allocate assistance funds to domestic law enforcement efforts that could lead to return of assets to developing countries.[270]

6. INTERNATIONAL MUTUAL LEGAL ASSISTANCE AGREEMENTS

6.1 Introduction to Mutual Legal Assistance Agreements

Mutual legal assistance is a process by which jurisdictions seek and provide assistance to other jurisdictions in the gathering of evidence, investigation and prosecution of criminal cases, and in tracing, freezing, seizing and confiscating proceeds of crime. It facilitates cooperation in dealing with transnational and multinational cases of corruption. Agreements oblige requested States to cooperate with requests. There are two types of mutual legal assistance agreements – bilateral (between two states) and multilateral (between more than two states). UNCAC, UNTOC, the OECD Convention and the Southeast Asian Mutual Legal Assistance in Criminal Matters are examples of multilateral conventions that provide mutual legal assistance in corruption cases.

Mutual legal assistance may be requested for a broad range of anti-corruption activities: see Article 46(3) of UNCAC, set out below. In most instances, a jurisdiction requests the assistance of another jurisdiction through a formal written request, although mutual legal assistance can and is sometimes provided without a formal request: UNCAC, Article 46(4).

The United Nations Office on Drugs and Crime states the importance of mutual legal assistance in the *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters*:

> The importance of effective mutual (legal) assistance as a tool to combat transnational crime cannot be overstated. Whatever the applicable legal

[268] Richard E Messick, "How Financial Disclosure Laws Help in the Recovery of Stolen Assets" in Zinkernagel, Monteith & Pereira, eds (2013) 235.
[269] Phil Mason, "Being Janus: A Donor Agency's Approach to Asset Recovery" in Zinkernagel, Monteith & Pereira, eds (2013) 197.
[270] Gray et al (2014) at 56.

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> system or tradition, criminal investigations and proceedings are based on evidence and increasingly that evidence in the criminal context is located outside of national borders. As a result, there is now an increased emphasis on a global level on the need to develop effective instruments that will allow for seeking and rendering assistance with cross border evidence gathering. While law enforcement co-operation by way of informal agreement and otherwise remains an important component of international cooperation, there are inherent limits to it in that it will not generally extend to the use of compulsory measures. Similarly, court to court requests, particularly as between states of different legal traditions may be of limited application and can prove slow and time consuming. For this reason, many states are striving to adopt instruments and measures to allow for the rendering of formal mutual (legal) assistance in a direct and effective manner.[271]

In general, MLA is a three-step process that involves (1) preparing for MLA, (2) drafting and (3) submitting a request for MLA.[272] Prior to drafting a request for MLA, the requesting authority decides whether to use the MLA channels or another intelligence or informal method of cooperation and determines the timing for submitting the request for MLA, the status of the authority requesting MLA, the type of assistance sought, and the legal basis for the request, as well as what criminal offence(s) are being investigated.[273] The request for MLA must contain basic identification information, and the narrative section sets out the facts of the case, description of the assistance sought, objectives of the request, any procedures to be observed, and transcription of the criminal offences.[274] Once prepared, the request may be transmitted via diplomatic channels (as the general rule), via central authorities or directly to the executing authority (if the applicable treaty or international agreement authorizes direct transmission).[275]

6.2 Legal Basis for MLA

The legal basis for mutual legal assistance can arise out of (1) a convention, (2) a unilateral treaty (one country to another) or a bilateral treaty (between multiple countries), (3) unilateral and bilateral agreements, and (4) domestic legislation. Executing a large number of unilateral or bilateral treaties or agreements can be expensive and time consuming, especially where there are no other treaty arrangements with a country. As an alternative,

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[271] *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters* (UNDOC), online: <http://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf>.

[272] Pedro Gomes Pereira, "Mutual legal assistance" in *Tracing Illegal Assets – A Practitioner's Guide* (Basel Institute on Governance, International Centre for Asset Recovery, 2015) at 53-65, online: <https://forum.assetrecovery.org/sites/collective.localhost/files/publications/tracing_illegal_assets_manuscript_final_online.pdf>.

[273] *Ibid* at 54.

[274] *Ibid* at 58-59.

[275] *Ibid* at 59-60.

some countries, like Australia, Thailand and Japan, have enacted domestic legislation authorizing mutual legal assistance to countries where there is no treaty.[276] The assistance is usually premised on promises of reciprocity. Reciprocity is a promise between States that the requesting State will provide the requested State with the same assistance in the future. The terms and procedures for such assistance are similar to that found in treaties. However, only treaties can bind States under international law, and therefore legislation does not oblige the requested jurisdiction to assist the foreign requesting States.

6.3 Mutual Legal Assistance under UNCAC

Article 46 of UNCAC states:

> 1. State Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.
> 2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.
> 3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:
>
> a) Taking evidence or statements from persons;
>
> b) Effecting service of judicial documents;
>
> c) Executing searches and seizures, and freezing;
>
> d) Examining objects and sites;
>
> e) Providing information, evidentiary items and expert evaluations;
>
> f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
>
> g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

[276] "Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific" (ADB/OECD, 2007) at 32, online: <http://www.oecd.org/site/adboecdanti-corruptioninitiative/mutuallegalassistanceextraditionandrecoveryofproceedsofcorruptioninasiaandthepacific.htm>.

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h) Facilitating the voluntary appearance of persons in the requesting State Party;

i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;

j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;

k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

…

27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

…

29. The requested State Party:

a) shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

b) may, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or in-formation in its

possession that under its domestic law are not available to the general public.

30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

6.4 Mutual Legal Assistance under OECD Anti-Bribery Convention

Article 9 states:

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.

6.5 Request Processes and Procedures

Requesting assistance varies depending on the jurisdictions and the treaties, agreements or legislation in place. The request must be tailored to the requirements of the requested jurisdictions. The request must specify a legal basis for cooperation (i.e., through conventions, treaties, bilateral agreements, domestic legislation allowing international cooperation or promises of reciprocity). The request must also be related to a criminal matter, although assistance with non-conviction based confiscation may be possible. Some jurisdictions require charges to be filed or a final confiscation order before providing assistance with seizure or restraint of assets. UNODC developed a Mutual Legal Assistance Request Writer Tool to assist in the process.[277]

UNCAC Article 46 states the following with respect to the request process under the Convention:

Article 46 – Mutual legal assistance

7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a

[277] Online: <http://www.unodc.org/mla/index.html>.

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treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply those paragraphs if they facilitate cooperation.

…

13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary- General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

15. A request for mutual legal assistance shall contain:

    a) The identity of the authority making the request;

    b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

e) Where possible, the identity, location and nationality of any person concerned; and

f) The purpose for which the evidence, information or action is sought.

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

…

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24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

…

28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

Similar mutual legal assistance provisions can be found in Article 18 of UNTOC.

6.6 Request Process in the United States

The details of the US MLA process are summarized at Section 5.4.1. The following is an excerpt from a 2011 document produced by the UNODC's Commission on Crime Prevention and Criminal Justice, *Requesting Mutual Legal Assistance in Criminal Matters from G8 Countries: A Step-by-Step Guide*:

BEGINNING OF EXCERPT

I. INTRODUCTION

The Central or Competent Authority of a foreign country may request assistance from the United States in the gathering of evidence for criminal investigations, prosecutions and proceedings related to criminal matters. All requests, whether they are (1) bilateral treaty or multilateral convention requests, (2) letters rogatory (court issued non-treaty requests) or (3) non-treaty letters of request are presented to the Office of International Affairs of the Criminal Division of the Department of Justice (OIA), the designated U.S. Central Authority. As further explained below, all three of these types of requests are generally handled and processed in a similar manner by OIA.

(a) Requests Made Under a Treaty/Convention

Requests made under a Mutual Legal Assistance Treaty (MLAT) are executed pursuant to the terms of the treaty and United States domestic law, specifically Title 28 United States Code Section 1782 and Title 18 United States Code Section 3512.

After an MLAT request has been reviewed by OIA, it is generally sent to one of the 94 federal U.S. Attorney's Offices for execution. The request is sent to the U.S. Attorney's Office where the evidence or witness is located. The usual practice is for the Assistant U.S. Attorney in that district to apply to the U.S. district court for an order appointing him or her as a commissioner to execute the foreign request. Among the powers that are granted the commissioner under U.S. law (Title 28 United States Code Section 1782) is the authority to issue subpoenas to compel the appearance of a witness to provide testimony or produce documents. Once the requested evidence is obtained by the commissioner, it is transmitted to OIA and then on to the foreign authorities, in accordance with the terms of the treaty.

Generally, the procedures used in providing assistance under multilateral conventions are very similar to the procedures described above and are further dictated by the terms of the underlying agreements.

(b) Letters Rogatory Requests (Court-Issued Non-Treaty Requests)

Absent an MLAT or other applicable treaty, letters rogatory from a foreign court should be forwarded to OIA for execution. Pursuant to Title 28 United States Code Section 1782, requests may be executed on a discretionary basis, even if there is no treaty or multilateral agreement with the requesting country. For the most part, the United States will provide cooperation. Assistance can be provided at the investigative stage of the proceedings. Section 1782 is broad in scope and can be used to obtain assistance such as: (1) production of government or corporate records; (2) witness interviews; and (3) handwriting exemplars. Generally, almost all evidence requiring the use of compulsory process (subpoena or judicial order) may be sought in accordance with U.S. law.

(c) Non-Treaty Letters of Request

Just as with a letter rogatory, absent an MLAT or other applicable multilateral convention, a letter of request from a foreign authority should be forwarded to OIA for execution. Pursuant to Title 28 United States Code Section 1782, these requests may be executed on a discretionary basis. Generally, the United States makes its best efforts to provide cooperation.

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(d) Dual Criminality is Generally Not Required

As a general rule, dual criminality is not required when seeking legal assistance from the United States. However, when seeking a search warrant or other intrusive measure in the United States as part of an MLAT request, pursuant to Title 18 United States Code Section 3512, dual criminality is required. There may also be some instances in which an MLAT request seeks the restraint and forfeiture of assets where dual forfeitability is required. Also, some requests may relate to conduct that is protected under U.S. laws regarding free speech and may be denied on that basis.[278]

END OF EXCERPT

The 2016 FATF Mutual Evaluation Report concluded that the United States provides constructive and timely mutual legal assistance across the range of international co-operation requests, including in relation to money laundering and asset forfeiture.[279] However, there may be barriers to obtaining beneficial ownership information in a timely way, and tax information is not generally available to foreign law enforcement authorities for use in non-tax criminal investigations.[280] The Report recommends, in particular, allocating more resources to process the large number of MLA and extradition requests, as well as taking urgent steps to ensure that adequate, accurate and current information about beneficial owners of legal entities is available in a timely manner.[281]

As of July 2015, the US was actively seeking MLA in 1,542 criminal matters related to money laundering, terrorist financing and asset forfeiture.[282] Also, between 2009 and 2014, the US received 1,541 MLA requests in matters involving money laundering, terrorist financing and asset forfeiture.[283] In money laundering and asset forfeiture matters, from 2009 to 2014, the most MLA requests were received from Switzerland, Mexico, the United Kingdom and the Netherlands, while the US sought MLA primarily from Switzerland, the United Kingdom, the Netherlands and Canada.[284]

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[278] Commission on Crime Prevention and Criminal Justice, "Requesting Mutual Legal Assistance in Criminal Matters from G8 Countries: A Step-by-Step Guide" (United Nations Office on Drugs and Crime, 2011) at 56–57, online: <http://www.coe.int/T/dghl/standardsetting/pc-oc/PCOC_documents/8_MLA step-by-step_CN152011_CRP.6_eV1182196.pdf>. Reprinted with the permission of the United Nations.

[279] Financial Action Task Force, (2016), at 163-164, online: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>. For more details on mutual legal assistance in the context of anti-money laundering, see Section 6.3.1 of Chapter 4.

[280] *Ibid* at 163.

[281] *Ibid*.

[282] *Ibid* at 168.

[283] *Ibid* at 165.

[284] *Ibid* at 165, 168.

International asset sharing is encouraged by US authorities and is available even when a country makes no direct request for a share of forfeited proceeds of crime.[285] Since 1989, more than $257 million in forfeited assets has been transferred to 47 countries from the Department of Justice Asset Forfeiture Funds (DOJ-AFF), and, since 1994, the Treasury Forfeiture Fund (TFF) has transferred more than $37 million to 29 countries.[286]

Overall, the Report concluded that the United States is "largely compliant" with the FATF Recommendations 37 ("Mutual legal assistance") and 38 ("Mutual legal assistance: freezing and confiscation"). The following is an excerpt from the report assessing the US anti-money laundering and combating the financing of terrorism (AML/CFT) regime:[287]

BEGINNING OF EXCERPT

Recommendation 37 – Mutual legal assistance

In its 3rd MER [Mutual Evaluation Report], the U.S. was rated largely compliant with these requirements. The technical deficiency related to potential barriers to granting MLA request linked to the laundering of proceeds that are derived from a designated predicate offense that is not covered.

Criterion 37.1 – The U.S. has a legal basis that would permit for the rapid provision of a wide range of MLA in relation to the investigation, prosecution and related proceedings for ML [money laundering], TF [terrorism finance] and associated predicate offenses. A statutory legal framework applies to all MLA requests regardless of whether they are based on a letter rogatory, or letter of request: 18 USC §3512. MLA treaties (MLATs) themselves are also a legal framework under which MLA requests may be executed. Where a bilateral treaty is not in place, the basis for cooperation may often be found in multilateral or regional conventions,[288] and agreements.[289] Additionally, U.S. courts are authorized to provide direct MLA to international tribunals: 28 USC §1782.

[285] *Ibid* at 167.
[286] *Ibid*.
[287] Financial Action Task Force, (2016) at 245-249, online: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>.
[288] [128] Including, but not exclusively: the Inter-American Convention on Mutual Assistance in Criminal Matters ("The OAS MLAT"), the Vienna Convention [arts 7-8) , the Convention Combating Bribery of Foreign Public Officials in International Business Transactions (OECD) [arts. 9, 11]; the International Convention for the Suppression of the Financing of Terrorism [arts. 12-16]; the Palermo Convention [arts. 18, 21]; Convention Against Corruption (Merida) [arts. 46-49]; Council of Europe Convention on Cybercrime [arts. 25-35].
[289] [129] As of May 2015, the U.S. had 70 such accords in place with 85 territories.

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Criterion 37.2 – The U.S. has a central authority for transmitting and executing MLA requests – DOJ-OIA [DOJ Office of International Affairs] through which must be channeled all requests in criminal matters for legal assistance requiring compulsory measures. DOJ-OIA has a prioritisation system in place for incoming and outgoing requests by which Treaty requests are prioritized above non-treaty requests. Crimes of violence, including terrorism cases, are given a high priority. High priority cases are dealt with by order of arrival or urgency (e.g. trial deadline). There is flexibility to deviate from these prioritizations in exceptional circumstances. However, due to their current IT system, the U.S. is only able to monitor progress and time taken to handle a request.

Criterion 37.3 – MLA is not prohibited or made to be subject to unduly restrictive conditions. MLA may be provided to foreign investigative authorities in criminal matters, including before a charge is laid and does not specify dual criminality as a condition: 18 USC §3512. Some restrictions may be provided for in treaties and conventions. Where dual criminality applies, this is mainly restricted to requests for assistance requiring the application of compulsory or coercive measures.

Criterion 37.4 – The U.S. does not refuse requests for MLA on the sole ground that the offense is also considered to involve fiscal matters, even where the applicable MLATs exclude fiscal matters from the scope of assistance[290]. Separate Tax Treaties or Conventions on Tax Information Exchanges also provide additional information exchange mechanisms, including on tax offenses. Likewise, MLA requests are not refused on the sole grounds of secrecy or confidentiality requirements on FIs [financial institutions] or DNFBP [designated non-financial businesses and professions], except where information is protected by the attorney-client privilege. Attorney-client privilege may be overcome if it can be shown that the attorney was actively participating in the criminal activities of his/her client.

Criterion 37.5 – The U.S. maintains the confidentiality of MLA requests received, subject to fundamental principles of domestic law, in order to protect the integrity of the investigation or inquiry. Most MLATs signed by the U.S. contain confidentiality provisions that can be invoked by the requested State. Additionally, subpoenas for documents or testimony, restraining orders, and other compulsory measures may be issued or undertaken with a court order sealing the matter from public disclosure for a certain period of time. Where legal process is required, sealing orders are routinely

[290] [130] For instance the MLATs between the U.S. and Switzerland, the Bahamas and the Cayman Islands exclude fiscal matters, including offences involving taxes, customs duties, governmental monopoly charges and/or exchange control regulations, from the scope of available assistance. Assistance is however generally available for criminal tax matters relating to the proceeds from criminal offences.

issued on the basis of the country's invocation of a treaty's confidentiality provision and factual circumstances that counsel confidentiality.

Criterion 37.6 – Where MLA requests do not involve coercive actions, the U.S. does not make dual criminality a condition for rendering assistance. Most of the bilateral MLATs do not require dual criminality as a condition for granting assistance. Where dual criminality is a condition, this is usually restricted to requests for compulsory or coercive measures. In such instances, gaps in the ML offenses can adversely impact MLA particularly when the foreign request is based on ML activity derived from a predicate offense that does not fall within the definition of SUA [specified unlawful activity] or the foreign request does not identify the underlying predicate offense (see R.3 [*Money laundering offense*] and R.36 [*International instruments*]). Conduct-based dual criminality applies when issuing search warrants necessary to execute a foreign request: 18 USC 3512(e). There is no dual criminality requirement for most court orders issued pursuant to 18 USC §3512 in aid of requests for assistance from foreign authorities.

Criterion 37.7 – Where dual criminality applies, technical differences between the offense's categorization in the requesting State do not prevent the U.S. from providing the requested assistance. It is enough to determine that the underlying acts are criminalized in both States. The U.S. has not denied any MLA requests on the basis of dual criminality (ML, TF and asset forfeiture).

Criterion 37.8 – The powers and investigative techniques required under R.31 and which are otherwise available to domestic competent authorities are also available for use in response to MLA requests. When a compulsory process is necessary, an OIA [Office of Intelligence and Analysis] attorney or a Federal prosecutor is routinely appointed as a commissioner to seek any order necessary to execute the request: 18 USC §3512. Where LEAs have entered into case specific MOUs with other countries for ML and TF investigative assistance, additional investigative tools and powers may be used. However, the interception of communications can only be undertaken as a part of a U.S. investigation.

Weighting and Conclusion:

The minor shortcomings identified in R.3 [*Money laundering offense*] could limit assistance when dual criminality applies. The interception of communications can only be undertaken as part of a U.S. investigation. The OIA case management system is being improved to facilitate the electronic monitoring of the processing of outgoing and incoming requests process and the monitoring of the time taken to handle these.

Recommendation 37 is rated largely compliant

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Recommendation 38 – Mutual legal assistance: Freezing and Confiscation

In its 3rd MER, the U.S. was rated largely compliant with these requirements. The technical deficiency related to potential barriers to granting MLA request linked to the laundering of proceeds that are derived from a designated predicate offense which is not covered.

Criterion 38.1 – The U.S. has a range of authorities to take action in response to requests by foreign countries to identify, freeze, seize or confiscate laundered property, proceeds, and instrumentalities used or intended for use in ML, TF or associated predicate offenses, or property of corresponding value including:

(a) Providing assistance in identifying and tracing assets mainly via informal police-to-police communication and information sharing networks Additionally, the U.S may obtain evidence for court proceedings on behalf of a foreign request including testimony, documents, or tangible items: 18 USC 3512 (see R.37).
(b) Restraining or seizing assets located in the U.S. upon the request of a foreign country for preservation purposes: 28 USC 2467(d)(3) A)(i).
(c) Enforcing foreign confiscation orders. The U.S. may also restrain untainted property as long as these are subject to forfeiture and provided all other requirements are met: 28 USC 2467.
(d) Enforcing a foreign confiscation judgment on the condition that the requesting country is party to the Vienna Convention, a MLAT or other international agreement with the U.S. that provides for confiscation assistance. The offense must: i) be an offense for which forfeiture would be available under U.S. Federal law if the criminal conduct occurred in the U.S; or ii) is a foreign offense that is a predicate for a U.S. ML offense: 28 USC 2467 (a)(2) & 18 USC 1956(c)(7(B).
(e) Initiating its own civil forfeiture proceedings against any property, proceeds and instrumentalities: 18 USC 981(b)(4). In such cases, the U.S. can proceed if it can state sufficiently detailed facts to support a reasonable belief that the property would be subject to forfeiture under U.S. Federal law, based on its own evidence and evidence from the requesting State, of a predicate offense for confiscation under U.S. law which would make that the property subject to confiscation.

Gaps in the ML offenses and the requirement for dual criminality are potentially an issue when the predicate offense is not one covered in the U.S. However, no MLA request has been denied on the basis of dual criminality (ML, TF and asset forfeiture).

Criterion 38.2 – The U.S. has authority to provide assistance to requests for cooperation made on the basis of non-conviction-based (NCBF) proceedings and related provisional measures 18 USC 981(b)(4)(A)-(B). Provisional measures may also be carried out under the enforcement of a foreign judgment any time, before or after, the initiation of enforcement proceedings by a foreign nation, including NCBF proceedings: 28 USC 2467(d)(3)(A)(1).

Criterion 38.3 – The U.S. has arrangements for coordinating seizure and confiscation actions with other countries; and for managing and disposing of property frozen, seized, or confiscated whether by on its own behalf or on behalf of a foreign government.

Criterion 38.4 - The U.S shares the proceeds of successful forfeiture actions with countries that made possible, or substantially facilitated, the forfeiture of assets under U.S. law as set out in free-standing international asset sharing agreements or asset sharing provisions within mutual legal assistance agreements and multilateral treaties by 18 USC §981(i), 21 USC §881(e)(1)(E), and 31 USC §9703(h)(2). AFMLS may negotiate case specific, bilateral asset sharing arrangements even in the absence of specific agreement/treaty.

Weighting and Conclusion:

In the context of dual criminality requirements, the gaps identified under R.3 [*Money laundering offense*] may be a barrier to providing freezing and confiscation assistance, particularly when the predicate offense is not covered in the U.S.

Recommendation 38 is rated largely compliant.

END OF EXCERPT

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6.7 Request Process in the United Kingdom

The details of the UK MLA process are summarized at Section 4.2. The following is an excerpt from a 2011 document produced by the Council of Europe Commission on Crime Prevention and Criminal Justice, *Requesting Mutual Legal Assistance in Criminal Matters from G8 Countries: A Step-by-Step Guide*:

BEGINNING OF EXCERPT

I. INTRODUCTION

The following gives a brief overview of the way in which Mutual Legal Assistance (MLA) can be requested from the UK. For further guidance please visit:

http://police.homeoffice.gov.uk/operational-policing/mutual-legal-assistance/.

A foreign state may request MLA from the UK via a letter of request to one of the central authorities in the UK. Requests are not required by the UK to come via diplomatic channels.

a) Countries the UK can assist

The UK can assist any country or territory in the world, whether or not that country is able to assist the UK. The UK can provide most forms of legal assistance without bilateral or international agreements. Where a treaty or Convention imposes specific conditions or procedures on the provision or requesting of MLA the UK expects such conditions or procedures to be adhered to.

b) Dual Criminality is Generally Not Required

As a general rule, dual criminality is not required when seeking MLA from the UK except for certain types of assistance. Requests which the UK require dual criminality for are:

(a) search and seizure
(b) restraint and confiscation of assets[291]

END OF EXCERPT

[291] *Ibid* at 50. © 2011 United Nations. Reprinted with the permission of the United Nations.

6.8 Request Process in Canada

The details of Canada's MLA process are summarized at Section 5.4.3. The following is an excerpt from a 2011 document produced by the Council of Europe Commission on Crime Prevention and Criminal Justice, *Requesting Mutual Legal Assistance in Criminal Matters from G8 Countries: A Step-by-Step Guide*:

BEGINNING OF EXCERPT

A foreign state may request assistance from Canada in the gathering of evidence or the enforcement of some criminal orders (seizure orders, confiscation orders, fines) through three separate routes: (i) treaty and convention requests, (ii) letters rogatory (court issued non-treaty letter of request) and (iii) non-treaty requests. In rare circumstances, Canada may enter into an administrative arrangement with a non-treaty country to give effect to an individual request for assistance, for a time-limited period. The widest assistance can be provided for treaty or convention requests. More limited assistance is available for letters rogatory and non-treaty requests.

(i) Requests Made Under a Treaty/Convention

Requests made under a treaty or convention, and which seek court-ordered assistance, are executed under Canada's *Mutual Legal Assistance in Criminal Matters Act*. The Act gives Canadian courts the power to issue orders to gather evidence for a requesting State, including by search warrant; to locate a person who is suspected of having committed an offence in the requesting State; and to enforce orders of seizure and confiscation. The Act permits assistance to be rendered at any stage of a criminal matter, from investigation to appeal.

In most cases, before issuing a court order to give effect to a request for assistance, the Canadian court must be satisfied, on reasonable grounds, that an offence has been committed and that the evidence sought from Canada will be found in Canada. Therefore, when seeking assistance that requires the issuance of compulsory measures (e.g. production orders, search warrants, orders compelling statements/ testimony), a requesting country must provide Canada with sufficient and clear information to establish a connection between the foreign investigation/prosecution and the evidence or assistance requested.

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(ii) Letters Rogatory Requests (Court-Issued Non-Treaty Requests)

Where there is no treaty/convention in place between Canada and the requesting State, it is still possible for the requesting State to seek some court-ordered assistance from Canada. Under the *Canada Evidence Act*, orders compelling witnesses to give evidence (including by video-link) and to produce records can be issued at the request of a foreign state. However, this mechanism requires that two essential conditions be met: (1) that there be a criminal matter pending before the foreign judge, court or tribunal; and (2) that the foreign judicial body wishes to obtain the evidence sought (i.e. the request must be made by the foreign judge, court or tribunal). It is important that this be clearly stated in the letters rogatory request. In addition, the request should include information that indicates how the evidence sought is relevant to the foreign proceedings.

(iii) Non-Treaty Letters of Request

To the extent possible, Canada will also execute non-treaty requests for assistance, as well as those that do not satisfy the requirements of the *Canada Evidence Act* (i.e. letters rogatory requests). However, the assistance that is generally available in response to a non-treaty letter of request is voluntary in nature (e.g. taking voluntary statements from persons; obtaining publicly available documents; or serving documents).

(iv) Dual Criminality is Generally Not Required

As a general rule, dual criminality is not required when seeking mutual assistance from Canada, unless the treaty with the requesting State requires it. Note, however, that with respect to requests to enforce seizure and forfeiture orders, dual criminality is always required under Canadian law.[292]

END OF EXCERPT

The 2016 FATF Mutual Evaluation Report concluded that Canada is "largely compliant" with FATF Recommendations 37 ("Mutual legal assistance") and 38 ("Mutual legal assistance: freezing and con-fiscation"). The following is an excerpt from the report assessing the Canadian anti-money laundering and combating the financing of terrorism (AML/CFT) regime:

[292] *Ibid* at 3-4. © 2011 United Nations. Reprinted with the permission of the United Nations.

BEGINNING OF EXCERPT

Recommendation 37 – Mutual legal assistance

In its third MER [Mutual Evaluation Report], Canada was rated LC [Largely Compliant] with former R.36 and SR. V due to concerns about Canada's ability to handle MLA requests in a timely and effective manner and about the lack of adequate data that would establish effective implementation. Canada's legal framework for MLA was supplemented by Canada's new Protecting Canadians from Online Crime Act (PCOCA, in force 9 March 2015). The requirements of the (new) R.37 are more detailed.

Criterion 37.1 – Canada has a sound legal framework for international cooperation. The main instruments used are the *Mutual Legal Assistance in Criminal Matters Act* (MLACMA); the relevant international conventions, the Extradition Act; 57 bilateral treaties on MLA in criminal matters, extradition and asset sharing; and MOUs for the other forms of assistance to exchange financial intelligence, supervisory, law enforcement or other information with counterparts. These instruments allow the country to provide rapid and wide MLA. In the absence of a treaty, Canada is able to assist in simpler measures (interviewing witnesses or providing publicly available documents), or, based in the MLACMA, to enter in specific administrative arrangements, that would provide the framework for the assistance.

Criterion 37.2 – Canada uses a central authority (the Minister of Justice, assisted by the International Assistance Group – IAG) for the transmission and execution of requests. There are clear processes for the prioritization and execution of mutual legal assistance requests, and a system called "iCase" is used to manage the cases and monitor progress on requests.

Criterion 37.3 – MLA is not prohibited or made subject to unduly restrictive conditions. Canada provides MLA with or without a treaty, although MLA without a treaty is less comprehensive. Requests must meet generally the "reasonable grounds to believe standard, in relation for example to MLACMA ss 12 (search warrant) and 18 (production orders). However, certain warrants (financial information, CC, s.487.018, tracing communications, and new s.487.015) may be obtained on the lower standard of "reasonable ground to suspect."

Criterion 37.4 – Canada does not impose a restriction on MLA on the grounds that the offense is also considered to involve fiscal matters, nor on the grounds of secrecy or confidentiality requirements on FIs or DNFBPs [Designated Non-Financial Businesses and Professions].

Criterion 37.5 – MLACMA, s.22.02 (2) states that the competent authority must apply *ex parte* for a production order that was requested in behalf of a state of entity. In

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addition to that, the international Conventions signed, ratified and implemented by Canada include specific clauses requiring the confidentiality of MLA requests be maintained.

Criterion 37.6 – Canada does not require dual criminality to execute MLA requests for non-coercive actions.

Criterion 37.7 – Dual criminality is required for the enforcement of foreign orders for restraint, seizure and forfeiture or property situated in Canada. MLACMA, ss.9.3 (3) (a) and (b) and 9.4 (1) (3) (5) (a) (b) and (c) allow the Attorney General of Canada to file the order so that it can be entered as a judgment that can be executed anywhere in Canada if the person has been charged with an offense within the jurisdiction of the requesting state, and the offense would be an indictable offense if it were committed in Canada. This applies regardless of the denomination and the category of offenses used.

Criterion 37.8 – Most, but not all of the powers and investigative techniques that are at the Canadian LEAs' [law enforcement agencies'] disposal are made available for use in response to requests for MLA. The relevant powers listed in core issue 37.1 are available to foreign authorities via an MLA request, including the compulsory taking of a witness statement (according to MLACMA, s.18). Search warrants are not possible to obtain via letters rogatory. However, the Minister may approve a request of a state or entity to have a search or a seizure, or to use any device of investigative technique (MLACMA, s.11). The competent authority who is provided with the documents of information shall apply *ex parte* for the warrant to a judge of the province in which the competent authority believes evidence may be found. Regarding the investigative techniques under core issue 37.2, undercover operations and controlled delivery are possible through direct assistance between LEAs from the foreign country and Canada. Production orders to trace specified communication, transmission data, tracking data and financial data are possible by approval of the Minister in response to a foreign request. The authorities will not grant interception of communications (either telephone, emails or messaging) solely on the basis of a foreign request (this special investigative technique is not provided for in the MLACMA and will not be provided for in bilateral agreements. According to MLACMA, s.8.1, requests made under an agreement may only relate to the measures provided for in the bilateral agreement). The only possibility to intercept communications is within a Canadian investigation in the case of organized crime, or a terrorism offense, which would require that the criminal conduct occurred, at least in part, in Canadian territory (including a conspiracy to commit an offense abroad). Foreign orders for restraint, seizure and confiscation can be directly enforced by the Attorney General before a superior court, as if it were a Canadian judicial order.

Weighting and Conclusion

The range of investigative measures available is insufficient.

Canada is largely compliant with R.37.

Recommendation 38 – Mutual legal assistance: freezing and confiscation

Canada was rated LC with R.38 in the 2008 MER due to the limited evidence of effective confiscation assistance, the rare occurrence of sharing of assets and the fact that Canada executed requests to enforce corresponding value judgments as fines. The framework remains the same.

Criterion 38.1 – Canada has the authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize or confiscate laundered property and proceeds from crime (MLACMA, ss.9.3, 9.4 and CC, ss.462.32, 462.33), and instrumentalities used in or intended for use in ML [money laundering], predicate offenses or TF [terrorist financing]. There is, however, no legal basis for the confiscation of property of corresponding value. As was the case during its previous assessment, Canada still treats value-based forfeiture judgement as fines, which has limitations and cannot be executed against the property. If the fine is not paid, it can be converted into a prison sentence. Regarding the identification of financial assets new CC, s.487.018 allows the production of financial registration data in response to requests from foreign states.

Criterion 38.2 – In Canada, MLA is based on the federal power in relation to criminal law. Therefore, the enforcement of some foreign non-conviction based confiscation orders is not possible under the MLACMA because they were not issued by a "court of criminal jurisdiction." However, in cases where the accused has died or absconded before the end of the foreign criminal proceedings, the MLACMA applies because the matter would still be criminal in nature. Due to Canada's constitutional division of powers, the Government of Canada cannot respond to a request for civil forfeiture as such requests fall within the jurisdiction of Canada's provinces. However, most of the Canadian provinces have already adopted legislation on a civil confiscation regime. Even if Canada is not able to provide assistance to requests for cooperation based on NCB proceedings, non-conviction based confiscation is possible under Canadian law. Should a foreign state seek to recover assets from Canada though NCB asset forfeiture, it must hire private counsel to act on its behalf in the province where the property or asset is located.

Criterion 38.3 – a) No particular legal basis is required in Canada for the coordination of seizure and confiscation actions. It is a matter primarily for national and foreign

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police authorities at the stage of seizure. Thus, via direct police-to-police contact, arrangements are made in relation to any relevant case.

b) The Seized Property Management Act sets out the mechanisms for the management and, when necessary, the disposition of property restrained, seized and forfeited. The Minister of Public Works and Government Services is responsible for the custody and management of all property seized at the federal level. The Minister may make an interlocutory sale of the property that is perishable or rapidly depreciating, or destroy property that has little or no value. Property seized in the provincial level is managed by the provincial prosecution services.

Criterion 38.4 – Canada shares confiscated property on a mutual agreement basis, under the Seized Property Management Act, s.11. Canada has 19 bilateral treaties regarding the sharing and transfer of forfeited or confiscated assets and equivalent funds.

Weighting and Conclusion

The seizure and confiscation regime has a deficiency, which is the impossibility of confiscation of equivalent value.

Canada is largely compliant with R.38.[293]

END OF EXCERPT

Further Reading

For more on the law of MLA in Canada, see Robert J Currie and Dr Joseph Rikhof, *International & Transnational Criminal Law*, 2nd ed (Irwin Law, 2013).

6.9 Request Process for Asia-Pacific Countries

Many Asia and Pacific countries experience significant challenges in making MLA requests to other countries and responding to MLA requests that they receive from other countries. In 1999, some jurisdictions in the Asia-Pacific region began cooperating with each other through the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific. As of 2017, there are now 31 members of the initiative who act in regional cooperation. In 2005, the Initiative

[293] Financial Action Task Force, (2016), at 196-198, online: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Canada-2016.pdf>.

identified ineffective MLA systems as a serious obstacle to fighting corruption. In 2007, the ADB and OECD published a detailed Report on the problems and suggestions for improvement. That Report has now been followed up by a 2017 ADB/OECD report entitled "Mutual Legal Assistance in Asia and the Pacific: Experiences in 31 Jurisdictions."[294] This Report focuses on common challenges, best practices, and practical tools. Annex B of the Report also provides statistical data from each country on MLA requests made, received, and rendered.

Further Reading

For a detailed account of mutual legal assistance requests in Asia-Pacific countries, see "Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific" (Asian Development Bank/OECD Anti-Corruption Initiative for Asia and the Pacific, 2007) at 61–72, online: <http://www.oecd.org/site/adboecdanti-corruptioninitiative/37900503.pdf>.

For more on the request process in Hong Kong, see Wayne Patrick Walsh, "Processing Requests for International Recovery of Ill-Gotten Assets in Hong Kong, China" UNAFEI Resource Materials Series No 83 (UNAFEI, 2011), online: <http://www.unafei.or.jp/english/pages/RMS/No83.htm>.

6.10 Grounds for Refusal of Mutual Legal Assistance Request under UNCAC and OECD Anti-Bribery Convention

There are several grounds upon which a jurisdiction can refuse a request for mutual legal assistance. The specific grounds for refusal of a request for mutual legal assistance in the US, UK and Canada are summarized in Sections 5.4.1, 5.4.2 and 5.4.3.

1. Dual Criminality. A request may be refused where the requested jurisdiction does not criminalize the conduct that the requesting jurisdiction is investigating or prosecuting. For instance, the offences of illicit enrichment and bribery in the public sector have not been criminalized in all jurisdictions. The problem may be resolved by employing a conduct-based approach. This approach involves re-examining the criminal conduct in order to fit the conduct into the criminal law framework of the requested jurisdiction. Some countries, for example Canada, do not require dual criminality for most requests based on treaties.

[294] Online: <https://www.oecd.org/corruption/ADB-OECD-Mutual-Legal-Assistance-Corruption-2017.pdf>.

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(a) UNCAC Article 46(9) states the following with respect to the dual criminality requirement:

> 9.(a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;
>
> (b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;
>
> (c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

(b) OECD Anti-Bribery Convention in article 9 states:

> 2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.

2. Essential Interests. Refusal may occur where the execution of the request could prejudice the "essential interests" of the requested jurisdiction. These interests could include sovereignty, security, burden on public resources and public order. Bilateral treaties may specify the essential interests that allow parties to deny mutual legal assistance. UNCAC also allows denial on grounds of essential interests. Article 46(21)(b) states the following:

> 21. Mutual legal assistance may be refused:
>
> (b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, public order or other essential interests.

The meaning of the terms "essential interests" or "public interests" is not precise, which affects the effectiveness of international cooperation treaties. Article 5 of the OECD Convention recognizes that the investigation and prosecution of corruption cases can be impacted by "considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."

3. Assets of *de minimis* value. Because mutual legal assistance is resource intensive, jurisdictions can refuse to assist where the assets involved are *de minimis*. UNCAC Article 55(7) states:

Article 55 – International cooperation for purposes of confiscation

7. Cooperation under this article may also be refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence or if the property is of a de minimis value.

4. Lack of information. Requests must provide sufficient evidence and information to enable the requested jurisdiction's authorities to meet their own evidentiary thresholds in their domestic courts (see Art. 46(21)(a)).

5. Lack of due process in requesting jurisdiction. UNCAC Article 46(21)(d) states:

21. Mutual legal assistance may be refused:

(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

6. Double jeopardy and ongoing proceedings or investigations in the requested jurisdiction or severe penalty deemed to be too harsh. A requested State may deny assistance if the accused person has been acquitted or punished for the conduct underlying the request for assistance. They may also deny assistance if there are ongoing proceedings or investigations in the requested State concerning the same crime for which the requesting State seeks assistance.

7. Immunity. Some public officials are provided with immunity, but immunity can be waived or subsequently repealed. For instance, in the Ferdinand Marcos case, the successive Philippines government enabled action to be taken against him by providing a waiver of immunity.

8. Bank Secrecy is not a ground for refusing mutual legal assistance. UNCAC Articles 46(8), (22) and 40 state the following:

Article 46 – Mutual legal assistance

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

Article 40 – Bank secrecy

Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

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OECD Anti-Bribery Convention states in article 9(3):

> 3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

9. Reasons must be provided for refusing mutual legal assistance.

UNCAC Article 46(23) states:

> 23. Reasons shall be given for any refusal of mutual legal assistance.

10. Mutual legal assistance may also be postponed.

UNCAC Article 46(25) and (26) states:

> 25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.
> 26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

11. Power to Override by Bilateral Agreement. Paragraphs 9 to 29 of UNCAC Article 46 can be overridden by a bilateral agreement. Paragraph 7 of Article 46 provides that those sections only apply "to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply these paragraphs if they facilitate cooperation."

6.11 Barriers to MLA

As discussed at Section 5.2.3, MLA procedures are challenging for developing nations and nearly impossible for failing states due to the complexity and variety of formatting requirements. The MLA process is time-consuming and often hindered by the difficulty of tracing the location and ownership of assets. Egypt has expressed frustration with the MLA

system since the uprising against Hosni Mubarak, complaining of both the lack of response by some requested countries and the barriers to MLA put up by others.[295]

When central authorities for MLA are themselves corrupt, their potential to wreak havoc in MLA procedures is boundless. An example is provided by the case of James Ibori, a former governor of Delta State in Nigeria who allegedly stole somewhere between US$300 million and US$3.4 billion while in public office. Investigations into Ibori by British law enforcement began in 2005. Assistance was provided by Nigeria's Economic and Financial Crimes Commission (EFCC) during the early stages of the investigation. In Nigeria, the Attorney General is the central authority for MLA purposes, and part way through the investigations, Michael Aondoakaa was appointed as the new Attorney General. Aondoakaa actively worked against investigation and prosecution of Ibori, among others, and, in his capacity as central authority, demanded that any evidence provided to the UK by the EFCC be returned. Although Aondoakaa was dismissed in 2010, he provides an example of the potential problems involved in entrusting MLA responsibilities to central authorities in corrupt states.[296]

The Abacha Loot

Barriers exist even in relatively successful cases of asset recovery. The Abacha case in Nigeria provides an example of a fairly successful asset recovery effort, although many hurdles were encountered along the way. General Sani Abacha was Nigeria's last military dictator and allegedly pilfered between $3 billion and $5 billion from the country. Nigeria began its efforts to recover the "Abacha loot" in 1999 when it requested Switzerland to assist in freezing Abacha's accounts.

Daniel and Maton describe the successes and challenges encountered in the Abacha saga.[297] At the time Daniel and Maton wrote their article in 2013, about $2.3 billion had been recovered by Nigeria, and other funds have been recovered since then. For example, after sixteen years, Swiss proceedings relating to the Abacha loot were concluded in March 2015 with a decision to return €360 million to Nigeria.

According to Daniel and Maton, Nigeria's ability to maintain political will from 1999 to the present has contributed greatly to successes in the asset recovery process. Nigeria also set up a Special Investigative Panel that uncovered valuable information to assist in MLA requests. In Switzerland, Nigeria was able to take part in proceedings through the *partie civile* procedure. This allowed Nigeria to persuade the court that the Abacha family was a criminal organization, thereby shifting the burden of proof to the Abachas to show their funds were legitimate. Since the Abachas were unable to do so, Nigeria recovered $0.5 billion. Nigeria promised to devote the money to projects for the benefit of the Nigerian people and the

[295] Daniel & Maton (2013) at 310.
[296] *Ibid* at 307. See also UN Digest (2015) at 11, 70.
[297] *Ibid* at 299–303.

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World Bank was appointed as trustee to ensure the funds were used properly. These proceedings lasted six years in total.

Along with these relative successes, Daniel and Maton describe the many challenges encountered during the asset recovery process. Responses to MLA requests were often unhelpful. For example, the UK took four years to provide the information requested by Nigeria. During this time, the Abacha family brought two applications for judicial review in the UK, slowing the process. The Abachas also mounted many challenges to MLA requests in other jurisdictions, maintaining apparently endless funding for such legal battles. The process of asset recovery was also hindered by Nigerian court judgments that were likely the product of bribes. For example, a Nigerian court complicated the MLA process in the UK by declaring MLA requests unconstitutional. Liechtenstein's Chief Examining Magistrate was also ordered by a court to refrain from interviewing Abacha's eldest son on the basis that such an interview would be against the rule of law and infringe sovereignty. In June 2014, however, Liechtenstein succeeded in returning $227 million of the Abacha loot to Nigeria. In order to obtain this recovery and end legal challenges against the Liechtenstein proceedings by the Abacha family, Nigeria agreed to drop charges against Abacha's eldest son.

Further Reading

For an in-depth discussion of barriers to MLA and asset recovery and recommendations for success, see Stephenson et al., (2011), online: <https://star.worldbank.org/star/sites/star/files/Barriers to Asset Recovery.pdf>.

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CHAPTER 6

INVESTIGATION AND PROSECUTION OF CORRUPTION

CONTENTS

1. INTRODUCTION

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1. INTRODUCTION

The economic and social costs of corruption are huge. They provide major motivation for global anti-corruption measures, exemplified by the widespread adoption of UNCAC and the earlier adoption of the OECD Anti-Bribery Convention. Anti-corruption enforcement is a vital part of the fight against global corruption. Prevention of corruption before it occurs is the ideal goal. When prevention fails and corruption occurs, investigation and punishment of corrupt offenders is essential; it instills public confidence that States will not sit idly by while corporations and individuals pursue illicit profits at the expense of the global citizenry. Effective detection, prosecution and sanctioning of corrupt offenders are crucial to corruption prevention. The strongest disincentive to corruption is a high likelihood of being caught and brought to justice.[1]

Very significant advances have been made in anti-corruption enforcement globally, and an era of increased investigation and prosecution of corruption offences has begun in many countries including the US, UK and Canada. But is enough being done? Even in countries with highly active enforcement regimes, it is probable that only a very small proportion of corrupt behaviour is actually discovered and prosecuted.

This chapter discusses the international provisions that mandate effective methods for investigation, prosecution and sanctioning of corruption offences and the implementation of

[1] Because "[s]uccessful detection of corruption depends upon insiders to report wrongdoing," Rose-Ackerman points out the tension between the need to deter and detect corruption offences: "One conundrum for anti-corruption efforts is the possible tension between the goals of signaling credible expected punishments and using the law to induce perpetrators to provide evidence." See Susan Rose-Ackerman, "The Law and Economics of Bribery and Extortion" (2010) 6 Annual Rev Law Soc Sci 217 at 221-22.

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these enforcement provisions in the US, UK and Canada. The different structural approaches to anti-corruption enforcement around the globe are also examined, followed by a brief examination of the powers and techniques necessary for enforcement and some of the difficult issues associated with overlapping enforcement jurisdictions for many corruption offences.

This chapter also deals with some of the costs of enforcement. Although significant, the costs involved in fighting corruption are not at the forefront of the global discussion. Anti-corruption enforcement takes financial and human resources, intelligence and technology, as well as perseverance in the face of political risk. Corruption investigations involve corporations and public officials in positions of power who can oppose and retaliate against those who investigate and prosecute their crimes.

Successful anti-corruption enforcement can sometimes come at a great cost to the enforcing State Party. In the case of BAE, discussed in Section 11 of Chapter 1, the UK would have paid a high price to prosecute BAE's bribery of Saudi officials. According to newspaper reports on the case, Prince Bandar of Saudi Arabia threatened to withdraw security and intelligence support for UK soldiers in Iraq and to cancel an $80 billion aircraft contract with BAE. Faced with the loss of strategic support that would endanger British lives in Iraq and the loss of a contract which would cost British jobs at home, UK Prime Minister Tony Blair pressured the UK Serious Fraud Office (SFO) to drop their investigation of BAE's alleged bribery of Saudi officials, which the SFO reluctantly did. This case illustrates an important point: political will is essential to effective enforcement of anti-corruption measures. It is impossible to summon this political will by narrowly focusing on domestic concerns. Faced with the cost to Britain, Tony Blair effectively stopped the prosecution, but he may have decided differently if he took a wider view of the global cost of corruption and considered the negative effect of corruption on millions of the world's poorest people.[2]

Some worry that a similar story is unfolding in relation to the SFO's investigation of GPT Special Project Management Ltd.[3] Once again, the alleged bribery involved defence contracts in Saudi Arabia. Although the SFO made arrests in 2014, no one has been charged and the investigation could be terminated on the basis of national security. In an October 2014 letter to Britain's Attorney General, Global Witness, TI UK and Corruption Watch urged independence for the SFO and stated that "[t]he UK cannot afford a re-run of the BAE/Al-Yamanah scandal."[4] The three NGOs maintain that the handling of the BAE case was inconsistent with Article 5 of the OECD Convention, which prohibits national economic

[2] It should be noted that BAE later faced charges related to corruption in Germany and the US and also paid fines in the UK for bribery offences committed in Tanzania. See Chapter 1, Section 11.
[3] Alistair Craig, "Will GPT be the SFO's next BAE?" (15 October 2014), *The FCPA Blog*, online: <http://www.fcpablog.com/blog/2014/10/15/will-gpt-be-the-sfos-next-bae.html>.
[4] Global Witness, Transparency International UK and Corruption Watch, online: <https://issuu.com/transparencyuk/docs/joint_letter_to_attorney_general_on>.

concerns and relations with other states from being taken into account when making prosecutorial decisions.

The BAE case illustrates the reality that high-level state and political interests can hamper and even quash investigation or prosecution of corruption. It has been suggested that making corruption an international crime to be prosecuted in an international court would prevent States from improperly interfering with the prosecution of corruption. However, world leaders are unlikely to be persuaded to add corruption to the small list of international crimes any time soon.

2. INTERNATIONAL OBLIGATIONS TO INVESTIGATE AND PROSECUTE CORRUPTION

2.1 Overview

Criminalization of corrupt behaviour is meaningless without robust law enforcement. As discussed in Chapter 1, the most effective deterrent to corrupt behaviour is an increased likelihood of being caught and prosecuted for the offence. To support the overall anti-corruption scheme of UNCAC, chapters III and IV of the convention include provisions that facilitate the effective investigation and prosecution of corruption offences. While narrower in scope than UNCAC, the OECD Anti-Bribery Convention also contains provisions to promote effective law enforcement.

Broadly speaking, law enforcement provisions in the conventions cover the following areas:

(1) Immunities and Pre-Trial Release of Defendants;
(2) Specialized Anti-Corruption Enforcement Bodies;
(3) Discretionary Power to Investigate and Prosecute Corruption;
(4) Investigatory Power to Search Financial Records;
(5) Protection of Witnesses, Victims, Whistleblowers and Participants;
(6) International Cooperation in Investigation and Cooperation;
(7) Jurisdiction for Prosecution and Transfer of Criminal Proceedings;
(8) Extradition;
(9) Use of Special Investigative Techniques.

As ratifiers of UNCAC and the OECD Convention, the US, UK and Canada are required to implement the provisions of the conventions in their domestic statutes and law enforcement practices. In the sections that follow, the convention requirements and the manner in which the US, UK and Canada have responded to those requirements will be described for each of the nine enforcement topics listed above. Each country's implementation of the convention requirements is monitored through the respective reviewing mechanisms adopted by the UN and the OECD.

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2.1.1 Peer Review Process

Peer Country Review Reports (in the case of UNCAC) and Phase 3 Reports (in the case of the OECD Convention) hold State Parties accountable to implement the anti-corruption measures of the conventions. These reviews also allow State Parties to respond to the reviewing group's recommendations regarding more effective ways to implement provisions of the anti-corruption conventions and to offer feedback in respect to the fight against corruption in their country.

There has been criticism of UNCAC's implementation review mechanism. Although the country review reports are completed by expert teams from randomly selected peer countries, the reports are largely "desk reviews" of the self-assessments done by the countries being reviewed. Country visits by the expert teams are optional and only possible upon the agreement of the country being reviewed. In addition, despite the fact that the UN resolution adopting the review mechanism encouraged governments to include civil society and private sector input during the review process, a country being reviewed can decide whether or not to include input from these sources. With the above criticisms of the UNCAC review mechanism in mind, the peer country review reports do provide good summaries of the apparent implementation of anti-corruption law enforcement provisions in the US, UK and Canada.

The OECD's review mechanism is regarded by many as more rigorous than the UNCAC review. The Phase 3 Reports are written by two peer countries that act as lead examiners. The country being reviewed responds to a detailed questionnaire designed to elicit information concerning the country's implementation of the OECD Convention and previous recommendations of the OECD Working Group on Bribery. Each Phase 3 Report involves a mandatory on-site visit led by the two peer countries to determine the veracity of the information on the questionnaire. The peer country reports are assessed by the entire Working Group on Bribery, made up of representatives from all Parties to the Anti-Bribery Convention, who evaluate each country's performance and adopt conclusions. Excerpts from Phase 3 reports will be relied upon later in this Chapter.

2.2 UNCAC and OECD Provisions and Their Implementation by the US, UK and Canada

In this section, the relevant UNCAC provisions are not quoted verbatim. Instead, the content of these provisions is summarized based on the *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (*Legislative Guide*). [5] Likewise, the OECD

[5] United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption* [*Legislative Guide*], 2nd ed [Legislative Guide (2012)] (United Nations, 2012), online: <https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf>.

Convention provisions are summarized rather than quoted.[6] Summaries of the US,[7] UK[8] and Canadian[9] provisions are largely from Executive Summaries produced by the UNODC's Implementation Review Group of the United Nations Convention against Corruption.

2.2.1 Immunities and Pre-Trial Release of Accused Persons

UNCAC

Article 30 (mandatory) requires State Parties to:

- Maintain a balance between immunities provided to their public officials and their ability to effectively investigate and prosecute offences established under the Convention (para 2);
- Ensure that pre-trial and pre-appeal release conditions take into account the need for the defendants' presence at criminal proceedings, consistent with domestic law and the rights of the defence (para 4).

OECD Convention

No mention of immunities or pre-trial release/detention.

US Law

Public officials are not immune from criminal and civil prosecution. However, US prosecutors have the power to grant public officials immunity from prosecution for corruption or other crimes, if those officials agree to provide information and assistance in the investigation and prosecution of others involved in corruption.

Measures to ensure that an accused person does not flee or leave the country pending trial are within the purview of the judicial authorities as set out in well-established federal and state laws governing bail and pre-trial release.

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[6] OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (2011), online: <http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf>.
[7] UNODC, 3rd Session of the Implementation Review Group (Vienna, June 2012) at 11–21. Reviewing countries: Sweden and the Republic of Macedonia, online: <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/18-22June2012/V1251970e.pdf>.
[8] UNODC, 4th Session of the Implementation Review Group (Vienna, May 2013) at 27–31. Reviewing countries: Greece and Israel, online: <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1382015e.pdf>.
[9] UNODC, 5th Session of Implementation Review Group (Vienna, June 2014) at 2–6. Reviewing countries: Switzerland and Iraq, online: <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1400913e.pdf>.

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UK Law

There are no automatic immunities or jurisdictional privileges accorded to UK public officials, including Members of Parliament, as regards investigation, prosecution or adjudication of UNCAC offences. Prosecutors have the power to enter into immunity agreements in exchange for assistance in investigating others. However, it is more common to reduce an informant's sentence by two-thirds (one-third for the guilty plea and an additional one-third for the information and cooperation in investigation and prosecution of others).

Measures to ensure that an accused person does not flee or leave the country pending trial are within the purview of well-established laws governing bail and pre-trial release.

Canadian Law

There are no general immunities for Canadian political, executive or civil service officials engaged in criminal conduct (unless authorized by law for a specific and unique circumstance). Prosecutors have the power to enter into immunity agreements in exchange for information or assistance in investigating others.

The *Criminal Code* sets out measures to be taken with regard to the pre-trial detention and conditional release of persons being prosecuted, taking into account the need to ensure public safety and the accused's appearance at subsequent proceedings.

Autocratic and Kleptocratic Countries

It is worth noting that some of the most kleptocratic regimes in the world have enacted immunity laws which protect the President and/or other senior officials from prosecution for accepting bribes and robbing their nations' wealth. An example is provided by Teodoro Obiang, a member of the notoriously corrupt Obiong family in Equatorial Guinea. He was appointed as vice-president of Equatorial Guinea and given immunity from corruption charges even though the position of vice-president is not mentioned in the country's Constitution, indicating that the appointment was solely for the purposes of providing immunity.[10] In Nigeria, the Constitution provides immunity to the president, vice-president, and state and deputy state governors of all 36 states. According to the Economic and Financial Crimes Commission in Nigeria, this immunity was exploited by an estimated 31 out of the 36 state governors, such as the corrupt Ibori of Delta State.[11] In Cameroon, President Paul Biya has been in power since 1982 and is immune from prosecution. Amendments to the constitution since his presidency began have removed presidential term limits, meaning Biya can be president for life, and also created immunity for presidents after

[10] John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Edward Elgar, 2014) at 82.
[11] *Ibid* at 83.

leaving office, meaning he is protected even after his presidency ends.[12] In Romania, the National Anti-Corruption Directorate is facing hurdles in charging the prime minister, Victor Ponta, for conflict of interest, money laundering, forgery, and tax evasion. Ponta's majority in Parliament blocked attempts to lift Ponta's immunity in June 2015, and his party is trying to pass laws making the prosecution of graft more difficult.[13] Presidential pardons can also be used to protect corrupt officials from the law, as demonstrated by the former Nigerian president Goodluck Jonathan's pardon of former state governor Diepreye Alamieyeseigha, who had been convicted of corruption offences.[14]

2.2.2 Specialized Anti-Corruption Enforcement Bodies

UNCAC

Article 36 (mandatory) requires State Parties, in accordance with the fundamental principles of their legal system:

- To ensure they have a body or persons specializing in combating corruption through law enforcement and that such body or persons is sufficiently independent and free from undue influence;
- To provide sufficient training and resources to such body or persons.

Article 38 (mandatory) requires that State Parties take measures to encourage cooperation between their public authorities and law enforcement. Such cooperation may include:

- Informing law enforcement authorities when there are reasonable grounds to believe that offences established in accordance with Articles 15 (bribery of national public officials), 21 (bribery in the private sector) and 23 (laundering of proceeds of crime) have been committed; or
- Providing such authorities all necessary information, upon request.

Article 39 (mandatory) requires State Parties:

- To take measures consistent with their laws encouraging cooperation between private sector authorities (financial institutions, in particular) and law enforcement authorities regarding the commission of offences established in accordance with the Convention (para 1);
- To consider encouraging its nationals and habitual residents to report the commission of such offences to its law enforcement authorities (para 2).

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[12] *Ibid* at 81.

[13] "Corruption in Romania: Immune system", *The Economist* (13 June 2015), online: <http://www.economist.com/news/europe/21654081-law-change-may-help-victor-ponta-prime-minister-dodge-prosecution-immune-system>.

[14] Hatchard, (2014) at 84.

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OECD Convention

Article 5 provides that:

> Investigation and prosecution of bribery shall not be influenced by consideration of national economic or political issues, nor by the identity of persons involved.

Annex I: Good Practice Guidelines on Implementing Specific Articles of the Convention states:

- Complaints of bribery of foreign public officials should be seriously investigated and credible allegations assessed by competent authorities.
- Member countries should provide adequate resources to law enforcement authorities so as to permit effective investigation and prosecution of bribery of foreign public officials in international business transactions, taking into consideration Commentary 27 to the OECD Anti-Bribery Convention.

Recommendation IX: Reporting Foreign Bribery provides that member countries should ensure that:

- Easily accessible channels are in place for the reporting of suspected acts of bribery of foreign public officials in international business transactions to law enforcement authorities, in accordance with the member country's legal principles.
- Appropriate measures are in place to facilitate reporting by public officials, in particular those posted abroad, directly or indirectly through an internal mechanism, to law enforcement authorities of suspected acts of bribery of foreign public officials in international business transactions detected in the course of their work, in accordance with the member country's legal principles.
- Appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions.

US Law

Section 3.3.1 describes the US enforcement bodies that deal with allegations of corruption.

UK Law

Section 3.3.2 describes the UK enforcement bodies that deal with allegations of corruption.

Canadian Law

Section 3.3.3 describes the Canadian enforcement bodies that deal with allegations of corruption.

Commentary

While the US, UK and Canadian law enforcement bodies are generally recognized as independent and honest, that is not the case in many other countries, which makes enforcement of anti-corruption laws in those countries infrequent and arbitrary.

On the other hand, both Conventions call for adequate resources for law enforcement. Considering the size and impact of corruption committed by businesses from the US, UK and Canada, it seems that the UK and Canada are seriously under-resourced, certainly in comparison to the US. For example, in 2013 the Royal Canadian Mounted Police (RCMP) announced that they had approximately 35 active investigations underway into alleged Canadian bribery of foreign officials, but how can a staff of 14 officers adequately investigate that many cases of large-scale, multinational foreign corruption?

2.2.3 Discretionary Power to Investigate and Prosecute Corruption Offences

UNCAC

Article 30 (non-mandatory) mandates that State Parties consider or endeavour:

> To ensure that any discretionary legal powers relating to the prosecution of offences established in accordance with the Convention maximize the effectiveness of law enforcement in respect of those offences and act as a deterrent (para 3).

Article 36 (mandatory) requires State Parties, in accordance with the fundamental principles of their legal system, to grant law enforcement the necessary independence to carry out its functions effectively without undue influence.

OECD Convention

Article 5 provides that:

> Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

US Law

Prosecutors in common law systems have traditionally had very broad and independent discretionary powers to prosecute or decline to pursue allegations of violations of criminal law. Those discretionary powers are based on considerations such as strength of the evidence, deterrent impact, adequacy of other remedies and collateral consequences, and in general are not supposed to include political or economic factors. At the federal level, prosecutorial discretion over criminal law is vested solely in the Department of Justice and

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the Attorney General. Allegations of prosecutorial misconduct can be brought before the courts at any time, including allegations of selective prosecution based on a number of prohibited factors.

In terms of prosecuting foreign and transnational bribery, the UNCAC Implementation Review Group noted that US law enforcement was effective in combating and deterring corruption and, within the framework of prosecutorial discretion and other aspects of the US legal system, had developed a number of good practices demonstrating a significant enforcement level in the US.

UK Law

The Crown Prosecution Service (CPS) exercises very broad and independent discretion over the prosecution of criminal offences under the general supervision of the Director of Public Prosecutions, whose office helps ensure that prosecutions do not involve political interference. In spite of this independence, as mentioned in the introduction to this chapter, the investigation of bribery allegations against Prince Bandar of Saudi Arabia and BAE was halted by the Prime Minister for economic and military purposes despite the SFO's intention to pursue charges, but at least that influence was openly exercised in public.

The Serious Fraud Office (SFO) investigates and prosecutes domestic and foreign corruption cases. The SFO is an independent department, headed by a Director, under the general supervision of the Attorney General. SFO prosecutors are subject to the CPS's Code for Crown Prosecutors. (In Scotland, investigation and prosecution of crimes are under the direction of the Lord Advocate.)

The SFO receives a core budget from Her Majesty's Treasury, which can be supplemented as necessary to enable the office to take on large cases. In 2015-16 the budget was £62.6m. Until 2013-14, the SFO received a portion of money recovered from investigations. However, as this was infrequent and highly unpredictable, the SFO agreed all proceeds would go to the Treasury with a fixed sum added to the SFO's funding.[15]

Canadian Law

In carrying out their duties in the public interest, Canadian prosecutors exercise a wide range of discretion over which criminal charges are pursued and they are obliged to exercise fair, impartial and independent judgement in those decisions. Guidance is provided in the Public Prosecution Service of Canada Deskbook, as well as in confidential practice directives. In general, the provincial ministries of justice are delegated authority to prosecute *Criminal Code* offences (including domestic corruption cases), while the Public Prosecution Service of Canada prosecutes *CFPOA* offences (although sometimes in cooperation with provincial prosecutors, as in the *Niko Resources* and *Griffiths Energy* cases).

[15] Serious Fraud Office, "About Us", online: <https://www.sfo.gov.uk/about-us/>.

2.2.4 Investigatory Power to Search Financial Records

(This topic is also covered in Chapter 5 on asset recovery).

UNCAC

In accordance with Article 31 (mandatory), State Parties must, to the greatest extent possible under their domestic system, have the necessary legal framework to enable:

- The identification, tracing and freezing or seizure of the proceeds and instrumentalities of crime covered by the Convention, for the purpose of eventual confiscation (para 2);
- The empowerment of courts or other competent authorities to order that bank, financial or commercial records be made available or seized. Bank secrecy shall not be a legitimate reason for failure to comply (para 7).

Article 40 (mandatory) requires State Parties to ensure that, in cases of domestic criminal investigations of offences established in accordance with the Convention, their legal system has appropriate mechanisms to overcome obstacles arising out of bank secrecy laws.

OECD Convention

Article 9 dealing with Mutual Legal Assistance provides:

> A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy (para 3).

Recommendation III also states:

- Each Member country should take concrete and meaningful steps in conformity with its jurisdictional and other basic legal principles to examine or further examine the following areas:
  - (iv) laws and regulations on banks and other financial institutions to ensure that adequate records would be kept and made available for inspection and investigation.

US Law

The peer review of US legislation by the UNCAC Implementation Review Group concluded that US law was in compliance with Article 40 of UNCAC on bank secrecy. The Review Report noted that the US authorities may wish to have in mind that, in terms of implementation, bank secrecy may also apply to the activities of professional advisors that could be linked to those of their clients under investigation (for example, the activities of lawyers acting as financial intermediaries).

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The Review Report noted that assistance is not denied on the grounds of bank secrecy or solely on the ground that the related offense involves fiscal matters.

UK Law

The UK is generally compliant with UNCAC Article 40. The provision of information by financial institutions is generally governed by old case law *(Tournier v National Provincial and Union Bank of England* (1924), 1 KB 461), which still holds as good practice addressing how and why confidentiality may be breached. Bank records are also available by search warrant and through mandatory bank reporting of suspicious transactions.

The UK has a value-based confiscation system. Confiscation, as well as the detection, freezing, seizing and administration of property, are mainly covered in a comprehensive manner by the *Proceeds of Crime Act 2002* and the *Powers of Criminal Courts (Sentencing) Act 2000*. The basic regulations in England and Wales, Scotland and Northern Ireland are identical.

Canadian Law

Bank secrecy does not prevent the prosecutor from requesting, and upon a court order, obtaining financial records relating to the proceeds of crime.

The mechanisms for identification and freezing criminal assets are set forth in the *Criminal Code* under section 462.3 — Part XII.2 — Proceeds Of Crime. Related provisions require banks and other financial institutions to report all transactions over $10 000.

2.2.5 Protection of Witnesses, Victims, Whistleblowers and Participants

(Protection of whistleblowers is examined in detail in Chapter 12.)

UNCAC

In accordance with Article 32 (mandatory), and bearing in mind that some victims may also be witnesses (Article 32, para 4), State Parties are required:

- To provide effective protection for witnesses, within available means (para 1). This may include:
  - Physical protection (para 2 (a));
  - Domestic or foreign relocation (para 2 (a));
  - Special arrangements for giving evidence (para 2 (b));
- To consider entering into foreign relocation agreements (para 3);
- To provide opportunities for victims to present views and concerns at an appropriate stage of criminal proceedings, subject to domestic law (para 5).

Article 33 (non-mandatory) requires State Parties to consider providing measures to protect persons who report offences established in accordance with the Convention to competent authorities.

Article 37 (mandatory) provides that State Parties must:

- Take appropriate measures to encourage persons who participate or who have participated in Convention offences:
  - To supply information for investigative and evidentiary purposes;
  - To provide concrete assistance towards depriving offenders of the proceeds of crime and recovering such proceeds (para 1);
  - To provide to such persons the same protection as provided to witnesses (para 4; see also Article 32).

OECD Convention

Recommendation IX: Reporting Foreign Bribery

Member countries should ensure that:

> Appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions.

US Law

The United States relies on a wide range of protection measures for witnesses and victims. Protection is provided not only to persons that actually testify in criminal proceedings, but also to potential witnesses, as well as the immediate and extended family members of the witnesses and the persons closely associated with them, if an analysis of the threat determines that such protection is necessary.

From an operational point of view, the protection of witnesses' and victims' physical security can be secured through the Federal Witness Security Program,[16] if these persons meet the requirements for participation in that program. Other procedures are also in place to provide limited protection through financial assistance for relocation.

With regard to the protection of reporting persons, the *Federal Whistleblower Protection Act* of 1989 makes the Office of the Special Counsel (OSC) responsible for, *inter alia*, protecting employees, former employees and applicants for employment from twelve statutory

[16] For more information, see Witness Security Program, online <http://www.usmarshals.gov/witsec/>.

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prohibited personnel practices, as well as receiving, investigating and litigating allegations of such practices. Whistleblower protection laws in the US are fully described in Chapter 12.

The protection of witnesses may also be extended to cooperating informants and defendants who agree to become government trial witnesses. The discretionary powers of the prosecution services are of relevance. In addition to granting immunity, prosecutors often negotiate a plea agreement with a defendant to induce that defendant's cooperation by dismissing one or more of the charges, and/or by recommending that the defendant receive a lower sentence in exchange for his/her cooperation.

UK Law

UK chief officers of police and heads of law enforcement agencies have access to an extensive range of measures to protect witnesses, based on the provisions of *SOCPA,* including full witness protection programmes involving witness relocation, a change of identity and a high degree of confidentiality. These measures fully cover the requirements of Article 32.

The same can be said about the protection of reporting persons. The *Public Interest Disclosure Act 1998* amending the *Employment Rights Act 1996* added whistleblowers to the list of those given special protection against dismissal or other detrimental treatment, and Northern Ireland has enacted similar legislation. Whistleblower protection laws in the UK are fully described in Chapter 12.

The protection and safety of persons who cooperate is the same in the UK as for witnesses under Article 32. Additionally, in England and Wales, section 82 of *SOCPA* makes special provision for the protection of witnesses and certain other persons involved in investigations or legal proceedings. Other implementing laws (including for Scotland and Northern Ireland) are referenced in the UN Report on the UK's compliance with UNCAC.

Canadian Law

Mechanisms exist to protect witnesses, including measures that may be used in court to protect witnesses during their testimony. The federal Witness Protection Program of Canada is administered by the RCMP and offers assistance to persons who are providing evidence or information, or otherwise participating in an inquiry, investigation or prosecution of an offence. Protection measures may include relocation inside or outside of Canada, accommodation, change of identity, counselling and financial support to ensure the witness's security or facilitate the witness's re-establishment to become self-sufficient.

With regard to persons reporting corruption, section 425.1 of the *Criminal Code* makes it a criminal offence for an employer to demote, terminate, or otherwise affect or take disciplinary action against an employee who reports a possible offence under any federal or provincial Act or regulation, either before a report takes place or in retaliation after a report is made. In addition, the *Public Servants Disclosure Protection Act (PSDPA)* provides a mechanism for public servants to make disclosures of wrongdoing, and established the office of the Public Sector Integrity Commissioner to investigate those alleged wrongdoings and

investigate complaints of reprisals. The *PSDPA* also provides members of the public with protection from reprisal by their employers for having provided, in good faith, information to the Public Sector Integrity Commissioner concerning alleged wrongdoing in the federal public sector. Other protections are available at the provincial level. Whistleblower protection laws in Canada are described in Chapter 12.

2.2.6 International Cooperation in Investigation and Prosecution

(Mutual Legal Assistance is dealt with in Chapter 5, Section 6)

UNCAC

Article 43 (mandatory) provides:

> State Parties shall cooperate in criminal matters in accordance with Articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, State Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.

Article 46 (mandatory) provides:

> State Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention (para 1).

Article 48 (mandatory) on law enforcement cooperation:

> Fleshes out the requirements of Articles 43 and 46 by requiring State Parties to cooperate with the law enforcement bodies of other State Parties through communicating, coordinating investigations, providing support, exchanging information, etc. It is recommended that in order to give effect to the requirements of Article 48, bilateral or multilateral agreements should be entered into by law enforcement bodies.

Article 49 (non-mandatory) on joint investigations provides:

> State Parties should consider conducting joint investigations and forming joint investigative bodies to that effect.

OECD Convention

Article 9 (mandatory) on Mutual Legal Assistance states:

- Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal

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proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance (para 1).

- Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention (para 2).

Article 11 (mandatory) provides:

> For the purposes of Article 4, paragraph 3 on consultation, Article 9 on mutual legal assistance and Article 10 on extradition, each Party shall identify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as a channel of communication for these matters for that Party, without prejudice to other arrangements between Parties.

US Law

The US considers the UNCAC provisions as a sufficient legal basis for law enforcement cooperation in respect of the offenses covered by UNCAC. Additionally, the country has entered into bilateral or multilateral agreements or arrangements on direct cooperation with many foreign law enforcement agencies.

The presence of law enforcement attachés abroad and the extensive use of the informal law enforcement channels in appropriate instances is commended by the UN Review Committee as good practice. The Financial Crimes Enforcement Network (FinCEN) of the Department of the Treasury, which is the US financial intelligence unit (FIU) and part of the Egmont Group, also plays a significant role in promoting information sharing with foreign counterparts in money laundering cases.

The US has concluded bilateral and multilateral agreements that allow for the establishment of joint investigative bodies. Joint investigations can also take place on a case-by-case basis, at the level of informal law enforcement cooperation, and entail information sharing and cooperation on developing effective investigative strategies.

UK Law

UK law enforcement authorities engage in broad, consistent and effective cooperation with international counterparts to combat transnational crime, including UNCAC offences. This cooperation relates, *inter alia*, to exchanges of information, liaising, law enforcement coordination and the tracing of offenders and of criminal proceeds. A particularly prominent role in such activities is played by the Serious Organised Crime Agency (SOCA), and examples of SOCA's activities were provided during the UNCAC Review of UK laws. Important roles are also played by the SFO, the City of London Police, the specialized units

of the Metropolitan Police and other law enforcement authorities. The level and effectiveness of these activities indicates effective compliance with UNCAC Article 48.

Investigating authorities in the UK make use of the mechanism of joint investigation teams (JITs), in particular with civil law jurisdictions in Europe, when their use will mitigate problems in receiving intelligence and investigative cooperation from those jurisdictions.

The UK has, and utilizes, the ability to cooperate with foreign law enforcement authorities, often through regular MLA procedures, in the use of special investigation techniques, including covert surveillance and controlled deliveries.

The UNCAC Review of UK laws also indicates that the UK handles a high volume of MLA and international cooperation requests with an impressive level of execution. The efficient operations of the UK in this sphere are not only carried out by regular law enforcement authorities, such as the Home Office and the Metropolitan Police, but also through the effective use of specialized agencies, such as the SFO and SOCA, to deal with requests involving particularly complex and serious offences, including offences covered by UNCAC. The effective use of this unique organizational structure merits recognition as a success and good practice under the Convention. In addition, the operations of aid-funded police units directed at illicit flows and bribery related to developing countries constitute a good practice in promoting the international cooperation goals of UNCAC. Similarly, the UK's efforts to assist in building the capacity of law enforcement authorities in developing nations, with the goal of enabling them to investigate and prosecute corruption offences, also constitutes a good practice.

Canadian Law

The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) has a mandate to exchange financial intelligence with other State Parties in relation to money laundering and terrorist financing. Information received by FINTRAC is shared as appropriate with Canadian police and other designated agencies. Such information can also relate to corruption offences: from April 1, 2010 to March 31, 2011, 34 money laundering cases, suspected to be related to corruption according to the voluntary information received from law enforcement, were disclosed by FINTRAC to relevant authorities.

To further enhance cooperation in law enforcement, the RCMP has 37 liaison officers deployed worldwide, with this number soon to be expanded. Combined with the establishment of the International Anti-Corruption Team at the RCMP, this provides a strong institutional framework for international cooperation in investigations. Furthermore, the RCMP recently concluded a memorandum of understanding with Australia, the UK and US on the establishment of an International Foreign Bribery Task Force, which will strengthen existing cooperative networks between the participants and outline the conditions under which relevant information can be shared.

The potential for joint investigations is evaluated on a case-by-case basis. They are most often conducted on the basis of a memorandum of understanding or exchange of letters between

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the RCMP and a foreign agency partner. Such joint investigations can, however, also be conducted without a formal agreement.

2.2.7 Jurisdiction for Prosecution and Transfer of Criminal Proceedings

UNCAC

Article 42 (mandatory) states:

> If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other State Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those State Parties shall, as appropriate, consult one another with a view to coordinating their actions (para 5).

Article 47 (mandatory) on transfer of criminal proceedings provides:

> State Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

OECD Convention

Article 4 (mandatory) states:

> When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution (para 3).

US Law

The US authorities reported no cases of transfer of criminal proceedings involving US citizens to foreign fora, due partly to the national policy of seeking extradition of US citizens alleged to have committed offenses under US jurisdiction.

US authorities will sometimes decline to prosecute foreign offenders under *FCPA* jurisdiction when these offenders are facing prosecution for the same acts of corruption in a foreign jurisdiction. For example, there was no US prosecution under the *FCPA* of Griffiths Energy Inc. on the grounds that the company's bribery was adequately prosecuted and punished in Canada.

UK Law

Although UK authorities indicated that it is possible for them to transfer proceedings to other jurisdictions and to accept such transfers, it also appears that they do not have any specific legislative or treaty mechanisms to effectuate such transfers. The transfer of proceedings under current UK practice involves simply accepting a foreign file for examination by UK prosecution authorities. If an independent basis for jurisdiction exists within the UK, the prosecution authorities may exercise discretion to undertake prosecution. In such cases, evidence is obtained via traditional MLA procedures. Domestic procedures and guidelines provide a practical basis under which the UK can entertain requests that cases pending in foreign jurisdictions be prosecuted in the UK. The UNCAC Implementation Review Group concluded that the UK complies with Article 47 of the Convention.

Canadian Law

While the transfer of criminal proceedings is not specifically addressed in the domestic legislation of Canada, the UNCAC review indicated that the discretion available to Canadian prosecution services is exercised so as to facilitate the processing of cases in the most appropriate jurisdiction.

2.2.8 Extradition[17]

UNCAC

Article 44 (mandatory) recommends that:

> State Parties streamline the extradition of accused persons to the territory of the requesting State Party so that they may stand trial for corruption offences.

OECD Convention

Article 10 (mandatory) states:

> Each Party shall take any measures necessary to ensure that it can extradite its nationals or prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution (para 3).

[17] Sometimes politics play a role in extradition proceedings. For example, in 2015, an Austrian court refused to extradite Dmytro Firtash, a Ukrainian national, to the US after the DOJ laid charges for violations of the *FCPA* committed in India. Firtash is a pro-Russian Ukrainian and argued that the DOJ was motivated by political concerns. The court agreed with Firtash and criticized the DOJ. See Richard L Cassin, "The FCPA Blog goes 'Above the Law'" (20 June 2015), *The FCPA Blog*, online: <http://www.fcpablog.com/blog/2015/6/20/the-fcpa-blog-goes-above-the-law.html>.

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US Law

The US extradition regime, based on a network of treaties supplemented by conventions, is underpinned by a solid legal framework allowing for an efficient and active use of the extradition process. The shift from rigid list-based treaties to agreements primarily based on the minimum penalty definition of extraditable offenses (in most cases deprivation of liberty for a maximum period of at least one year, or a more severe penalty) for establishing double criminality has given the extradition system much more flexibility, and should be highlighted as a good practice.

The US policy of extraditing its own nationals constitutes a good practice since it can assist in dealing with issues of double jeopardy, jurisdiction and coordination.

The US authorities indicated that no implementing legislation was required for the implementation of Article 44 of the UNCAC. It was further reported that the US may only seek extradition or grant an extradition request on the basis of a bilateral extradition treaty, and therefore UNCAC alone cannot be used as the basis for extradition. It can, however, expand the scope of the extraditable offense when a bilateral treaty is already in place.

The US does not refuse extradition requests solely on the ground that the offense for which extradition is sought involves fiscal matters.

The US has bilateral extradition treaties with 133 States or multilateral organizations, such as the European Union. All incoming and outgoing extradition requests are reviewed and evaluated by the Office of International Affairs, Department of Justice and the Office of the Legal Adviser, Department of State.[18]

UK Law

The UK has a complex but comprehensive legislative framework for enabling the extradition of fugitives. The complexity of the framework derives in part from the fact that the procedures and requirements for extradition may vary depending on the legislative category that the requesting State falls into, as well as which region of the UK (England and Wales, Northern Ireland or Scotland) is involved.

The UNCAC Review for the UK makes clear, however, that the UK is able to extradite to all States, even those which are included in neither Category 1 (EU Member States) nor Category 2 (designated non-EU Member States) of the *Extradition Act 2003*. Under section 193 of the *Extradition Act 2003*, if a State is a party to an international convention to which the UK is also a party, the UK may designate the State under section 193 and thereby allow extradition to that State. No designations have been made under section 193 regarding UNCAC. Nevertheless, where an extradition request is received from a State that is not a

[18] For detailed information on US extradition law, see M Cherif Bassiouni, *International Extradition United States Law and Practice*, 6th ed (Oxford University Press, 2014).

designated extradition partner and the person sought is wanted for conduct covered by a convention that the UK has ratified, the UK will consider whether to enter into a "special extradition arrangement" under section 194. In this manner, the UK may comply with the extradition requirements of UNCAC.

While UNCAC could seemingly be a legal basis for extradition under section 193 of the *Extradition Act 2003*, the UK did not indicate whether the necessary designation under this section was made with respect to State Parties to UNCAC. It was observed that UNCAC has never served as the basis for an extradition from the UK.

It is nevertheless clear that the UK's extradition framework satisfies the requirements of the Convention regarding offences subject to extradition and the procedures and requirements governing extradition. The fact that the UK has criminalized UNCAC offences as "equivalent conduct offences" would seem to reduce any concerns regarding requirements for double criminality, one of the primary issues of concern in Chapter IV of UNCAC. Similarly, the UK's willingness and ability to extradite its own nationals was favourably noted.

While the UK would appear to require the provision of prima facie evidence to enable extradition to UNCAC partners who would not qualify as Category 1 or Category 2 territories under UK legislation, the UNCAC Review Group indicated that these evidentiary requirements are applied in a flexible and reasonable manner.

Similarly, the review indicates that the differences between extradition procedures in Scotland and other parts of the UK are of more technical than substantive significance and do not affect the review's conclusion that the UK complies with the requirements of the Convention.[19]

Canadian Law

In Canada, extradition is provided for under bilateral and multilateral agreements to which Canada is party and, in limited circumstances, through a specific agreement under the *Extradition Act*. Canada has signed 51 bilateral extradition conventions and is also a party to four multilateral treaties. Canada also accepts UNCAC as the legal basis for extradition where it does not have an existing agreement in place with a requesting State Party and has informed the Secretary-General of the UN accordingly. UNCAC has been used as the legal basis for extradition on a number of occasions.

Dual criminality is a prerequisite to grant extradition, but a flexible, conduct-based test is applied to this requirement under section 3 of the *Extradition Act*. In addition, the offence in relation to which extradition is sought must be subject to a punishment of no less than two years, meaning that all acts covered by UNCAC (with the exception of illicit enrichment, in

[19] For detailed information on UK extradition law see, Clive Nicholls QC et al, *Nicholls, Montgomery, and Knowles on The Law of Extradition and Mutual Assistance*, 3rd ed (Oxford University Press, 2013) and Edward Grange & Rebecca Niblock, *Extradition Law: A Practitioner's Guide* (Legal Action Group, 2013).

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relation to which Canada made a reservation upon ratification of the Convention) are extraditable offences. Canada permits the extradition of its nationals.

In accordance with Article 44, paragraph 4 of the Convention, none of the offences established in accordance with UNCAC are considered political offences. Canada also meets the requirements of Article 44, paragraph 16 of the Convention by not denying extradition requests for the sole reason that they are based on fiscal matters.

Canada has taken effective steps to simplify the evidentiary requirements and procedures in relation to extradition proceedings which has resulted in more efficient processing of extradition cases. Under the *Extradition Act*, Canada is able to provisionally arrest an individual in anticipation of a request for extradition.

The Supreme Court of Canada in *Lake v Canada (Minister of Justice*), 2008 SCC 23 at paras 21-22, explained that the process of extradition from Canada has two stages, a judicial and executive one. As the Court states:

> The first stage consists of a committal hearing at which a committal judge assesses the evidence and determines (1) whether it discloses a *prima facie* case that the alleged conduct constitutes a crime both in the requesting state and in Canada and that the crime is the type of crime contemplated in the bilateral treaty; and (2) whether it establishes on a balance of probabilities that the person before the court is in fact the person whose extradition is sought. In addition, s. 25 of the *Extradition Act*, S.C. 1999, c. 18 (formerly s. 9(3) of the *Extradition Act*, R.S.C. 1985, c. E-23), empowers the committal judge to grant a remedy for any infringement of the fugitive's *Charter* rights that may occur at the committal stage: *Kwok*, at para. 57.
>
> After an individual has been committed for extradition, the Minister reviews the case to determine whether the individual should be surrendered to the requesting state. This stage of the process has been characterized as falling "at the extreme legislative end of the *continuum* of administrative decision-making" and is viewed as being largely political in nature: *Idziak v. Canada (Minister of Justice)*, 1992 CanLII 51 (SCC), [1992] 3 S.C.R. 631, at p. 659. Nevertheless, the Minister's discretion is not absolute. It must be exercised in accordance with the restrictions.

Under the *Canadian Charter of Rights and Freedoms* and the *Extradition Act*, those subject to an extradition request benefit from due process and fair treatment throughout relevant proceedings. Furthermore, under both existing international agreements and the domestic provisions of the *Extradition Act*, Canada is required to refuse an extradition request when it

is based on motives of a discriminatory nature, such as the race, sex, language, religion or nationality of the person.[20]

2.2.9 Use of Special Investigative Techniques

UNCAC

Article 50 (mandatory) requires:

> State Parties employ special investigative techniques in combating corruption. These techniques include using controlled delivery (i.e., allowing illicit activity to go forward under surveillance to gather evidence for prosecution), electronic surveillance and undercover operations where appropriate.

OECD Convention

No mention of investigative techniques.

US Law

US laws permit controlled deliveries,[21] electronic surveillance and undercover operations in accordance with legal limits and constitutional protections.[22] For further discussion, see Section 4.

UK Law

The UK has cooperated with foreign law enforcement authorities.

UK laws permit controlled deliveries, electronic surveillance and undercover operations in accordance with legal limits, which include reliance on the abuse of process doctrine.[23] For further discussion, see Section 4.

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[20] For detailed information on Canadian extradition law, see Garry Botting, *Canadian Extradition Law Practice*, 5th ed (LexisNexis Canada, 2015) and Robert J Currie & Joseph Rikhof, *International and Transnational Criminal Law*, 2nd ed (Irwin Law, 2014) at 478–504.

[21] Controlled deliveries are normally discussed in the context of the law surrounding entrapment. Controlled deliveries do not constitute entrapment and are therefore legal.

[22] *American Jurisprudence*, 2nd ed "Search and Seizures: Electronic Surveillance Generally", § 338 and "Undercover Activities", § 2406.

[23] Colin Nicholls et al, *Corruption and Misuse of Public Office*, 2nd ed (Oxford University Press, 2011) at 192-200.

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Canadian Law

Canadian law permits the use of controlled deliveries, electronic surveillance and undercover operations, subject to legal and constitutional limits under domestic law and the *Charter of Rights and Freedoms*.[24] For further discussion, see Section 4.

3. ENFORCEMENT BODIES

3.1 UNCAC and OECD Provisions

Article 36 of UNCAC, along with other international conventions (e.g., Article 20 of the Council of Europe Criminal Law Convention on Corruption) requires State Parties to empower specialized persons or bodies to fight corruption by investigating and prosecuting corruption offences. Without a standardized institutional blueprint for enforcement bodies, countries vary widely in their structural approaches to enforcement.

Article 36(b) of UNCAC requires State Parties "to grant the body or persons the necessary independence to carry out its or their functions effectively without undue influence." This "necessary independence" requirement is vital to effective enforcement, but the term is vague and not uniformly implemented. The *Legislative Guide* recommends the creation of entirely new enforcement bodies independent from existing law enforcement organizations to satisfy UNCAC's requirements. It also suggests that specializing and enlarging the power of an existing enforcement organization may be an appropriate course of action depending on the State Party's particular circumstances.[25]

Article 5 of the OECD Anti-Bribery Convention instructs that Parties not be influenced by their own economic interests or international strategic concerns when investigating and prosecuting corruption. The article does not, however, specify the means by which Parties should achieve such independence.

The lack of specific guidance on how to ensure independence in anti-corruption enforcement underscores the difficulty of preventing political and economic interests from influencing investigations and prosecutions. Creating an independent enforcement system is easier said than done. Whatever structure the enforcement body takes, it must be sufficiently independent from government to ensure that its decisions to enforce anti-corruption measures are not compromised by national or international governmental concerns or, worse, by corrupt government officials.

[24] Don Stuart, *Canadian Criminal Law, Student Edition*, 7th ed (Carswell, 2014).
[25] Legislative Guide (2012) at 148.

The OECD publication *Specialised Anti-Corruption Institutions: Review of Models* provides a summary of the criteria for effective enforcement bodies and a good survey of the different types of enforcement bodies in operation around the world:

BEGINNING OF EXCERPT

Both the United Nations and the Council of Europe anti-corruption conventions establish *criteria for effective specialized anti-corruption bodies*, which include independence, specialisation, the need for adequate training and resources [see articles 6 and 36 of UNCAC and article 20 of the *Council of Europe Criminal Law Convention on Corruption*]. In practice, many countries face serious challenges in implementing these broad criteria.

- **Independence** primarily means that the anti-corruption bodies should be shielded from undue political interference. Thus, genuine political will to fight corruption is the key prerequisite for independence. Such political will must be embedded in a comprehensive anti-corruption strategy. The independence level can vary according to specific needs and conditions. Experience suggests that it is structural and operational autonomy that are important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for the director's appointment and removal, proper human resources management, and internal controls are important elements to prevent undue interference. Independence should not amount to a lack of accountability: specialised services should adhere to the principles of the rule of law and human rights, submit regular performance reports to executive and legislative bodies, and enable public access to information on their work. Furthermore, no single body can fight corruption alone. Inter-agency co-operation, and co-operation with civil society and businesses are important factors to ensure their effective operations.
- **Specialisation** of anti-corruption bodies implies the availability of specialised staff with special skills and a specific mandate for fighting corruption. The forms and level of specialisation may differ from country to country, as there is no one successful solution that fits all. For instance, the Council of Europe Criminal Law Convention on Corruption clarifies the standard for law enforcement bodies, which can require the creation of a special body or the designation of several specialised persons within existing institutions. International trends indicate that in OECD countries, specialisation is often ensured at the level of existing public agencies and regular law enforcement bodies. Transition, emerging and developing economies often establish separate specialised anti-corruption bodies often due to high corruption-levels in existing agencies. In addition, these

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countries often create separate specialised bodies in response to pressure from donors and international organisations.

- **Adequate resources, effective means and training** should be provided to the specialised anti-corruption institutions in order to make their operations effective. Specialised staff, training and adequate financial and material resources are the most important requirements. Concerning specialised law enforcement anti-corruption bodies, an important element to properly orient them is the delineation of substantive jurisdictions among various institutions. Sometimes, it is also useful to limit their jurisdiction to important and high-level cases. In addition to specialised skills and a clear mandate, specialised anti-corruption bodies must have sufficient powers, such as investigative capacities and effective means for gathering evidence. For instance, they must have legal powers to carry out covert surveillance, intercept communications, conduct undercover investigations, access financial data and information systems, monitor financial transactions, freeze bank accounts, and protect witnesses. The power to carry out all these functions should be subject to proper checks and balances. Teamwork between investigators, prosecutors, and other specialists, e.g. financial experts, auditors, information technology specialists, is probably the most effective use of resources.

Considering the multitude of anti-corruption institutions worldwide, their various functions, and performance, it is difficult to identify all main functional and structural patterns. Any new institution needs to adjust to the specific national context taking into account the varying cultural, legal and administrative circumstances. Nonetheless, identifying "good practices" for establishing anti-corruption institutions, as well as trends and main models is possible. A comparative overview of different models of specialised institutions fighting corruption can be summarised, according to their main functions, as follows:

- **Multi-purpose anti-corruption agencies.** This model represents the most prominent example of a single-agency approach based on key pillars of repression and prevention of corruption: policy, analysis and technical assistance in prevention, public outreach and information, monitoring, investigation. Notably, in most cases, prosecution remains a separate function. The model is commonly identified with the Hong Kong Independent Commission against Corruption and the Singapore Corrupt Practices Investigation Bureau. It has inspired the creation of similar agencies on all continents. This model can be found in Australia (in New South Wales), Botswana, Lithuania, Latvia, Poland, Moldova and Uganda. A number of other institutions, for instance, in the Republic of Korea,

Thailand, Argentina and Ecuador, have adopted elements of the Hong Kong and Singapore models, but follow them less rigorously.

- **Specialised institutions in fighting corruption through law enforcement.** The anti-corruption specialisation of law enforcement can be implemented in detection, investigation or prosecution bodies. This model can also result in combining detection, investigation and prosecution of corruption into one law enforcement body/unit. This is perhaps the most common model used in OECD countries. This model is followed by the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime Økokrim, the Central Office for the Repression of Corruption in Belgium, the Special Prosecutors Office for the Repression of Economic Offences Related to Corruption in Spain, but also by the Office for the Prevention and Suppression of Corruption and Organised Crime in Croatia, the Romanian National Anti-Corruption Directorate, and the Central Prosecutorial Investigation Office in Hungary.

This model could also apply to internal investigation bodies with a narrow jurisdiction to detect and investigate corruption within the law enforcement bodies. Good examples of such bodies can be found in Germany, the United Kingdom and Albania. For example, in the UK, investigation of police corruption is handled by the Independent Police Complaints Commission (IPCC).

…

Assessing performance is a challenging task for anti-corruption agencies, and many agencies lack the skills, expertise, and resources to develop adequate methodologies and monitoring mechanisms. Few agencies have rigorous implementation and monitoring mechanisms in place to trace their performance, and to account for their activities to the public. At the same time, showing results might often be the crucial factor for an anti-corruption institution to gain, or retain public support and fend off politically-motivated attacks. The report recommends that anti-corruption agencies develop their monitoring and evaluation mechanisms to examine and improve their own performance and to improve public accountability and support.

While many anti-corruption bodies created in the past decade have achieved results and gained public trust, the experience in emerging and transition economies shows that establishing a dedicated anti-corruption body alone cannot help to reduce corruption. The role of other public institutions, including various specialised integrity and control bodies, and internal units in various public institutions is increasingly important for preventing and detecting corruption in the public sector. This trend converges with the approach of many OECD countries where specialised anti-corruption units were established in law enforcement agencies, while the task of

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preventing corruption in the public sector and in the private sector was ensured by other public institutions as part of their regular work.[26]

END OF EXCERPT

3.1.1 Hong Kong's Independent Anti-Corruption Commission

Hong Kong provides a helpful blueprint for effective enforcement bodies. As noted in the executive summary of the OECD publication *Specialised Anti-Corruption Institutions: Review of Models*, [27] Hong Kong's Independent Commission Against Corruption (ICAC) has achieved laudable independence and has been extensively copied by countries with systemic corruption problems:

> Inspired by the success story of Hong Kong's anti-corruption commission and its three-pronged approach to fighting corruption and also encouraged by international conventions, many countries around the world, including in Eastern Europe, established specialised bodies to prevent and combat corruption. Creating such bodies was often seen as the only way to reduce widespread corruption, as existing institutions were considered too weak for the task, or were considered to be part of the corruption-problem and could therefore, not be part of the solution for addressing it.[28]

The features of Hong Kong's ICAC are distinctive. As Scott points out:

> Hong Kong's Independent Commission Against Corruption (ICAC) is often regarded as a model of the way in which efforts to prevent and control corruption should be organized and implemented. Its achievement in transforming Hong Kong from a place where corrupt practices were accepted to a place in which they are the exception has been widely admired and studied … [T]he ICAC's success is attributed to its distinctive characteristics, which may be said to form a syndrome in the sense that each of its features is thought to be necessary for the organization to work well.[29]

The characteristics of the ICAC are as follows:

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[26] OECD, *Specialised Anti-Corruption Institutions: Review of Models*, 2nd ed (OECD Publishing, 2013) at 12-15, online: <http://dx.doi.org/10.1787/9789264187207-en>.
[27] *Ibid.*
[28] *Ibid* at 11.
[29] Ian Scott, "The Hong Kong ICAC's approach to corruption control" in Adam Graycar and Russell Smith, eds, *Handbook of Global Research and Practice in Corruption* (Edward Elgar, 2011) at 401.

- A unitary body with sole authority over corruption control rather than multiple anti-corruption organizations operating simultaneously;
- Independence from the Hong Kong government;
- Structural divisions that reflect the ICAC's three-pronged approach: Corruption Prevention, Community Relations and Operations Departments;
- Wide policing powers including the right of arrest and detention;
- Secure funding independent from a budget approved by the government;
- Personnel that are not susceptible to corruption;
- The political will to combat corruption; and
- Public support and goodwill towards the ICAC (the organization has been voted the most trusted organization in Hong Kong several times).

There has been some debate as to whether the Hong Kong model should be followed widely or whether the structure of the ICAC works only in the specific cultural context of Hong Kong. Speville provides an in-depth discussion of the merits of Hong Kong's ICAC and an answer to critics who view the ICAC model as impractical for other countries.[30]

3.1.2 Quebec's Anti-Corruption Unit

In 2011, Quebec became the first (and so far only) province in Canada to create a permanent anti-corruption enforcement agency. UPAC, the Unité permanente anticorruption (Permanent Anticorruption Unit), is made up of staff seconded from six different governmental agencies: Sûreté du Québec (police); Revenu Québec (tax collection); Ministère des Transports (roads and infrastructure); Commission de la construction du Québec (responsible for labour relations in the construction industry); and Ministère des Affaires municipales (municipal affairs). UPAC started in 2011 with 200 employees and a $31 million budget. By 2016, UPAC had grown to 320 employees and a budget of $48 million.[31] UPAC is headed by the Anti-Corruption Commissioner, a role created through the provincial *Anti-Corruption Act.*[32]

From 2011 to October 2016, UPAC has charged 169 individuals and 14 businesses with domestic criminal corruption offences resulting so far in 27 individuals convicted. There have also been penal investigations of regulatory offences leading to charges against 59 individuals and 45 businesses, resulting thus far in convictions of 13 individuals and 9 businesses. In addition, UPAC does significant work in the prevention of corruption. It has

[30] Bertrand de Speville, "Anticorruption Commissions: The 'Hong Kong Model' Revisited" (2010) 17:1 Asia-Pacific Rev 47.
[31] Robert Lafrenière Unité permanente anticorruption" (Presentation delivered at the Follow the Money: Corruption, Money Laundering & Organized Crime Conference, Vancouver BC, 28 October 2016).
[32] *Anti-Corruption Act*, SQ c L-6.1.

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held 774 sessions on corruption and improper use of public office, which were attended by over 22,000 public office holders and workers.[33]

As set forth in the *Anti-Corruption Act*, the "mission of the Commissioner is to ensure, on behalf of the State, the coordination of actions to prevent and to fight corruption in contractual matters within the public sector. The Commissioner exercises the functions conferred on the Commissioner by this Act, with the independence provided for in this Act."[34] The Anti-Corruption Commissioner has a mandate to:

- Coordinate investigations in relation to the *Criminal Code*, penal and fiscal law,
- Receive, record and examine disclosures of wrongdoings,
- Make recommendations to governmental and public administrators,
- Play an educative and preventative role in the fight against corruption.[35]

One of the highest profile cases involving UPAC is the arrest and guilty plea of Gilles Vaillancourt, mayor of Laval from 1989 to 2012. Vaillancourt was arrested in 2013 as part of a sweep by UPAC that saw 36 individuals arrested. Following a guilty plea, Brunton J accepted a joint submission for a 6-year prison sentence and restitution of about $7 million, much of which was hidden in Swiss bank accounts.[36]

3.1.3 Guatemala's Unique External Anti-Corruption Commission

The International Commission against Impunity in Guatemala (CICIG) is a ground-breaking reform, making Guatemala the first country to adopt an external foreign body to help fight corruption. CICIG's efforts have led to the arrests of hundreds of individuals, including former President Otto Pérez Molina, who resigned from office and is now imprisoned awaiting trial (as of December 2016). The reforms undertaken in Guatemala could serve as a blueprint for combating corruption in countries where corruption has permeated the highest echelons of civil servants and government employees.

With 15.8 million residents, the Republic of Guatemala is Central America's most populous country. The country endured a civil war from 1960 to 1996 that saw over 200,000 people either killed or "disappeared" at the hands of the government.[37] As Lakhani writes, a "1996

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[33] Lafrenière (28 October 2016).

[34] *Ibid*.

[35] *Ibid.*

[36] Paul Cherry, "Ex-Laval mayor Gilles Vaillancourt pleads guilty to fraud, could face six-year prison term", *National Post* (1 December 2016), online: <http://news.nationalpost.com/news/canada/canadian-politics/ex-laval-mayor-gilles-vaillancourt-pleads-guilty-to-fraud>; "Former Laval mayor Gilles Vaillancourt sentenced to 6 years for Fraud", *Canadian Press* (15 December 2016), online: <http://www.ctvnews.ca/canada/former-laval-mayor-gilles-vaillancourt-sentenced-to-6-years-for-fraud-1.3205149>.

[37] "Guatemala 'Silent Holocaust': The Mayan Genocide" *The Center for Justice and Accountability*, online: <http://cja.org/where-we-work/guatemala/>.

peace deal ended the conflict but not the criminality. Instead, new groups infiltrated politics, security forces and the criminal justice system, operating with almost total impunity."[38] Approximately 6,000 homicides occur in Guatemala annually (about twenty times more than in Canada) and corruption reaches the highest levels of civil servants and elected officials. In 2015, Transparency International scored Guatemala 23/100, ranking it the 123rd worst country based on perceptions of corruption.[39]

Backed by the United Nations, CICIG began operating in Guatemala in 2007. CICIG has a staff of 150 individuals who come from 20 countries and a budget of $12-15 million per year,[40] close to half of which is funded by the US.[41] CICIG's mandate must be extended by the Guatemalan congress every two years, with the current mandate ending in September 2017.[42] CICIG works with the Public Prosecutors Office, National Civil Police and other state institutions to combat crimes committed by clandestine security groups and to implement measures aimed at strengthening the justice system.[43]

While CICIG's efforts are broader than anti-corruption reform, anti-corruption efforts have been prioritized by Iván Velásquez Gómez, CICIG's commissioner since 2012. Velasquez, a former investigating judge of Columbia's Supreme Court, set five priorities for CICIG: 1) contraband; 2) administrative corruption, 3) illegal campaign financing; 4) judicial corruption, and 5) drug trafficking and money laundering.[44]

CICIG had a rocky start. In its first five years, two commissioners resigned due to conflict with the government.[45] A major break-through for CICIG came from an investigation into customs officials taking bribes to reduce duties. Dubbed *La Linea* (the line), the case brought down a president and ignited a social movement. Over the course of eight months, CICIG and the prosecutor's office investigated a network of senior state officials who were alleged to have defrauded customs revenues. The investigation intercepted some 66,000 telephone calls and over 6,000 electronic messages. On April 16, 2015, 21 suspects were arrested.[46] The

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[38] Nina Lakhani, "Guatemalan president's downfall marks success for corruption investigators", *The Guardian* (9 September 2016), online <https://www.theguardian.com/world/2015/sep/09/guatemala-president-otto-perez-molina-cicig-corruption-investigation>.

[39] Transparency International, "Corruption Perceptions Index 2015".

[40] Lakhani, (9 September 2016).

[41] Steven Dudley, "Guatemala's CICIG: An Experiment in Motion Gets a Report Card", *Insight Crime* (24 March 2016), online: <http://www.insightcrime.org/news-analysis/guatemala-cicig-an-experiment-in-motion-gets-a-report-card>.

[42] International Crisis Group, "Crutch to Catalyst? The International Commission Against Impunity in Guatemala" (29 January 2016) at 2, online:< https://www.crisisgroup.org/latin-america-caribbean/central-america/guatemala/crutch-catalyst-international-commission-against-impunity-guatemala>.

[43] International Commission against Impunity in Guatemala, "About Us", online: <http://www.cicig.org/index.php?page=about>.

[44] International Crisis Group (2016) at 6.

[45] *Ibid* at 4-5.

[46] *Ibid* at 7-8.

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network is said to have earned some $328,000 per week. As Mike Allison noted, recouping some or all of this money and preventing reoccurrence of this single scheme would pay for CICIG for several years.[47]

Immediately following *La Línea*, then President Molina asked Congress to extend CICIG's mandate, a move he previously opposed. On September 1, 2015, following months of protests, Congress voted to removed Molina's presidential immunity, a measure that passed 132-0.[48] The following day Molina resigned as president and on September 3, 2015 was arrested and continues to be held awaiting trial.

In the following election, Guatemalan voters demonstrated that they would no longer tolerate corruption in the government. Jimmy Morales, a political outsider and former television comedian, ran for president with a slogan "*Ni corrupto, ni ladrón*" (neither corrupt nor a thief). Morales won the election with 67% of the vote and assumed office in January, 2016.

CICIG serves as both a blueprint for eradicating established practices of corruption and a message of hope that this can be done even where corruption has reached the highest echelons of government. A poll in 2015 found CICIG to be Guatemala's most trusted institution with 66% positive rating, well beyond the trust of the police (26%), judges (25%), Congress (12%) and the Presidency (11%).[49] The success of CICIG has led to calls for similar institutions to be set up in other countries. The Organization of American States and government of Honduras signed an agreement to establish the Support Mission Against Corruption and Impunity in Honduras (MACCIH), which began operating on April 19, 2016.[50] MACCIH has full autonomy and independence to work with government institutions to dismantle corruption and impunity. MACCIH's efforts are focused on: 1) prevention and fighting against corruption, 2) reform of criminal justice, 3) political-electoral reform and 4) public security.[51]

But, on August 27, 2017, the future of CICIG became uncertain when President Jimmy Morales attempted to expel CICIG's highly respected Commissioner, Iván Velásquez. Tensions had arisen between Morales and Velásquez by early 2017 when prosecutors

[47] Lakhani (9 September 2016).
[48] Twenty-six Congress members were absent and did not vote. International Crisis Group, "Crutch to Catalyst? The International Commission Against Impunity in Guatemala" (29 January 2016) at 10, 22 online: <https://www.crisisgroup.org/latin-america-caribbean/central-america/guatemala/crutch-catalyst-international-commission-against-impunity-guatemala>.
[49] *Ibid* at 13.
[50] Honduras scored 31/100 on TI's 2015 corruption index and ranked 112th out of 168 countries. See Transparency International, "Corruption Perceptions Index 2015".
[51] Organization of American States, "Mission to Support the Fight against Corruption and Impunity in Honduras - About the Mission", online: <http://www.oas.org/en/spa/dsdsm/maccih/new/mision.asp>.

charged the President's brother and son with fraud. [52] In late August, 2017, Velásquez and Attorney General Thelma Aldana asked the court to strip Morales of his political immunity so that charges could be brought against him in regard to alleged illegal campaign funding during the 2015 election. Less than 48 hours later, Morales announced via Twitter that he was expelling Velásquez from his position as Commissioner.[53] Several ministers resigned in protest of Morales' bid to fire Velásquez, and international embassies and organizations quickly came out in support of Velásquez.[54] Later that same day, Guatemala's Constitutional Court blocked Morales' attempt to expel Velásquez.[55] However, on September 11, Congress voted to allow Morales to keep his presidential immunity. This controversy has sparked widespread protest among the Guatemalan public who are calling for the resignation of Morales and most members of Congress. On October 8, 2017, supporters of Morales and former President Arzu held a small protest outside of CICIG calling for the ouster of Commissioner Velásquez from the country.[56] On October 10, 2017, the Ministry of Foreign Affairs announced it had revoked Velásquez's visa.[57] His visa was renewed on October 17th for one year although the normal renewal period is two years. It remains to be seen what CICIG's future will be like in the wake of these events.

3.2 Varying Levels of Independence in Anti-Corruption Enforcement

A problem in many developing countries is not only the relative lack of independence of enforcement bodies, but a lack of resources and power. Painter argues that "independence" is overstated as an enforcement body ideal. Independence can be symbolic and is largely irrelevant if the enforcement body lacks the power to truly enforce anti-corruption measures.[58] "[I]n the matter of investigation," writes Painter, "it is the raw operational power of the ACA [anti-corruption agency] that seems to matter, as much if not more than its purported political independence."[59] This sentiment seems to be confirmed by the very low

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[52] Rachel Schwartz, "Guatemala's president tried to expel the U.N. commissioner who announced he was under investigation", *The Washington Post* (6 September 2017), online: <https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/06/guatemalas-president-tried-to-shut-down-a-u-n-commission-that-announced-it-was-investigating-him/?utm_term=.8d55cfcbcb4b>.

[53] Nina Lakhani, "Crisis flares in Guatemala over corruption and organized crime", *The Guardian* (27 August 2017), online: <https://www.theguardian.com/world/2017/aug/27/guatemalan-president-jimmy-morales-order-expel-head-un-body-suspended>.

[54] Lakhani (27 August 2017).

[55] Schwartz (6 September 2017).

[56] Maria Martin, "Guatemalans Confront Government over Its Resistance to Fight Corruption", *NBC News* (10 October 2017), online: <https://www.nbcnews.com/news/latino/guatemalans-confront-government-over-its-resistance-fight-corruption-n805121>.

[57] "CICIG's head has visa revoked", *Breaking Belize News* (11 October 2017), online: <https://www.breakingbelizenews.com/2017/10/11/cicigs-head-visa-revoked/>.

[58] Martin Painter, "Myths of Political Independence, or How Not to Solve the Corruption Problem: Lessons for Vietnam" (May 2014) 1:2 Asia & the Pacific Policy Studies 273-286.

[59] *Ibid* at 279.

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rates of corruption in certain developed countries like Sweden, for example, where enforcement bodies are powerful, but not independent from government. In 2013, Sweden ranked third on Transparency International's Corruption Perception Index, though it has no specialized anti-corruption agency. Like the US and Canada (except Quebec), Sweden's anti-corruption forces are organized as units within the general police force and prosecution service. Comparing Sweden to under-developed countries with systemic corruption problems may be a fool's errand given the wide cultural and economic divide that separates them.[60]

For anti-corruption enforcement bodies, an organizational framework which gives the appearance of independence is no guarantee of effectiveness. Bangladesh is a prime example. In the executive summary from UNCAC's country review report of Bangladesh, the expert team of reviewers concluded that the Anti-Corruption Commission (ACC) in Bangladesh is sufficiently independent because it is comprised of three commissioners who are appointed by the President, are not eligible for reappointment and cannot be removed from their positions unless strict procedures are followed.[61] But this "independence" is superficial at best. In the ACC's investigation of SNC-Lavalin's alleged bribery of Bangladeshi public officials in the Padma bridge case (discussed in Chapter 1), the independence of the ACC was seemingly compromised by the self-interest of high-ranking Bangladeshi politicians.

Bangladesh Minister of Communications Syed Abul Hossain was the most senior public official allegedly involved in the SNC-Lavalin bribery. Ultimate award of the engineering contract required his approval and he allegedly stood to gain $2 million as a bribe (4% of the $50 million contract). In the wake of the bribery allegations, Hossain resigned from his position in the Prime Minister's cabinet, after which the Prime Minister called him a "patriot." Subsequently, Hossain was not charged with bribery as a result of the ACC's investigation. The World Bank convened an external panel of experts to assess the completeness and fairness of the ACC's initial investigation. While agreeing with the ACC's decision to investigate the seven persons who were formally charged, the external panel's final report, issued in February 2013, stated that "there was no legal reason to exclude the name of the former Minister of Communications from the initial list of persons to be investigated…. Thus, as of the date of this report, the Panel cannot conclude that the activity

[60] For an excellent report on the challenges of effective anti-corruption enforcement in developing countries, see Hannes Hechler et al, *Can UNCAC address grand corruption? A political economy analysis of the UN Convention against Corruption and its implementation in three countries* (Chr. Michelsen Institute, U4 Anti-Corruption Resource Centre, 2011), online: <http://www.u4.no/publications/can-uncac-address-grand-corruption/>.

[61] UNCAC Implementation Review Group, *Executive Summary: Bangladesh*, UNODC, 3rd Sess, UN Doc CAC/COSP/IRG/I/1/1/Add.8 (2012), online: <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1254364e.pdf>.

of the ACC constitutes a full and fair investigation." [62] In September 2014, the ACC concluded, however, that no bribery or conspiracy had taken place. It recommended the acquittal of all seven accused persons in spite of what appears to be very convincing evidence collected by the World Bank and Canadian investigators.

According to an article in Bangladesh's leading newspaper, *The Daily Star*, the ACC's politically-motivated decision not to charge Hossain and their final conclusion that no bribery had taken place was not surprising. The *Daily Star claims* these actions just provide further proof of the enforcement body's lack of independence and effectiveness: "[T]he ACC's credibility is mired in controversy once again. Its failure to gather evidence in the Padma bridge case has again proved that the anti-[corruption] watchdog fails to go ahead with the case against individuals enjoying the blessing of the government higher-ups." [63]

Some measure of independence from government is necessary at both the investigatory and prosecutorial stages. For example, it may be counter-productive for an enforcement body that has complete investigatory independence to submit its findings to a governmental prosecution agency, especially if the investigation is into the activities of the prosecutors themselves. In the well-documented corruption case of former Pennsylvania Attorney General Ernie Preate,[64] the Pennsylvania Crime Commission, which investigated Preate, had independent power to begin investigations, interview witnesses under oath, gather evidence, and subpoena financial records. They performed a protracted investigation into Preate despite intense political pressure to refrain from doing so. Eventually, the Commission gathered enough evidence for an airtight case against Preate, but having no prosecutorial authority, they were in the awkward position of lobbying the Pennsylvania Attorney General's office to prosecute the incumbent Attorney General. The Pennsylvania Attorney General's office did not prosecute, but Preate was eventually prosecuted by the federal government for racketeering and corruption offences. He was convicted and sentenced to two year's imprisonment, but not before the Pennsylvania Crime Commission was disbanded by Preate's political allies in the state legislature.

3.3 Investigative and Prosecutorial Bodies

Unlike Hong Kong with its ICAC, the US, UK and Canada (except Quebec) do not have unitary anti-corruption bodies with independence from government and monopolies over

[62] World Bank, *Final Report of the External Panel of Experts Re: The Padma Multipurpose Bridge Project* (2013), (Panel Report), online: <http://pubdocs.worldbank.org/en/245411449174958015/Padma-Bridge-External-Expert-Panel-Final-Report.pdf>.
[63] Shakhawat Liton, "The Patriot and His Friends", *The Daily Star* (13 November 2014), online: <http://www.thedailystar.net/the-patriot-and-his-friends-48085>.
[64] See Chapter 7 of Brad Bumstead's *Keystone Corruption: A Pennsylvania Insider's View of a State Gone Wrong* (Camino Books, 2013).

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law enforcement. Each of these countries has multiple national agencies working together to combat domestic and international corruption.

The following descriptions of the US, UK and Canadian anti-corruption law enforcement structures are derived from the executive summaries of UNCAC's country review reports, which form part of the first cycle of the UNCAC review mechanism. The UNCAC review mechanism was briefly discussed in Chapter 1.

3.3.1 US

The following excerpt is from the UNCAC *Country Review Report of the United States of America*:

BEGINNING OF EXCERPT

Primary responsibility for enforcement aspects of the UNCAC lies with the U.S. Department of Justice (DOJ).

Regarding corruption of domestic officials, DOJ has a dedicated unit within its Criminal Division in Washington, D.C., the Public Integrity Section, which specializes in enforcing the nation's anti-corruption laws. The promotion and implementation of the prevention provisions of [UNCAC] Chapter II are carried out by a number of government entities through a variety of systems and programs.

DOJ's Public Integrity Section was created in 1976 to consolidate into one unit DOJ's responsibilities for the prosecution of criminal abuses of the public trust by government officials. The Section currently has 29 attorneys working full-time to prosecute selected cases involving federal, state, or local officials, and also to provide advice and assistance to prosecutors and investigators in the 94 United States Attorneys' Offices around the country. The Criminal Division supplements the resources available to the Public Integrity Section with attorneys from other sections within the Criminal Division - including the Fraud, Organized Crime and Racketeering, Computer Crimes and Intellectual Property, and Asset Forfeiture and Money Laundering sections, to name just four – and from the 94 U.S. Attorneys Offices.

The United States federal judicial system is broken into 94 separate districts, 93 of those districts are assigned a senior prosecutor (called the United States Attorney, who is an official of DOJ) and a staff of prosecutors to enforce federal laws in that district. (One U.S. Attorney serves in two districts.) Those offices, in addition to the Public Integrity Section, also enforce the United States anti-corruption laws.

DOJ has also dedicated increased resources to combating domestic public corruption. The Federal Bureau of Investigation, for example, currently has 639 agents dedicated to investigating public corruption matters, compared to 358 in 2002. Using these resources, DOJ aggressively investigates, prosecutes, and punishes corruption of and by public officials at all levels of government (including local, state, and national public officials), in all branches of government (executive, legislative, and judicial), as well as individuals from major United States political parties.

For example, DOJ recently convicted one former Member of Congress of substantial public corruption charges, and has indicted a sitting Member of Congress on significant corruption and other charges. DOJ also recently convicted two former state governors of bribery offences, and conducted a large-scale bribery investigation into the activities of a well-known Washington, D.C. lobbyist. To date, that investigation has netted a total of 11 bribery-related convictions. Those convictions have included a guilty plea by the former Deputy Secretary of the Department of the Interior and the jury conviction of a former official of the United States General Services Administration, among others.

Statistically, DOJ has increased its enforcement efforts against public corruption in recent years. Over the period from 2003 to 2009 (the most recent period for which data is available), the Department charged 8,203 individuals with public corruption offences nationwide and obtained 7,149 convictions. In addition, over the five-year period from 2001 to 2005, the Department charged 5,749 individuals with public corruption offences nationwide and obtained 4,846 convictions. Compared with the preceding five year period from 1996-2000, the 2001-2005 figures represent an increase of 7.5 percent in the number of defendants charged and a 1.5 percent increase in the number of convictions.

Three governmental agencies have primary responsibility for the prosecution of bribery of foreign officials: the DOJ's dedicated foreign bribery unit within the Criminal Division's Fraud Section; the Federal Bureau of Investigations (FBI) International Anti-Corruption Unit; and the Securities and Exchange Commission's (SEC) dedicated foreign bribery unit. The Foreign Corrupt Practices Act (FCPA) Unit of the Fraud Section of the DOJ Criminal Division handles all criminal prosecutions and for civil proceedings against non-issuers, with investigators from the FCPA Squad of the Washington Field Office of the FBI. The Fraud Section formed its dedicated unit in 2006 to handle prosecutions, opinion releases, interagency policy development, and public education on the foreign bribery offense. In total, the Fraud Section has the equivalent of 12-16 attorneys working full-time on FCPA matters. The goal is to increase this figure to 25.

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Prosecutors from a local United States Attorney's Office and the Asset Forfeiture and Money Laundering Section often assist in specific cases.

In 2008, the FBI created the International Corruption Unit (ICU) to oversee the increasing number of corruption and fraud investigations emanating overseas. Within the ICU, the FBI further created a national FCPA squad in its Washington, D.C. Field Office to investigate or to support other FBI units investigating FCPA cases. The United States Department of Homeland Security also has a specialized unit dedicated to the investigation and prosecution of foreign corruption.

The SEC Enforcement Division is responsible for civil enforcement of the FCPA with respect to issuers of securities traded in the United States. In January 2010, the Division created a specialized FCPA unit with approximately 30 attorneys. In addition, the SEC has other trained investigative and trial attorneys outside the FCPA Unit who pursue additional FCPA cases. The FCPA Unit also has in-house experts, accountants, and other resources such as specialized training, state-of-the-art technology and travel budgets to meet with foreign regulators and witnesses.

…

Beyond domestic efforts, the United States works internationally to build and strengthen the ability of prosecutors around the world to fight corruption through their overseas prosecutorial and police training programs. Anti-corruption assistance programs are conducted bilaterally and regionally, including at various U.S.-supported International Law Enforcement Academies established in Europe, Africa, Asia and the Americas. Assistance efforts involve the development of specialized prosecutorial and investigative units, anti-corruption task forces, anti-corruption commissions and national strategies, internal integrity programs, and specific training on how to investigate and prosecute corruption.

For example, DOJ, in coordination with the Department of State, sends experienced U.S. prosecutors and senior law enforcement officials to countries throughout the world to provide anti-corruption assistance, both on short term and long term assignments. On a long term basis, DOJ has posted Resident Legal Advisors (RLA's) and Senior Law Enforcement Advisors (SLEA's) throughout the world to work with partner governments on anti-corruption efforts and to assist our partners with building sound and fair justice systems and establishing non-corrupt institutions. They provide specialized anti-corruption assistance, tailored to partner country needs, including pilot programs on asset recovery. They offer expertise on a broad array of anti-corruption measures, such as legislative drafting and institutional development, through consultations, workshops, seminars and training programs. DOJ's international assistance programs are coordinated by the Criminal Division's

Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) and International Criminal Training Assistance Program (ICITAP).[65]

END OF EXCERPT

In April, 2016, the DOJ announced an enhanced *FCPA* enforcement strategy. Part of the strategy involved increasing enforcement resources. The Fraud Section of the DOJ increased its *FCPA* unit in excess of 50% by adding 10 more prosecutors, while the FBI established three new squads dedicated to *FCPA* enforcement. The new strategy also emphasized strengthening coordination with foreign counterparts.[66]

3.3.2 UK

The following excerpt is from the UNCAC *Country Review Report of the United Kingdom*:

BEGINNING OF EXCERPT

b) Law enforcement agencies which play a role in tackling corruption

87. The Attorney General for England and Wales (with his deputy known as the Solicitor General) is the Minister of the Crown responsible in law for superintending the main prosecuting authorities, the Crown Prosecution Service (CPS), headed by the Director of Public Prosecutions (DPP), and the Serious Fraud Office (SFO), headed by its Director (previously also the Revenue and Customs Prosecutions Office, which has been merged with the CPS since 1 January 2010). A protocol was published in July 2009 which sets out the relationship between Attorney General and the Director of Public Prosecutions and the Director of the Serious Fraud Office. The Attorney General for England and Wales also holds the separate office of Advocate General for Northern Ireland. Northern Ireland has its own Attorney General.

[65] From *Review by Sweden and the Former Yugoslav Republic of Macedonia of the implementation by the United States of America of Articles 15 – 42 of Chapter III. "Criminalization and law enforcement" and Articles 44 – 50 of Chapter IV. "International cooperation" of the United Nations Convention against Corruption for the review cycle 2010 - 2015* (United Nations Office on Drugs and Crime, 2013) at 17-19, online: <http://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2013_11_19_USA_Final_Country_Report.pdf>. Reprinted with the permission of the United Nations. For more on US enforcement bodies see chapter 10 of Robert W Tarun, *The Foreign Corrupt Practices Act Handbook*, 3rd ed (ABA Publishing, 2013).

[66] Andrew Weissman, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance" (U.S. Department of Justice Criminal Division, 5 April 2016) at 1, online: <https://www.justice.gov/criminal-fraud/file/838416/download>.

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88. In England, Wales and Northern Ireland, prosecutions for offences under the main anti-corruption legislation, The Bribery Act 2010, require the personal consent of the Director of one of the main prosecuting authorities (The Director of Public Prosecutions, the Director of Public Prosecutions for Northern Ireland, the Director of the Serious Fraud Office, or the Director of Revenue and Customs Prosecutions). This replaced a previous requirement for the consent of the Attorney General.

89. In Scotland, the head of prosecutions is the Lord Advocate, who supervises the work of the Crown Office and Procurator Fiscal Service (COPFS or Crown Office), with the other Law Officer, the Solicitor General. In Scotland, most serious corruption cases are handled by the Serious and Organised Crime Division contained within the Crown Office. In appropriate cases Crown Office works closely with UK agencies; protocols are in place between COPFS and CPS and also between COPFS and SOCA. A protocol is also being developed between COPFS and the SFO regarding a number of matters. Some orders (e.g. those under the Proceeds of Crime Act) can be enforced across the UK. Otherwise a procedure is in place for Scottish warrants to be backed by a magistrate in England and Wales before enforcement.

90. The Public Prosecution Service (PPS) is the principal prosecuting authority in Northern Ireland. In addition to taking decisions as to prosecution in cases investigated by the police in Northern Ireland, it also considers cases investigated by other statutory authorities, such as HM Revenue and customs. The PPS is headed by the Director of Public Prosecutions for Northern Ireland.

91. The Serious Fraud Office (SFO) is responsible for investigating and prosecuting serious or complex fraud cases, and is the lead agency in England and Wales for investigating and prosecuting cases of overseas corruption. Approximately 100 investigators work in the SFO's Bribery and Corruption Business Area. This investigates and prosecutes both domestic and foreign corruption cases. The SFO's Proceeds of Crime Unit is responsible for the restraint, freezing and confiscation of assets both in relation to suspected fraud and corruption cases.

92. The UK police service comprises 52 territorial police forces (43 for England and Wales, eight for Scotland - soon to be reduced to one - and one in Northern Ireland), along with four special police forces: the Ministry of Defence Police, the British Transport Police Force, the Civil Nuclear Constabulary, and the Scottish Drug Enforcement Agency. Police in the Crown Dependencies of Jersey and Guernsey are members of the UK Police Service, even though they are outside the UK prosecutorial system. Corruption-related specialised units exist within the Metropolitan Police ("the Met") and the City of London police (CoLP). The City of London Police, based in London's financial centre, is the UK's National Lead Police Force for Fraud. In addition to an Economic Crime Department the CoLP has an Overseas Anti-Corruption Unit, sponsored by DFID, which, alongside the SFO, handles all UK

international foreign corruption cases. The Metropolitan Police has a Proceeds of Corruption Unit that investigates foreign Politically Exposed Persons (PEPs) committing theft of state assets. It also has a Fraud Squad that investigates domestic corruption in the public sector.

93. The Independent Police Complaints Commission (IPCC) was established by the Police Reform Act 2002 and began work on 1 April 2004. The IPCC deals with complaints and allegations of misconduct against the police in England and Wales. The IPCC has a Lead Commissioner for corruption and an Operational Lead for corruption at Director Level. The Police Complaints Commissioner for Scotland and the Police Ombudsman for Northern Ireland are the independent equivalents of the IPCC in Scotland and Northern Ireland respectively.

94. The Serious Organised Crime Agency (SOCA) was established by the Serious Organised Crime and Police Act 2005 (SOCPA). Its functions are set out in that Act and (in relation to civil recovery functions) in the Serious Crime Act 2007. The functions are to prevent and detect serious organised crime; to contribute to its reduction in other ways and the mitigation of its consequences; and to gather, store, analyse and disseminate information on organised crime. SOCA works in close collaboration with UK intelligence and law enforcement partners, the private and third sectors, and equivalent bodies internationally. In Scotland, the SCDEA has a primary role in preventing and detecting serious organised crime. SOCA houses the UK's Financial Intelligence Unit (UKFIU). The unit has national responsibility for receiving analysing and disseminating financial intelligence submitted through the Suspicious Activity Reports (SARs) regime, and receives over 200,000 SARs a year. These are used to help investigate all levels and types of criminal activity, from benefit fraud to international drug smuggling, and from human trafficking to terrorist financing. SOCA also has an Anti-Corruption Unit which supports UK partners (police and/or prosecutors) in tackling corruption that enables organised crime and works to increase knowledge of the use of corruption in support of organised crime. The unit also tackles corruption directed against SOCA, or public sector corruption impacting on SOCA.

95. The Financial Services Authority (FSA) regulates most of the UK's financial services sector. It has a wide range of rule-making, investigatory and enforcement powers in order to meet its statutory objectives, which include the reduction of the extent to which it is possible for a financial business to be used for a purpose connected with financial crime. Financial crime includes fraud and dishonesty, money-laundering and corruption.

96. The FSA does not enforce the Bribery Act. However, authorised firms are under a separate, regulatory obligation to identify and assess corruption risk and to put in place and maintain policies and processes to mitigate corruption risk. The FSA can

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take regulatory action against firms who fail adequately to address corruption risk; for example, the FSA has fined two firms for inadequate anti-corruption systems and controls. The FSA does not have to obtain evidence of corruption to take action against a firm.

97. Plans were published in June 2011 which set out in more detail plans to create in 2013 a new National Crime Agency (NCA) to enhance the UK law enforcement response to serious and organised criminality. The NCA will be UK-wide and will respect the devolution of powers to Scotland and Northern Ireland. Building on the capabilities of SOCA, the NCA will comprise of distinct operational Commands including an 'Economic Crime Command' (ECC) dealing with economic crimes (defined as including fraud, bribery and corruption). The ECC is planned to provide a national strategic and coordinating role with respect to the collective response to fraud, bribery and corruption across the UK organisations tackling these areas, which includes police forces, SFO, CPS, FSA, the Office of Fair Trading, Department for Business, Innovation and Skills, Her Majesty's Revenue and Customs and the Department for Work and Pensions. It will also have operational investigative capabilities focused on fraud, bribery and corruption linked to the areas of criminality which are the focus of the NCA's other Commands organised crime, border policing and the child exploitation and online protection centre (CEOP).

98. There are a number of coordination groups which bring together the different agencies working on international corruption issues. The Politically Exposed Persons (PEPs) Strategic Group, which meets quarterly, provides a strategic lead and coordinates government departments and agencies to tackle money laundering by corrupt PEPs. With the planned creation of the NCA in 2013, a new group was established in 2012 to interface between the NCA build on economic crime and the DFID-funded cross-agency work on international anti-corruption. This is the International Corruption Intervention Group which co- ordinates activity between the DFID funded overseas corruption units (the Metropolitan Police Service Proceeds of Corruption Unit; the City of London Police Overseas Anti- Corruption Unit and the Serious Organised Crime Agency International Corruption Intelligence Cell).[67]

END OF EXCERPT

[67] UNCAC, Reviewers from Greece and Israel, Review Cycle 2011-2012, online: <https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/UK_Final_country_review_report_18.3.2013.pdf>. For more on UK enforcement bodies, see Nicholls et al, (2011) ch 7.

The NCA replaced the SOCA in 2013. Corruption investigations are overseen by the NCA's Economic Crime Command. For a list of the NCA's activities in its first year of operations, see: <http://www.nationalcrimeagency.gov.uk/publications/525-factsheet-results-of-nca-led-and-coordinated-activity-in-our-first-year-of-operation/file>. Additionally, the City of London Overseas Anti-Corruption Unit, established in 2006 and funded by the Department for International Development, investigates corruption and bribery in developing countries.

3.3.3 Canada

The following extract is from the Executive Summary of the *Review of Implementation of the United Nations Convention against Corruption*:

> Specialized services responsible for combating economic crimes and corruption have been established in the Royal Canadian Mounted Police ("RCMP"). In February 2005, the RCMP appointed a commissioned officer to provide functional oversight of all RCMP anti-corruption programmes. The corruption of foreign public officials is specifically referenced in the RCMP Commercial Crime Program's mandate, which includes major fraud cases and corruption offences.
>
> In 2008, the RCMP established the International Anti-Corruption Unit, which comprises two seven-person teams based in Ottawa and Calgary. This structure is currently undergoing a reorganization process to make available additional resources and expertise in the investigation of corruption and other complex cases in the newly established Sensitive Investigations Unit. The Unit's mandate will include carrying out investigations of the CFPOA of Canada, related criminal offences and assisting foreign enforcement agencies or governments with requests for international assistance (asset recoveries and extraditions).[68]

The RCMP also promotes its work by developing educational resources for external partners using information pamphlets and posters that describe the RCMP's work and the negative effects of corruption for distribution and presentation to Canadian missions abroad.

In 2013, the RCMP disbanded the International Anti-Corruption Units and reorganized their resources for investigating corruption. Under the RCMP's newly created "National Division," corruption investigations are handled by the Sensitive and International

[68] UNODC, 5th Session of Implementation Review Group (Vienna, June 2014) at 2–6. Reviewing countries: Switzerland and Iraq, online: <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1400913e.pdf>.

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Investigations Section or they are assigned to Calgary's Financial Integrity Unit. Procunier summarizes the 2013 changes as follows:

> Offences that fall under the *Corruption of Foreign Public Officials Act* (CFPOA) are either brought to the attention of Calgary's financial integrity unit or the Sensitive and International Investigations Section of the RCMP in Ottawa's National Division.
>
> In Ottawa, members of the division's former international anti-corruption unit (IACU) work among four teams of investigators who investigate the many corruption complaints they receive. Depending on the nature, impact and priority of a given complaint, a team of investigators is assigned a file to work on and carry forward.
>
> Being so close to the seat of the federal government, Ottawa's unit is often called upon to deal with other sensitive cases that may have national and international political implications.
>
> "Politically sensitive cases or financial crimes that are rooted in Canada with international connections would come to us," says Sgt. Patrice Poitevin, senior investigator and outreach coordinator for the Sensitive and International Investigations Section.[69]
>
> The section is currently involved in a number of ongoing investigations, such as the SNC Lavalin file, which has national and international implications.

In my view, it remains to be seen whether this disbanding and reorganization of the two anti-corruption units will result in the devotion of more or less police investigation time to allegations of foreign corruption, versus other types of politically sensitive or large scale financial crime cases. In addition, unlike other areas of the criminal law in Canada, provincial enforcement agencies are not able to share investigative and prosecutorial tasks for breaches under the *CFPOA*. Restricting the burden of investigation and prosecution to the RCMP has the potential to hamper enforcement capability.[70]

In 2006, the Public Prosecution Service of Canada (PPSC) was created, and it discharges the criminal prosecution mandate of the Attorney General of Canada. Unlike the former Federal Prosecution Service (FPS), the PPSC is not a part of the Department of Justice. The PPSC is an independent organization, reporting to Parliament through the Attorney General of Canada.

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[69] Mallory Procunier, "A Little Payment Here, a Little Gift There" (2013) 75:3 Gazette Magazine 9.
[70] Anne-Marie Lynda Boisvert et al, "Corruption in Canada: Definitions and Enforcement", Report No 46, prepared for Public Safety Canada by Deloitte LLP (Her Majesty the Queen in Right of Canada, 2014) at 46.

Unlike in the US, Canadian securities regulation authorities cannot investigate and prosecute *CFPOA* breaches and have not undertaken administrative enforcement proceedings for foreign corrupt practices.[71] Transparency International Canada recommends that Canada involve provincial securities regulators in *CFPOA* enforcement in a similar manner to the US Securities Exchange Commission.[72]

3.4 Cooperation Agreements between State Parties and between Enforcement Bodies

International cooperation between State Parties and between enforcement bodies is an integral part of investigating international corruption. The *Legislative Guide* to UNCAC summarizes it well:

> Ease of travel from country to country provides serious offenders with a way of escaping prosecution and justice. Processes of globalization allow offenders to more easily cross borders, physically or virtually, to break up transactions and obscure investigative trails, to seek a safe haven for their person and to shelter the proceeds of crime. Prevention, investigation, prosecution, punishment, recovery and return of illicit gains cannot be achieved without effective international cooperation.[73]

Recognizing this, Article 46 of UNCAC and Article 9 of the OECD Convention require State Parties to provide Mutual Legal Assistance (MLA) to other State Parties investigating and prosecuting corruption. See Chapter 5, Section 6 for a more thorough description of MLA. See also Section 2.2.6 above, for a discussion of cooperative investigations across borders.

In brief, MLA may take the form of bilateral agreements between States, multilateral agreements between multiple States, or, in the absence of formal agreements, States can and do informally provide MLA to each other. Article 46(30) of UNCAC states that:

> States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

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[71] Wendy Berman and Jonathan Wansbrough, "A Primer on Canada's Foreign Anti-Corruption Enforcement Regime" (Cassels, Brock & Blackwell LLP, 2014) at 16, online: <http://www.mondaq.com/canada/x/345442/White+Collar+Crime+Fraud/Risky+Business+A+Primer+on+Canadas+Foreign+AntiCorruption+Enforcement+Regime>.

[72] Transparency International Canada has noted that this lack of availability of conditional sentences or discharges is problematic for the prosecution of less severe violations of the *CFPOA*. See Transparency International Canada, *Review of Canada's Implementation of UNCAC* (October 2013) at 11.

[73] Legislative Guide (2012) at 143.

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In addition to MLA, which often involves the bureaucratic formalities of state-to-state communication, Article 48 of UNCAC requires cooperation between State Parties' law enforcement bodies (police-to-police). Article 48(2) recommends that the law enforcement bodies of State Parties enter into direct bilateral or multilateral cooperation agreements with other State Parties' enforcement bodies to streamline international corruption investigations and prosecutions.

The International Foreign Bribery Task Force (IFBTF) is an example of a multilateral police-to-police agreement between enforcement bodies. Australia, Canada, the UK and the US signed a memorandum of understanding in May 2013 to create the IFBTF. It was formed to support the four countries' commitments to mutual legal assistance under the OECD Convention and UNCAC. Under the terms of the agreement, the Australian Federal Police, Canadian RCMP, City of London Police's Overseas Anti-Corruption Unit, and the FBI commit to working collaboratively to strengthen investigations into foreign bribery crimes by providing an efficient means of sharing knowledge, skills and methodologies, as well as providing swift assistance to one another.

4. INVESTIGATING CORRUPTION: INTERNAL AND EXTERNAL INVESTIGATIONS

For the purposes of this section, it is important to distinguish between internal and external corruption investigations. External investigations are those performed by public enforcement bodies into allegations of corruption against individuals and corporations, while internal investigations are conducted internally by a company's board, management, or in-house counsel as part of that company's internal compliance program or in response to reports of corruption within their own company. Internal compliance programs are discussed at length in Chapter 8 of this book on the role of the corporate lawyer. In brief, most large corporations have internal compliance programs to monitor the legality of their international business activities and to prevent violations of anti-corruption legislation. As discussed below in Section 6.2.1 on criminal charges, evidence of a corporation's strong internal compliance program (including accounting procedures and controls) can serve as an affirmative defence to a corruption charge under the UK *Bribery Act*. In prosecutions under the *FCPA*, evidence of a corporation's strong internal compliance program and cooperation with external investigations is often the basis for not charging the corporation, entering into a deferred prosecution agreement, or reducing the sentence in cases where bribery convictions are obtained. There are additional reasons why a company would choose to conduct an internal investigation:

- To convince enforcement bodies to use prosecutorial discretion not to bring charges;
- To gather evidence and prepare a defence or negotiation strategy for prosecutions, enforcement actions and/or litigation with shareholders;

- To fulfill management's fiduciary duty to the company's shareholders and satisfy shareholder concerns;
- To assess the effectiveness of internal accounting procedures.

The board may hire outside counsel to conduct or manage the internal investigation. There is a significant financial cost incurred when a company is subject to a corruption investigation. As Koehler notes, before settling with a company, enforcement agencies will ask where else the conduct may have occurred, necessitating a team of lawyers, forensic accountants and other specialists to travel and investigate around the world. Avon, which settled with the SEC and DOJ for $135 million, spent $350 million in pre-enforcement expenses from 2009-2011.[74] Insurance carriers have responded with products covering investigation costs during corruption investigations.[75] For more on the costs of investigations see Chapter 7, Section 4.7.

The following sections briefly discuss sources and methodologies of both internal and external investigations.

4.1 Sources of Internal Investigations

4.1.1 Anonymous Sources and Whistleblowers

Robust internal compliance programs (discussed more fully in Chapter 8) generally include a mechanism for receiving anonymous reports from employees or others about suspected corrupt conduct. In the US, the *Sarbanes-Oxley Act* of 2002, which was enacted in response to the highly publicized accounting scandals at Enron and Worldcom, requires publicly traded corporations to provide an anonymous channel for whistleblowing employees to report wrongdoing. Additionally, the *FCPA Resource Guide*[76] states that "[c]ompanies may employ, for example, anonymous hotlines or ombudsmen" to satisfy the anonymous reporting mechanism requirement.

The following is an example of an internal investigation that was initiated after receiving tips from an anonymous source and an employee whistleblower. The excerpt is from a 2011 annual financial report filed by the Goodyear Tire & Rubber Company with the SEC:

> In June 2011, an anonymous source reported, through our confidential ethics hotline, that our majority-owned joint venture in Kenya may have made certain improper payments. In July 2011, an employee of our

[74] Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Edward Elgar, 2014) at 178.
[75] Lawrence J Trautman & Kara Altenbaumer-Prince, "Lawyers, Guns, and Money: The Bribery Problem and the U.K. Bribery Act" (2013) 47 Int'l Law 481 at 512.
[76] *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Department of Justice and Securities Exchange Commission, 2012), online: <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>.

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> subsidiary in Angola reported that similar improper payments may have been made in Angola. Outside counsel and forensic accountants were retained to investigate the alleged improper payments in Kenya and Angola, including our compliance in those countries with the U.S. Foreign Corrupt Practices Act. We do not believe that the amount of the payments in question in Kenya and Angola, or any revenue or operating income related to those payments, are material to our business, results of operations, financial condition or liquidity.
>
> As a result of our review of these matters, we have implemented, and are continuing to implement, appropriate remedial measures and have voluntarily disclosed the results of our initial investigation to the U.S. Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"), and are cooperating with those agencies in their review of these matters. We are unable to predict the outcome of the review by the DOJ and SEC.[77]

In early 2015, the SEC charged Goodyear Tire & Rubber Company with violating the books and records provisions of the *FCPA* because of the bribes discussed above.[78] Goodyear neither admitted nor denied the allegations, but agreed to pay more than $16 million to settle the charges.[79] The SEC credited Goodyear for the "company's self-reporting, prompt remedial acts, and significant cooperation with the SEC's investigation."[80] Furthermore, Goodyear announced that the Department of Justice closed their inquiry and would not be charging the company with any criminal offences.[81]

4.1.2 Internal and External Accounting

As discussed in Chapter 2, "books and records" offences are an integral part of anti-corruption legislation. In order to satisfy the general accounting requirements of anti-corruption legislation and various other regulatory provisions, such as the provisions of the US *Security and Exchange Act*, public corporations are obliged to perform regular internal and external audits and regularly release published accounts of their business performance.

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[77] United States Securities and Exchange Commission, Form 10-K Annual Report of Goodyear Tire & Rubber Company (2012) at 20-21, online: <http://www.sec.gov/Archives/edgar/data/42582/000095012313000902/gt-123112x10k1.htm>.

[78] United States Securities and Exchange Commission, Press Release, "SEC Charges Goodyear with FCPA Violations" (24 February 2015), online: <http://www.sec.gov/news/pressrelease/2015-38.html>.

[79] *Ibid.*

[80] *Ibid.*

[81] United States Securities and Exchange Commission, Form 10-K Annual Report of Goodyear Tire & Rubber Company (2014) at 20, online: <https://www.sec.gov/Archives/edgar/data/42582/000095012315002527/gt-q4201410k.htm>. Although there has been no official confirmation of this by the DOJ, it is likely accurate, as the DOJ usually announces charges simultaneously with SEC settlements.

Auditors may discover accounting discrepancies that suggest corruption activity, leading to an internal investigation.

4.1.3 Competitor Complaints

Corrupt behaviour often occurs in situations (such as public tendering processes) where a company is in direct competition with other companies and seeks to gain an advantage over them. Indeed, as discussed in Chapter 1, the OECD Convention is specifically focused on corrupt behaviour which confers an improper business advantage. Any improper advantage necessarily disadvantages the company's business competitors. If these competitors suspect that a company is gaining an advantage through corruption—for example, that a contract is awarded to a company because it bribed a public official—the competitors are motivated to report their suspicions to the management of the company or to the relevant enforcement bodies.

Whether a competitor reports its suspicions to the competing company itself or to law enforcement depends on factors like the seniority of the employees under suspicion and the perceived strength of a company's internal compliance program. Interestingly, in Dow Jones' "Anti-Corruption Survey Results 2014," only 33% of companies surveyed reported ever having lost business to competitors because of corruption, and this number appears to be falling.[82] While a majority of the companies agreed that bribery should always be reported, only 13% of companies reported ever having taken action against a corrupt competitor.

4.1.4 Reports of External Investigations

A company may not realize it is under suspicion for corruption until it learns that an external enforcement body is conducting an investigation into its actions and the actions of its employees. Companies learn of external investigations through a variety of sources: media reports, search warrants, subpoenas, arrest reports, etc. When a company learns that an external investigation is underway, it should immediately initiate its own internal investigation, preserve documents, interview witnesses and generally cooperate with the external enforcement bodies in order to gain cooperation credit. See Chapters 7 and 8 for more on this point.

4.1.5 Other Sources

A company may be alerted to the corrupt behaviour of its employees through various other sources. For example, the notable *FCPA* case *US v. Kay* began in a singular way:

> In 1999 ARI [Kay's and Murphy's employer] retained a prominent Houston law firm to represent it in a civil suit. Preparing for this suit, the lawyers

[82] Dow Jones, *Anti-Corruption Survey Results 2014*, Online: <http://images.dowjones.com/company/wp-content/uploads/sites/15/2014/04/Anti-Corruption-Survey-Results-2014.pdf>.

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> asked Kay for background information on ARI's rice business in Haiti. Kay volunteered that he had [made or authorized payments to Haitian customs officials], explaining that doing so was part of doing business in Haiti. Those lawyers informed ARI's directors. The directors self-reported these activities to government regulators.
>
> The SEC launched an investigation into ARI, Murphy, and Kay. Murphy and Kay were eventually indicted on twelve counts of violating the *FCPA*.[83]

4.2 Internal Investigations by Corporations: Five Basic Steps

As discussed above, corporations are motivated to fully investigate reports of corruption against their own officers and employees and to voluntarily disclose the results of those investigations to the relevant enforcement authorities. Internal investigations may show that there was no wrongdoing or that the corporation met the standard of care required for an affirmative defence to corruption charges under the UK *Bribery Act*. At the least, internal investigations could mitigate the sanctions imposed under various other corruption statutes. Additionally, corporations are motivated to internally investigate reports of corruption rather than suffer the hardship and ignominy of external investigations by the relevant enforcement bodies. In order to accomplish all of this, an internal investigation must be carried out in a thorough and logical manner such that external auditors and enforcement bodies will accept the findings of the internal investigation. In serious cases, it is highly advisable to hire external counsel known to the enforcement body for high competence and unquestioned integrity to conduct the internal investigation. The following summary of the five basic steps for meeting a standard of thoroughness and precision in an internal investigation is based on Tarun's, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*.[84]

4.2.1 Determine the Scope of the Allegation

Understanding the nature and scope of the allegation is vital to engaging in a logical and adequate investigation. For example, if it is alleged that a regional manager who has overseen the company's business operations in Southeast Asia for the past five years bribed a public official in Malaysia, the scope of the investigation should include all the company's business activities in Southeast Asia for the past five years. Narrowly focusing on recent activities in Malaysia alone would likely be inadequate to accomplish the company's goal of discovering all of its corruption-related liabilities. An investigation with inadequate scope will not be credible to the relevant enforcement bodies and will not garner the same mitigation of sanctions as a more thorough investigation.

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[83] *US v Kay*, 513 F (3d) 432 (5th Cir 2007), online: <http://www.justice.gov/criminal/fraud/fcpa/cases/kayd/10-24-07kay-5th-circuit-opinion.pdf>.

[84] Robert W Tarun, *The Foreign Corrupt Practices Act Handbook*, 3rd ed (American Bar Association, 2013).

4.2.2 Develop the Facts through Interviews and Document Review

Prompt action is required to preserve documentation and to interview witnesses upon learning of corruption allegations. When assessing the cooperation of a company, public enforcement bodies evaluate how promptly and effectively the internal investigation secured both documentary and electronic evidence.

Forensic accounting firms should be hired to assist in performing thorough searches of company communications, financial records and public information. Comprehensive email searches have become standard in the contemporary context and must be thorough to establish a credible investigation.

4.2.3 Assess Jurisdictional and Legal Issues

The company must assess suspected corrupt acts in light of the overlapping application of anti-corruption legislation in different jurisdictions. For example, if the company's activities fall under concurrent US and UK jurisdiction under the *FCPA* and the *Bribery Act*, the company's legal strategy will be different than if the UK has jurisdiction alone. Legal issues discussed in Chapters 2 and 3, such as jurisdiction, party liability, corrupt intent, knowledge, vicarious liability, and defences, will need to be considered in light of the specific legislation violated by the alleged corrupt activities. Additionally, negotiating settlement agreements and mitigated sanctions will differ depending on which enforcement bodies have jurisdiction.

4.2.4 Report to the Company

Once internal investigators have gathered all possible evidence and considered the jurisdictional and legal issues, the next step is consulting with the company, whether that be an individual executive, board of directors or other committee. At this stage, various decisions must be made, including whether the company will voluntarily disclose information to the relevant enforcement bodies, terminate the employment of individuals involved, repudiate business contracts, or attempt to negotiate deferred prosecution or non-prosecution agreements.

4.2.5 Recommend and Implement Remedial Measures

The case of German conglomerate Siemens provides a model response for companies who discover corruption liabilities. A massive multinational company with 400,000 employees operating in 191 countries, Siemens implemented remedial measures on a grand scale after it became public that they were involved in widespread and systematic corrupt business activities. While the penalties imposed on Siemens were enormous (combined penalties of over $1.6 billion including the largest *FCPA* fine ever imposed), the SEC and DOJ applauded Siemens for their extensive global investigation, the overhaul of their internal compliance program and the implementation of a state of the art anti-corruption compliance program. In order to conduct their investigation, Siemens retained over 300 lawyers, forensic analysts

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and others to untangle transactions all over the world, with lawyers and an outside auditor accumulating 1.5 million billable hours.[85] Siemens now employs hundreds of full-time compliance personnel.[86]

The lesson for all companies, whether they have 10 employees or 400,000, is that the implementation of thorough and effective remedial measures can positively sway public opinion and the good graces of enforcement bodies. The final step in any internal investigation should be to assess what remedial measures should be taken and recommend their implementation to the company's executives, board of directors, or compliance committee.

4.3 Sources of External Investigations

Corruption activity which leads to an external investigation may be detected proactively or reactively. Proactive detection involves undercover investigation, wire taps, integrity testing and other forms of intelligence interception gathered by special investigative techniques, discussed below. Reactive detection, however, is by far the most common origin of external investigations; enforcement bodies are advised of corruption activity by a credible source and based on that information, they launch an investigation.

4.3.1 Voluntary Disclosures

According to Koehler, "voluntary disclosures are the single largest source of corporate *FCPA* enforcement actions."[87] This reflects the reality that corporations, especially those with internal compliance programs and various regulatory auditing requirements, are in the best position to know whether they have committed any corruption offences. Additionally, the DOJ and the SEC strongly encourage voluntary disclosures and advise corporations that if they disclose violations and cooperate with enforcement, they may escape prosecution in some circumstances or their penalties will be significantly less severe.[88] According to

[85] Siri Schubert, "At Siemens, Bribery Was Just a Line Item", *The New York Times* (21 December 2008), online: <http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html>.
[86] The long list of Siemens' remedial measures is detailed in Tarun (2013) at 239-240.
[87] Koehler (2014) at 173.
[88] In the Canadian context, one could ask whether the new owners of Griffiths Energy International, who voluntarily disclosed bribes in Chad, received any significant reduction in sentence, compared to Niko Resources, which did not self-disclose. Griffiths paid $10.35 million (fine) whereas Niko Resources paid nearly $9.5 million (fine and victim surcharge). Griffiths also spent $5 million on its internal investigation, which it turned over to the RCMP, saving the RCMP a significant amount of money, whereas Niko Resources cost the RCMP approximately $1 million in investigation expenses. The major difference in the bribery in the two cases was the size of the bribe: $2 million in the Griffiths case compared to $200,000 in the Niko Resources case. On the other hand, Griffiths implemented a robust anti-corruption policy after the initial investigation revealed bribery, while Niko Resources did not. Thus, the Court put Niko Resources on probation for three years and required implementation of an anti-corruption compliance program as a condition of probation.

Koehler, "in 2012, 50 percent of all corporate *FCPA* enforcement actions were the result of voluntary disclosures."[89]

Despite promises of leniency in the US, the actual benefit to a corporation of voluntarily disclosing corruption violations is often unclear. Recent studies, cited by Koehler, show no difference between the fines and penalties levied against disclosing and non-disclosing companies. Indeed, Tarun writes, "the SEC, especially through disgorgement of profits, can quickly eviscerate the credit the DOJ extended to companies for cooperation in *FCPA* investigations."[90]

On the other hand, in 2014, Andrew Ceresney, the Director of the SEC Divison of Enforcement, maintained that cooperation is "always in the company's best interest."[91] Ceresney pointed out that the SEC offers incentives such as non-prosecution agreements and reduced penalties, and is committed to "making sure that people understand there will be such benefits."[92] In cases of "extraordinary cooperation," Ceresney notes that penalties will be significantly lower. For example, in 2014, Layne Christensen Co. was charged with making improper payments to African officials but, thanks to self-reporting and cooperation, its penalty was reduced to 10% of the disgorgement amount, as opposed to the usual penalty of closer to 100% of the disgorgement amount. Ceresney also warned that the consequences will be worse and opportunities to gain credit through cooperation will be lost if a company chooses not to self-report and the SEC subsequently discovers violations through investigation or whistleblowers. A company's failure to self-report could also indicate that their compliance program and controls were inadequate.

In the UK, the SFO issued guidance in 2009 on dealing with foreign corruption.[93] The guidance encouraged UK companies to voluntarily disclose corruption offences with the promise of more lenient negotiated civil settlements, rather than criminal prosecutions.[94] The Balfour Beatty case is a prime example. Balfour Beatty self-reported bribery payments made to secure engineering and construction contracts as part of a UNESCO project to rebuild the Alexandria Library in Egypt. As a result of the company's voluntary disclosure, the SFO agreed not to bring criminal charges and required the relatively low amount of 2.5M GBP to be returned as a civil recovery.[95] In a speech given in 2016, Ben Morgan, the Joint Head of Bribery and Corruption in the UK, noted that deferred prosecutions cannot be "a cosy deal,"

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[89] Koehler (2014) at 173.
[90] Tarun (2013) at 297.
[91] Andrew Ceresney, "Remarks at the 31st International Conference on the Foreign Corrupt Practices Act" (19 November 2014), online: <http://www.sec.gov/News/Speech/Detail/Speech/1370543493598>.
[92] *Ibid*.
[93] Nicholls et al (2011) at 213-214.
[94] Nicholas Lord, *Regulating Corporate Bribery in International Business: Anti-Corruption in the UK and Germany* (Ashgate Publishing, 2014) at 121, reports that the SFO's new director, David Green, removed this guidance in October 2012 after a review. However, Green maintains that self-reporting is encouraged.
[95] Nicholls et al (2011) at 218-219.

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but must be sufficiently lenient to reward self-reporting and cooperation. Morgan noted that some view a discount of one third of the fine as an insufficient incentive. Previous deferred prosecution agreements demonstrate the willingness of UK courts to consider a discount of up to 50% in the right circumstances, as the court did in the UK's second case involving the use of the new DPA option.[96]

4.3.2 Whistleblowers

UNCAC recognizes the reality that many instances of corruption will never come to light if witnesses to corrupt activity do not come forward with information. These witnesses face dangerous repercussions if they blow the whistle and are unlikely to come forward without adequate resources in place to protect them. Articles 32 and 37 of UNCAC require State Parties to provide effective protection to witnesses and participants in corruption offences who are willing to supply information and assistance to enforcement bodies. Article 33 of UNCAC recommends that State Parties consider extending these same protections to all persons who report corruption offences.

Recent legislative reforms in the US may result in an increase in the number of corruption investigations sparked by whistleblowers in the near future. Under section 922 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* of 2010, if a whistleblower's information leads to an enforcement action, the whistleblower will be entitled to an award of 10 to 30 percent of any resulting monetary sanctions in excess of $1 million.

See Chapter 12 for more on whistleblower laws and policies.

4.3.3 Competitor Complaints

The corruption investigation which led to the first case brought under Canada's *CFPOA* began with a competitor complaint. A Canadian company, Hydro Kleen Systems Inc., competed with other industrial cleaning companies, including Innovative Coke Expulsion Inc. (ICE), for contracts in the US and Canada. The employees of both companies often travelled back and forth across the US-Canada border with industrial cleaning equipment. Hydro Kleen paid bribes to a US border guard to facilitate easy movement of its own employees and equipment across the border. The border guard, on his own initiative, also denied ICE employees' admission to the US on multiple occasions and improperly photocopied confidential ICE documents that he had required the employees to present. He passed these documents on to Hydro Kleen. Incensed, ICE reported the guard's conduct and their suspicions about Hydro Kleen to an Alberta court and received a court order to search Hydro Kleen's premises for the confidential ICE documents. After the resulting

[96] Ben Morgan, "Deferred Prosecution Agreements (DPA): A Practical Guide by Defence and Prosecution" (Serious Fraud Office, 2016), online: <https://www.sfo.gov.uk/2016/10/17/deferred-prosecution-agreements-dpa-practical-guide-defence-prosecution/>.

investigation, Hydro Kleen pled guilty to bribing a public foreign official under the *CFPOA*.[97]

The Padma bridge case also provides a possible example of a competitor complaint. As discussed in Chapter 1, after the initial bidding process for the Padma River bridge project, SNC-Lavalin was reportedly in second position behind the Halcrow Group, a multinational engineering firm based in the UK, who had submitted a lower and more competitive bid. Following the alleged bribery conspiracy, however, SNC-Lavalin moved to first position and was awarded the bridge contract. As financiers of the Padma bridge project, it was the World Bank that initiated an investigation into the alleged bribery conspiracy, but it is easy to imagine that SNC-Lavalin's competitor, the Halcrow Group, was upset by the cloak and dagger bidding process and reported their suspicions to the World Bank.

4.3.4 Diplomatic Embassies and Trade Offices

Diplomats and ambassadors are tasked with fostering strong relations with foreign states, and foreign trade offices are tasked with improving a country's business trade in foreign countries and protecting the reputation of the country's businesses. The pall of corruption detracts from the goals of both diplomats and trade officials; as such, they are motivated to swiftly address corruption concerns regarding their own countries' citizens and businesses and report their findings to the proper authorities.

A Canadian diplomat was instrumental to the instigation of an investigation and the ultimate conviction obtained in *R. v. Niko Resources Ltd* under the *CFPOA*. In the agreed statement of facts submitted during the *Niko* case,[98] it came to light that "the RCMP investigation into Niko Canada began after the Canadian Department of Foreign Affairs and International Trade (DFAIT) alerted the RCMP on June 20, 2005, to news stories concerning a possible violation of the *Corruption of Foreign Public Officials Act* by the Niko family of companies." DFAIT was informed of the possible corruption by David Sproule, Canada's High Commissioner to Bangladesh, who read a *Daily Star* article which reported that Niko had "gifted" a luxury SUV to a Bangladeshi minister.

4.3.5 Cooperative Foreign Enforcement Bodies

Enforcement bodies that have cooperation agreements with foreign enforcement bodies often refer investigations or exchange information about corruption activity that leads to

[97] A more in-depth account of the Hydro Kleen case can be found in Norm Keith, *Canadian Anti-Corruption Law and Compliance* (Lexis Nexis, 2013) at 115–21.

[98] Agreed Statement of Facts, *R v Niko Resources Ltd*, (June 23 2011) ABQB, online: <http://www.osler.com/uploadedFiles/Agreed statement of facts.pdf>.

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external investigations. For example, in 2007 the DOJ in the US referred their investigation into Innospec Ltd. to the UK's SFO.[99]

4.3.6 Non-Governmental Organizations

Non-governmental organizations like Transparency International (TI) are instrumental in reporting corruption activity.[100] Beginning in 2003, TI began operating Advocacy and Legal Advice Centres (ALACs) around the globe to empower witnesses and victims of corruption to fight back. To date, 140,000 people have contacted ALACs and their reports of corrupt activity have been passed on to enforcement bodies and recorded by TI in their role as advocates for change.

4.4 An Overview of the Essential Elements of an External Investigation

The following extract from Kwok's "Investigation of Corruption"[101] provides a good overview of the elements of a corruption investigation. While his paper is focused on investigations carried out by Hong Kong's ICAC, the requisite elements are similar for police investigations of bribery in other countries.

BEGINNING OF EXCERPT

A. Introduction

The Hong Kong Independent Commission Against Corruption (ICAC) is popularly regarded as a successful model in fighting corruption, turning a very corrupt city under colonial government into one of the relatively corruption-free places in the world. One of the success factors is its three-pronged strategy — fighting corruption through deterrence, prevention and education. All three are important but in my view, deterrence is the most important. That is the reason why ICAC devoted over 70% of its resources into its Operations Department, which is responsible for investigating corruption. Nearly all of the major corruption cases I have dealt with were committed by people in high authority. For them, they have certainly been educated about the evil of corruption, and they may also be subject to certain degrees of corruption prevention control. But what inspired them to commit corruption? The

[99] See Colin Nicholls et al, *Corruption and Misuse of Public Office*, 2nd ed (Oxford University Press, 2011) at 222-23 for a fuller discussion.

[100] See Transparency International online for more information: <http://www.transparency.org/getinvolved/report>.

[101] Tony Kwok Man-Wai, "Investigation of Corruption" in Resource Materials Series No. 89 (UNAFEI, 2013) at 104-108 online: <http://www.unafei.or.jp/english/pdf/RS_No89/No89_VE_Man-wai.pdf>.

answer is simply greed, as they would weigh the fortune they could get from corruption against the chance of being discovered. If they think that it is a low risk, high-return opportunity, they will likely succumb to the temptation. So how can we deter them from being corrupt? The only way is to make them realize that there is a high risk of being caught. Hence the Mission of the ICAC Operations Department is — to make corruption a high-risk crime. To do that, you need a professional and dedicated investigative force.

B. Difficulties of Investigating Corruption

Corruption is regarded as one of the most difficult crimes to investigate. There is often no scene of the crime, no fingerprints, no eye-witnesses to follow up. It is by nature a very secretive crime and can involve just two satisfied parties, so there is no incentive to divulge the truth. Even if there are witnesses, they are often parties to the corruption themselves, hence tainted with doubtful credibility when they become prosecution witnesses in court. The offenders can be equally as professional as the investigators and know how to cover up their trails of crime. The offenders can also be very powerful and ruthless in enforcing a code of silence amongst related persons through intimidation and violence to abort any investigation. In this modern age, the sophisticated corrupt offenders will make full advantage of the loopholes across jurisdictions and acquire the assistance of other professionals, such as lawyers, accountants and computer experts in their clandestine operations and to help them launder their corrupt proceeds.

C. Corruption and Organized Crime

Corruption rarely exists alone. It is often a tool to facilitate organized crimes. Over the years, ICAC has investigated a wide range of organized crimes facilitated by corruption. Law enforcement officers have been arrested and convicted for corruptly assisting drug traffickers and smugglers of various kinds; bank managers for covering up money laundering for the organized crime syndicates; hotel and retail staff for perpetuating credit card fraud. In these cases, we need to investigate not only corruption, but some very sophisticated organized crime syndicates as well.

D. Prerequisites for an Effective Investigation

Hence, there is an essential need for professionalism in corruption investigations. There are several prerequisites to an effective corruption investigation:

a. Independent — corruption investigations can be politically sensitive and embarrassing to the Government. The investigation can only be effective if it is truly independent and free from undue interference. This depends very much on whether there is a top political will to fight corruption in the

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country, and whether the head of the anti-corruption agency has the moral courage to stand against any interference.

b. Adequate investigative power — because corruption is so difficult to investigate, you need adequate investigative power. The HK ICAC enjoys wide investigative power. Apart from the normal police power of search, arrest and detention, it has power to check bank accounts, intercept telephone communications, require suspects to declare their assets, require witnesses to answer questions on oath, restrain properties suspected to be derived from corruption, and hold the suspects' travel documents to prevent them from fleeing the jurisdiction. Not only is the ICAC empowered to investigate corruption offences, both in the Government and private sectors, they can investigate all crimes which are connected with corruption. I must hasten to add that there is an elaborate system of checks and balances to prevent abuse of such wide power.

c. Adequate resources — investigating corruption can be very time-consuming and resource intensive, particularly if the cases cross jurisdictions. In 2007, the HK ICAC's annual budget amounted to US$90M, about US$15 per capita. You may wish to multiply this figure with your own country's population and work out the anti-corruption budget that needs to be given to be the equivalent of ours! However, looking at our budget from another angle — it represents only 0.3% of our entire Government budget or 0.05% of our Gross Domestic Product (GDP). I think you will agree that such a small "premium" is a most worthwhile investment for a clean society.

d. Confidentiality — it is crucial that all corruption investigations should be conducted covertly and confidentially, at least before an arrest is made, so as to reduce the opportunities for compromise or interference. On the other hand, many targets under investigation may prove to be innocent, and it is only fair to preserve their reputation before there is clear evidence of their corrupt deeds. Hence in Hong Kong, we have a law prohibiting any one, including the media, from disclosing any details of ICAC investigation until overt action such as arrests and searches have been taken. The media once described this as a "press gag law" but they now come to accept it as the right balance between press freedom and effective law enforcement.

e. International mutual assistance — many corruption cases are now cross-jurisdictional and it is important that you can obtain international assistance in the areas such as locating witnesses and suspects, money trails, surveillance, exchange of intelligence, arrest, search and extradition, and even joint investigation and operation.

f. Professionalism — all the investigators must be properly trained and professional in their investigations. The HK ICAC strives to be one of the most professional law enforcement agencies in the world. ICAC is one of the first agencies in the world to introduce the interview of all suspects under

video, because professional interview techniques and the need to protect the integrity of the interview evidence are crucial in any successful corruption prosecution. The investigators must be persons of high integrity. They must adhere strictly to the rule of confidentiality, act fairly and justly in the discharge of their duties, respect the rights of others, including the suspects and should never abuse their power. As corruption is so difficult to investigate, they need to be vigilant, innovative and prepared to spend long hours to complete their investigation. ICAC officers are often proud of their sense of mission, and this is the single most important ingredient of success of ICAC.

g. An effective complaint system — No anti-corruption agency is in a position to discover all corrupt dealings in the society by itself. They rely heavily on an effective complaint system. The system must be able to encourage quality complaints from members of the public or institutions, and at the same time, deter frivolous or malicious complaints. It should provide assurance to the complainants on the confidentiality of their reports and if necessary, offer them protection. Since the strategy is to welcome complaints, customer service should be offered, making it convenient to report corruption. A 24-hour reporting hotline should be established, and there should be a quick response system to deal with any complaints that require prompt action. All complaints, as long as there is substance in them, should be investigated, irrespective of how minor the corruption allegation. What appears to be minor in the eyes of the authority may be very serious in the eyes of the general public!

E. Understanding the Process of Corruption

It should be helpful to the investigators to understand the normal process of corruption, through which the investigators would be able to know where to obtain evidence to prove the corruption act. Generally a corrupt transaction may include the following steps:

1. Softening up process — it is quite unlikely that a government servant would be corrupt from his first day in office. It is also unlikely that any potential bribe-offerer would approach any government servant to offer bribes without building up a good relationship with him first. Thus there is always a "softening up process" when the briber-offerer would build up a social relationship with the government servant, for example, inviting him to dinner and karaoke, etc. Thus the investigator should also attempt to discover evidence to prove that the government servant had accepted entertainment prior to the actual corrupt transaction.
2. Soliciting/offering of bribe — when the time is ripe, the bribe-offerer would propose to seek a favour from the government servant and in return offer a

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bribe to him. The investigator should attempt to prove when and where this had taken place.

3. Source of bribe — when there is agreement for the bribe, the bribe-offerer would have to withdraw money for the payment. The investigator should attempt to locate the source of funds and whether there was any third person who assisted in handling the bribe payment.
4. Payment of bribe — The bribe would then be paid. The investigator should attempt to find out where, when and how the payment was effected.
5. Disposal of bribe — On receipt of the bribe, the receiver would have to dispose the cash. The investigator should try to locate how the bribe was disposed, either by spending or depositing into a bank account.
6. Act of abuse of power – To prove a corruption offence, you need to prove the corrupt act or the abuse of position, in return for the bribe. The investigator needs to identify the documents or other means proving this abuse of authority.

The task of the investigator is to collect sufficient evidence to prove the above process. He needs to prove "when", "where", "who", "what", "how" and "why" on every incidence, if possible.

However this should not be the end of the investigation. It is rare that corruption is a single event. A corrupt government servant would likely take bribes on more than one occasion; a bribe-offerer would likely offer bribes on more than one occasion and to more than one corrupt official. Hence it is important that the investigator should seek to look into the bottom of the case, to unearth all the corrupt offenders connected with the case.

F. Methods to Investigate Corruption

Investigating corruption can broadly be divided into two categories:

1. Investigating past corruption offences
2. Investigating current corruption offences

1. <u>Investigating Past Offences</u>

The investigation normally commences with a report of corruption and the normal criminal investigation technique should apply. Much will depend on the information provided by the informant and from there, the case should be developed to obtain direct, corroborative and circumstantial evidence. The success of such investigations relies on the meticulous approach taken by the investigators to ensure that "no stone is left unturned". Areas of investigation can include detailed checking of the related bank accounts and company ledgers, obtaining information from various witnesses

and sources to corroborate any meetings or corrupt transaction, etc. At the initial stage, the investigation should be covert and kept confidential. If there is no evidence discovered in this stage, the investigation should normally be curtailed and the suspects should not be interviewed. This would protect the suspects, who are often public servants, from undue harassment. When there is a reasonable suspicion or evidence discovered in the covert stage, the investigation can enter its overt stage. Action can then be taken to interview the suspects to seek their explanation and if appropriate, the suspects' home and office can be searched for further evidence. Normally further follow-up investigation is necessary to check the suspects explanation or to go through the money trails as a result of evidence found during searches. The investigation is usually time-consuming.

2. Investigating Current Corruption Offences

Such investigation will enable a greater scope for ingenuity. Apart from the conventional methods mentioned above, a proactive strategy should always be preferred, with a view to catch the corrupt redhanded. In appropriate cases, with proper authorities obtained, surveillance and telephone intercepts can be mounted on the suspects and suspicious meetings monitored. A co-operative party can be deployed to set up a meeting with a view to entrap the suspects. Undercover operation can also be considered to infiltrate into a corruption syndicate. The pre-requisites to all these proactive investigation methods are professional training, adequate operational support and a comprehensive supervisory system to ensure that they are effective and in compliance with the rules of evidence.

As mentioned above, corruption is always linked and can be syndicated. Every effort should be explored to ascertain if the individual offender is prepared to implicate other accomplices or the mastermind. In Hong Kong, there is a judicial directive to allow a reduction of 2/3 of the sentence of those corrupt offenders who are prepared to provide full information to ICAC and to give evidence against the accomplices in court. ICAC provides special facilities to enable such "resident informants" to be detained in ICAC premises for the purpose of debriefing and protection. This "resident informant" system has proved to be very effective in dealing with syndicated or high-level corruption.

G. Investigation Techniques

To be competent in corruption investigations, an investigator should be professional in many investigation techniques and skills. The following are the essential ones:

- Ability to identify and trace persons, companies and properties
- Interview technique
- Document examination

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- Financial Investigation
- Conducting a search & arrest operation
- Surveillance and observation
- Acting as undercover agent
- Handling informers
- Conducting an entrapment operation

H. Professional Investigative Support

In order to ensure a high degree of professionalism, many of the investigation techniques can be undertaken by a dedicated unit, such as the following:

- **Intelligence Section**
  - as a central point to collect, collate, analyze and disseminate all intelligence and investigation data, otherwise there may be a major breakdown in communication and operations.
- **Surveillance Section**
  - a very important source of evidence and intelligence. Hong Kong ICAC has a dedicated surveillance unit of over 120 surveillance agents, and they have made significant contributions to the success of a number of major cases.
- **Technical Services Section**
  - provide essential technical support to surveillance and operations.
- **Information Technology Section**
  - it is important that all investigation data should be managed by computer for easy retrieval and proper analysis. In this regard, computers can be an extremely useful aid to investigations. On the other hand, computers are also a threat. In this modern age, most personal and company data are stored in computers. The anti-corruption agency must possess the ability to break into these computers seized during searches to examine their stored data. Computer forensics is regarded as vital for all law enforcement agencies worldwide these days.

I. Financial Investigation Section

The corruption investigations these days often involve sophisticated money trails of proceeds of corruption, which can go through a web of off-shore companies and bank accounts, funds, etc. It is necessary to employ professionally qualified investigative accountants to assist in such investigations and in presenting such evidence in an acceptable format in court.

- **Witness Protection Section**

  ICAC has experienced cases where crucial witnesses were compromised, with one even murdered, before giving evidence. There should be a comprehensive system to protect crucial witnesses, including 24-hour protection, safe housing, new identity and overseas relocation. Some of these measures require legislative backing.

J. Conclusion and Observation

In conclusion, the success factors for an effective corruption investigation include:

- An effective complaint system to attract quality corruption reports
- An intelligence system to supplement the complaint system and to provide intelligence support to investigations
- Professional & dedicated investigators who need to be particularly effective in interviewing techniques and financial investigation
- More use of proactive investigation methods, such as entrapment and undercover operations
- Ensure strict confidentiality of corruption investigation, with a good system of protection of whistleblowers and key witnesses
- International co-operation

END OF EXCERPT

4.5 Investigation Strategy in Corruption Cases

Monteith, an anti-corruption specialist with working experience at both the International Centre for Asset Recovery (ICAR) and the SFO, wrote a brief, informative chapter on the importance of establishing an investigative strategy and plan when dealing with corruption allegations.[102] Monteith points out that planning and strategizing are instrumental in meeting the unique challenges posed by corruption cases. These challenges include the overwhelming amounts of data involved in untangling transactions and tracing assets, dealing with aggressive defence lawyers and a disinterested public, and the time lapse before corrupt conduct is brought to light. The transnational nature of many corruption cases creates other challenges and calls for mutual trust, cooperation, coordination and information sharing. Careful planning is needed to navigate these features of cross-border investigations.

[102] Charles Monteith, "Case and investigation strategy" in Gretta Fenner Zinkernagel, Charles Monteith & Pedro Gomes Pereira, eds, *Emerging Trends in Asset Recovery* (International Academic Publishers, 2013) at 183-96.

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The author outlines the key pieces of a successful investigation. As multiple agencies are often involved in each corruption case, cooperation between agencies is required to set the stage for the investigation. This means choosing a lead agency, allocating responsibilities and sharing information. Monteith also stresses the importance of assembling a team of intelligence officers, financial investigators, analysts and lawyers in order to ensure the right expertise is available at the right time.

He also recommends that an investigative plan cover the following key components. First, the plan must take into account the features of the corrupt activity, such as where, when, by whom and how corruption occurs. Second, a strategy is needed to meet the evidential requirements for proving the offence. Agencies must determine how to turn intelligence into admissible evidence and how to fill gaps in the evidence.

Third, investigating authorities must develop a plan for the implementation of investigative powers and techniques in order to avoid improper use of those techniques. A plan also assists investigators in sifting through vast amounts of evidence, focusing the investigation, and reaching the goal of connecting assets to corrupt conduct. This part of the plan should cover how an agency will use open source intelligence, human intelligence and financial intelligence, as well searches and seizures, compulsory requests for information, compulsory interviews, arrest and interview, and covert actions. The strategy should address how investigators will circumvent the weaknesses, pitfalls and timing issues involved with these tools. A strategy for ensuring the success of MLA requests for information is also important, along with a plan for coordinating cross-border surprise raids.

Fourth, the investigating agency should plan out media communications to promote public confidence. Investigating agencies should stress that proper gathering of evidence takes time, since the public might have unrealistic expectations surrounding the time frame of an investigation. Finally, Monteith recommends that the investigative plan be evaluated and adapted throughout the investigation to reflect new evidence.

4.6 Investigative Techniques

As Kwok's paper notes, detecting corruption and gathering evidence of corruption can be both difficult and time-consuming. Effective enforcement has many elements, two of which are well-trained and well-funded investigators who have the investigative powers essential to the task. However, the bestowing of investigative powers on investigators must be subject to checks and balances in respect to all persons' fundamental privacy interests. For that reason, in common law countries like the US, UK and Canada, investigative techniques which involve a significant invasion into a person's reasonable expectation of privacy of person or property normally require a judicial warrant—i.e., prior approval for the search or interception granted by an independent judicial officer who finds there are reasonable grounds to believe evidence of corruption will be found by the search or interception. Without reasonable grounds, searches and interceptions are generally illegal. While the laws on electronic interception and monitoring and on search and seizure vary in some details in

the US,[103] UK[104] and Canada,[105] each country authorizes such techniques subject to significant checks and balances. Electronic surveillance generally includes eavesdropping, wiretapping and intercepting communications from cell-phones (both oral and text messages), emails and postal services.[106]

4.6.1 International Provisions for Special Investigative Techniques

4.6.1.1 UNCAC

Article 50 states:

> 1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.
>
> …
>
> 4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as interception and allowing the goods or funds to continue intact or to be removed or replaced in whole or in part.

The investigative techniques mentioned in Article 50—controlled delivery, electronic or other forms of surveillance and undercover operations—are legally authorized in the US, UK and Canada, subject to legal restrictions which balance the individual's right to privacy and the State's interest in law enforcement.

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[103] For the law of search and seizure in the US, see Wayne R LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, vol 1, 5th ed (Thomas Reuters, 2013). For the law on electronic surveillance, interception and wiretaps see *American Jurisprudence*, 2nd ed, "Search and Seizures: Electronic Surveillance Generally", § 338 and "Undercover Activities", § 2406.

[104] For the law of search and seizure in the UK, see Lord Justice Hooper et al, eds, *Blackstone's Criminal Practice 2008* (Oxford University Press, 2007). For the law on electronic surveillance, interception and wiretaps, see Victoria Williams, *Surveillance and Intelligence Law Handbook* (Oxford University Press, 2006).

[105] For the law of search and seizure in Canada, see Tim Quigley, *Procedure in Canadian Criminal Law*, 2nd ed (Carswell, 2005) (loose-leaf). For the law on electronic surveillance, interception and wiretaps, see Robert Hubbard, Peter Brauti & Scott Fenton, *Wiretapping and Other Electronic Surveillance: Law and Procedure* (Canada Law Book, 2000) (loose-leaf).

[106] Nicholls et al (2011) at 192; Quigley, (2005) at 8-49.

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4.6.1.2 OECD Convention

The OECD Convention has no specific articles on special investigative procedures.

4.6.2 Controlled Deliveries: US, UK and Canadian Law

Controlled deliveries are a common technique in the investigation of offences such as possession of illegal drugs or stolen goods, and, though less likely, could be used to investigate ongoing bribery. Controlled deliveries involve investigation during the commission of a crime rather than afterward. For example, the police may believe that A is in possession of drugs, stolen goods or proceeds of crime and that A is going to deliver those goods to B, the kingpin or higher official of the organized activity. Rather than arrest A, the police will follow A to the delivery point in order to discover the identity of B and facilitate the arrest of both A and B. Controlled deliveries are lawful in the US,[107] UK[108] and Canada.[109] They raise no special concerns.

4.6.3 Integrity Testing versus Entrapment

While Article 50 of UNCAC does not specifically mention integrity testing, the *United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigations*[110] promotes integrity testing as an "extremely effective … investigative tool as well as … an excellent deterrent."[111] Moreover, the *UN Handbook* encourages the use of random integrity testing and targeted tests based on suspicion.[112] For example, integrity testing has been used very effectively by the New York Police Department to detect internal corruption[113] and in the UK to detect the presence of issues (not amounting to criminal offences) in private institutions.[114] Integrity testing, especially when coupled with video surveillance, can be very intrusive and is thus subject to the rules of entrapment (discussed below), as well as criminal procedure

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[107] Joshua D Poyer, "*United States v Miggins*: A Survey of Anticipatory search warrants and the Need for Uniformity Among the Circuits" (2004) 58: 2 U Miami L Rev 701 at 705.
[108] William C Gilmore, "Police Co-Operation and the European Communities: Current Trends and Recent Developments" (1993) 19:4 Commonwealth L Bull 1960 at 1962.
[109] Chantal Perras & Frederic Lemieux, "Convergent Models of Police Cooperation: The Case of Anti-Organized Crime and Anti-terrorism Activities in Canada" in Frederic Lemieux, eds, *International Police Cooperation: Emerging Issues, Theories and Practice* (Williams Publishing, 2010) 124 at 139.
[110] *United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigations* (Vienna: United Nations Office on Drugs and Crime, September 2004), online: <https://www.unodc.org/pdf/crime/corruption/Handbook.pdf>.
[111] *Ibid* at 91.
[112] *Ibid* at 90.
[113] *Ibid* at 92.
[114] Nicholls et al (2011) at 202.

and human rights legislation.[115] In some countries integrity testing is illegal unless there is reasonable suspicion that the persons being tested are violating a particular law.[116]

A distinction is drawn in some legal systems between integrity testing and entrapment. In short, integrity testing is the presenting (usually by an undercover police officer or agent) of an opportunity to commit a crime, for example by asking a person "would you like to buy some marihuana" or "would you like to pay me a bribe to avoid my arresting you for speeding." Entrapment goes beyond offering an opportunity to commit a crime and involves active persuasion and inducement to commit the crime.

4.6.3.1 US Law

There is no unified approach to the defense of entrapment in the United States.[117] Instead, there are two major approaches: (a) a subjective approach and (b) an objective approach.[118] Federal courts[119] and a majority of state courts follow the subjective approach, also called the *Sherman-Sorrells* doctrine.[120] This approach has a two-step test: (1) was the offense induced by a government agent; and (2) was the defendant predisposed to commit the type of offense charged?[121] There are a variety of factors taken into account during this test.[122] The focus of the *Sherman-Sorrells* doctrine is on the propensity of the defendant to commit the offense rather than the officer's actions.[123]

The objective approach, also known as the Roberts-Frankfurter[124] approach, is followed by a few state courts.[125] This approach uses a test which focuses on the conduct of the government agent and determines if the offense was induced by the agent "employing methods of persuasion or inducement, which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it."[126] When the test is being applied it is necessary to consider the surrounding circumstances.[127] These two approaches differ in procedure, including whether a judge or jury considers the issue.[128] Under both

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[115] *Ibid*.
[116] For example, in Canada this would be considered an abuse of process and a violation of the section 8 right to privacy under the *Canadian Charter of Rights and Freedoms*.
[117] Paul H Robinson, *Criminal Law Defenses: Criminal Practice Series* (West Publishing, 1984) at 511.
[118] Wayne R LaFave, *Substantive Criminal Law,* 2nd ed (Thomson/West, 2003) vol 2 at 94.
[119] Federal courts follow the subjective approach. As a result, since bribery falls under federal jurisdiction in the US, the subjective approach is the relevant test for bribery.
[120] LaFave (2003) at 94. The approach is named after *Sherman v United States*, 365 US 369 (1958) and *Sorrells v United States*, 287 US 435 (1932), in which the majority adopted this approach.
[121] LaFave, *ibid* at 95.
[122] For a full list of the relevant factors see *ibid* at 96.
[123] *Ibid* at 97.
[124] Named after the judges who authored the concurring opinions in *Sorrells* and *Sherman*.
[125] LaFave (2003) at 99.
[126] *Ibid* at 100.
[127] *Ibid* at 100.
[128] For a full analysis of the procedural differences between the two approaches see *ibid* at 104-10

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approaches a finding of entrapment will normally lead to an acquittal, but the defense is not available for offenses of bodily harm.[129]

There is also a debate in the US about whether entrapment should be considered an excuse (leading to an acquittal) or a non-exculpatory defense.[130] In two cases, the courts acknowledged that a finding of entrapment may sometimes be used as a due process (non-exculpatory) defense leading to a stay of proceedings.[131] As a result, LaFave suggests that "a reasonable suspicion prerequisite may … emerge as an aspect of the due process limits upon encouragement activity" to curb over-involvement by the government.[132]

4.6.3.2 UK Law

The House of Lords has repeatedly affirmed that there is no substantive defence of entrapment available in English law.[133] Instead, traditionally under English law, a finding of entrapment would lead to exclusion of evidence or result in a reduced sentence.[134] However, in response to a European Court of Human Rights decision,[135] the House of Lords in *R v Loosely* and *Attorney General's Reference* (*No 3 of 2000*)[136] concluded that when a defendant has been entrapped, the appropriate remedy is a stay of proceedings, thus acknowledging a non-exculpatory defence of entrapment.[137] The House of Lords defined entrapment as "instigating[ing] or incit[ing] the target to commit an offence that he would not have otherwise committed," as opposed to the legitimate technique of providing an "unexceptional opportunity" to commit the offence.[138]

When determining whether entrapment has occurred the court considers multiple factors, including whether the investigation was undertaken in good faith.[139] If the investigation was based on reasonable suspicion of an individual, group of individuals or a specific location, the court will likely find the investigation was undertaken in good faith.[140] The good faith criterion has the effect of curbing the use of random virtue integrity testing based on

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[129] Robinson, (1984) at 524.
[130] *Ibid* at 515.
[131] LaFave (2003) at 112. *United States v Russell*, 411 US 423 (1973), *Hampton v United States*, 425 US 484 (1976).
[132] LaFave, *ibid* at 114; *United States v Twigg*, 588 F (2d) 373 (3rd Cir 1978).
[133] Simester et al, (2010) at 741, 743; Nicholls et al, (2011) at 200.
[134] Pursuant to s 78 of the *Police and Criminal Evidence Act 1984* and *R v Latif*, [1996] 1 All ER 353 (HL); Simester et al, (2010) at 742.
[135] *Teixeira de Castro v Portugal*, [1998] Crim LR 751.
[136] These two case were heard together: [2002] Cr App R 29.
[137] Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 4th ed (Hart Publishing, 2010) at 743; Nicholls et al, (2011) at 201.
[138] Nicholls et al, (2011) at 201.
[139] *Ibid* at 202; see also Simester et al (2010) at 743 for the full list of factors.
[140] Nicholls et al (2011) at 202

speculation, as these types of investigations may lead to a stay of proceedings for abuse of process.[141]

The test described in *Loosely* applies to all covert investigations.[142] As stated by Nicholls et al., investigators must investigate, not create, the offence.[143] Investigators therefore must be cautious when deploying undercover agents and participating sources or when conducting intelligence-led integrity testing, which responds to intelligence that a target is or may be committing crime.[144]

4.6.3.3 Canadian Law

In Canada, entrapment is a non-exculpatory defence and a finding of entrapment will result in a stay of proceedings for abuse of process.[145] Under Canadian law, entrapment can occur in two situations: (a) "the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in a criminal activity or pursuant to a *bona fide* inquiry, [or,] (b) although having such a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and induce the commission of an offence."[146]

In regard to (a), the Supreme Court of Canada has created a threshold of reasonable suspicion or *bona fide* inquiries before random virtue testing is lawful.[147] Random virtue testing involves law enforcement officers approaching individuals randomly (i.e., without reasonable suspicion that he or she is already engaged in a particular criminal activity) and presenting him/her with the opportunity to commit a particular crime. The Supreme Court of Canada held that random virtue testing is an improper use of police power.[148] However, the Court has also acknowledged an exception. Under this exception, law enforcement officials may present any individual with an opportunity to commit a particular offence during a *bona fide* inquiry into a sufficiently defined location if it is reasonably suspected that criminal activity is occurring in that location.[149]

In regard to (b), the Court has outlined relevant factors for consideration when determining whether the police have gone beyond providing an opportunity and instead induced the

[141] *Ibid* at 202; David Ormerod, *Smith and Hogan's Criminal Law*, 13th ed (Oxford University Press, 2011) at 400.
[142] Nicholls et al (2011), *ibid* at 200.
[143] *Ibid*.
[144] *Ibid*. For a detailed account of covert investigation techniques in the UK, see *ibid* at 190-200.
[145] Stuart, (2014) at 642.
[146] *R v Mack*, [1988] 2 SCR 903 at para 130 quoting Estey J. in *Amato v The Queen*, [1982] 2 SCR 418.
[147] Stuart (2014) at 646.
[148] *R v Mack*, [1988] 2 SCR 903 at para 133.
[149] *R v Barnes*, [1991] 1 SCR 449 at 463.

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commission of an offence.[150] Courts will objectively assess the conduct of the police and their agents rather than assessing the effect of the police conduct on the accused's state of mind.[151]

While entrapment normally involves undercover police operations, some undercover operations cannot constitute entrapment because they are used to detect past crimes, not induce future crimes. In Canada, the most controversial form of this covert police activity is the "Mr. Big Operation."[152]

4.6.4 Obtaining Financial Reports

Corruption investigations usually involve obtaining and analyzing financial records. How do law enforcement investigators obtain access to the relevant financial records?

4.6.4.1 US Law

The majority of *FCPA* investigations involve voluntary disclosure and cooperation by the company under investigation. In those cases, relevant financial documents are handed over to the DOJ or SEC investigators voluntarily. As noted in Chapter 5 (Asset Recovery), banks and other financial institutions are required to report suspicious money transactions. These reports, and other forms of information, will frequently provide the probable grounds or probable cause required to get a warrant to search and seize financial records in respect to suspected offenses of corruption or bribery. In the US, grand jury investigations are common and financial records can be obtained by the issuance of subpoenas *duces tecum*, although subpoenaed documents are subject to attorney-client privilege, particularly if the subpoena is directed to the target of the grand jury investigation.

Where the official actions involve civil enforcement of SEC anti-bribery and books and records violations, a "formal order of investigation" can be issued privately by the SEC which carries with it a subpoena power for financial records.[153]

4.6.4.2 UK Law

In addition to the general police power to apply to a court for a search and seize warrant, section 2 of the *Criminal Justice Act 1987* grants power to the Director of the SFO to compel disclosures orally and in writing of information and documents relevant to an SFO investigation. There are limits on the use that can be made of statements obtained from the person under investigation and certain information is protected by solicitor-client privilege. The SFO disclosure orders are frequently directed to banks, accountants or other professional consultants and can override duties of confidence, but are only enforceable

[150] For a full list of factors see Stuart (2014) at 646-47.
[151] *Ibid* at 645.
[152] For the latest restrictions on the use of "Mr Big Operations," see *R v Hart*, 2014 SCC 52 and *R v Mack*, 2014 SCC 58.
[153] Tarun (2013) at 254.

against UK institutions and persons.[154] The *Act* also creates offences and sanctions for those who refuse to comply with an order to disclose information.[155]

4.6.4.3 Canadian Law

Domestic corruption offences are enforced by the relevant municipal or provincial police agencies. Enforcement of foreign bribery offences under *CFPOA* is conducted by special units within the RCMP. Unlike the Director's power in the SFO to order disclosure of relevant financial orders, no similar power exists for the RCMP or for municipal or provincial police. Instead, the police must obtain search warrants from a court in order to obtain financial records, unless of course the person or company under investigation is fully cooperating with the police. For example, in the *Griffiths Energy International* case, the company, under a new board of directors, voluntarily reported the company's acts of corruption and handed over to the RCMP the results of their extensive internal investigation. On the other hand, in the SNC-Lavalin investigation and subsequent charges related to corruption in Libya and Tunisia, the RCMP executed a search warrant on SNC-Lavalin headquarters in Montreal in April 2012.

4.6.5 Use of Forensic Accountants

Detection and proof of corruption normally requires careful analysis of financial records and related communications. Forensic accountants are a necessity in such circumstances and are an integral part of the investigation team. Their evidence will frequently be the foundation of corruption charges and prosecution.

In *The Law of Fraud and the Forensic Investigator*, Debenham asserts that "understanding the rules of evidence is a critical part of the forensic accountants' skill set."[156] Potentially relevant evidence should always be brought forward, unless it is covered by privilege, to ensure the investigation has access to all pertinent documents. Debenham suggests that even potentially illegally-obtained evidence can be brought forward, particularly in civil proceedings. Often relevant evidence is left out due to misunderstandings about the law of evidence and too easily assumed privilege.[157] Where privilege is asserted, possibly in an attempt to veil wrongdoing, forensic accountants must be well informed on the legal rules of evidence in order to navigate the situation.

Forensic accountants should also be attentive to conflicts of interest. If a forensic accountant has accepted a retainer to investigate financial statements of a client, a conflict of interest can arise if they discover evidence of criminal activity. If the conflict involves a former client or

[154] For more detail on SFO disclosure orders, see Nicholls et al (2011) at 181-83.
[155] *Ibid* at 182.
[156] David Debenham, *The Law of Fraud and the Forensic Investigator,* 3rd ed (Carswell, 2012) at 801.
[157] *Ibid*.

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if the accountant is acting as a corporate auditor, the accountant's fiduciary duties may prevent them from disclosing confidential information to persons other than their client.

5. OVERVIEW OF DISPOSITIONS RESULTING FROM CORRUPTION INVESTIGATIONS

5.1 Introduction

When warranted by the evidence collected in a corruption investigation, individuals and/or organizations involved in alleged corrupt conduct can be subject to a range of civil and criminal procedures and sanctions. The State's choice to proceed with civil and/or criminal procedures is dependent on a large number of factors and also varies from country to country.

If a person or organization is charged with a criminal offence of bribery or corruption in common law countries like the US, UK or Canada, they have the choice to plead guilty to the charges or to plead not guilty, in which case the prosecutor will have to prove their guilt beyond a reasonable doubt in a trial before a judge alone, or a judge and jury. If the accused persons plead guilty or are found guilty at their trial, the judge will then sentence the offenders (e.g., impose a term of imprisonment, probation, suspended sentence, fine and/or a forfeiture order). In addition, there may be other consequences that flow from a conviction. The consequences can include restrictions on global travel, loss of civil privileges to drive, vote, hold public office, act as a lawyer or a broker, etc., or debarment from the right to bid for government or NGO projects.

The investigation and uncovering of corrupt behaviour will not always result in the laying of criminal charges. In some cases, the evidence may not be strong enough to establish "proof beyond a reasonable doubt." In some countries, only individuals, not organizations, may be charged and tried for a crime. In these countries, UNCAC requires that the organization be subject to civil or administrative liability for corruption. Even in countries like the US, UK and Canada, which allow organizations to be charged and convicted criminally, the relevant authorities may decide not to pursue criminal charges and instead pursue the individuals and/or organizations involved in corrupt actions through civil and administrative proceedings and remedies.

5.2 Criminal Options and Procedures

Pursuing corruption through the criminal process involves three components:

(1) Charging policies and the choice of charges;
(2) Guilty plea negotiations, settlement agreements or prosecution by trial; and
(3) Sentencing an offender after a guilty plea or after a conviction at trial.

5.3 Civil Options and Procedures

Civil procedures may be undertaken as an alternative to criminal charges or as a supplement to criminal charges. These civil procedures may include:

(1) Civil forfeiture proceedings (freezing, seizing and recovery of illegally obtained assets);
(2) Civil or administrative penalties (usually fines and/or suspension of licenses to operate); and
(3) Civil actions for damages, contractual restitution or disgorgement of profits.

5.4 Comparative Data on the Use of Different Remedies in Bribery of Foreign Officials

The summary of data in Figure 6.1 below is from the OECD *Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials*. It is based on 427 foreign bribery convictions and sanctions imposed on 263 individuals and 164 collective entities.[158]

- As of 2014, 427 cases in OECD countries involving punishment of foreign bribery were reported to the OECD. Figure 6.1 reflects how foreign bribery was punished and includes data from cases where several types of sanctions were imposed.
- Compensation in this chart included compensation for victims, civil damages, and State costs related to the case. The proceeds of compensation were either paid to NGOs designated by law or as restitution to the government of the country where the bribery took place.
- Article 3(3) of the OECD Convention requires confiscation of the instrument of the bribe and its proceeds (or property of an equivalent value). Thus, the number of cases involving confiscation should be high. The low percentage of confiscation in these statistics may be explained by situations in which the proceeds of foreign bribery are confiscated from companies while individuals face fines and a prison or suspended sentence.
- The data also shows very low numbers of debarment despite the 2009 OECD *Recommendation for further Combating Bribery of Foreign Public Officials in International Business Transactions*, which encouraged debarment of enterprises which have been proven to have bribed foreign public officials in contravention of international law. However, European Union Member Countries are required to implement Directive 2014/24/EU which requires mandatory exclusion of economic operators that have been found guilty of corruption.

[158] OECD, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (OECD Publishing, 2014) at 18, online: <http://dx.doi.org/10.1787/9789264226616-en>.

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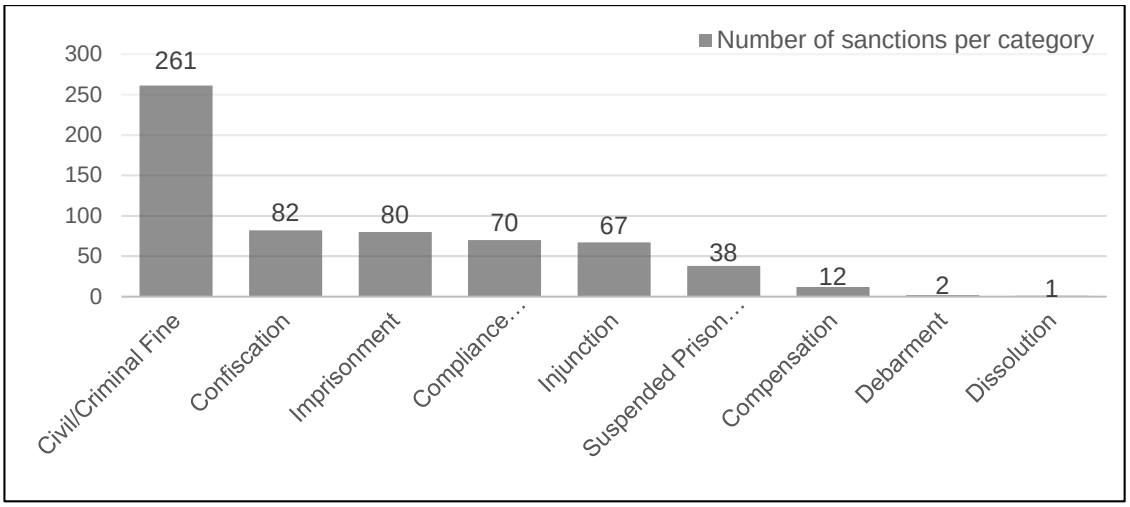

Figure 6.1 Types of Sanctions Imposed. Adapted from *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials*.[159]

It is important to note that 69% of sanctions were imposed through settlement procedures, while 31% were imposed through convictions.

Not listed on the chart are the substantial costs of foreign bribery enforcement actions that either cannot be quantified in monetary terms or do not constitute official sanctions, such as:

- Reputational damage and loss of trust by employees, clients and consumers;
- Legal fees;
- Monitorships; and
- Remedial action within the company.

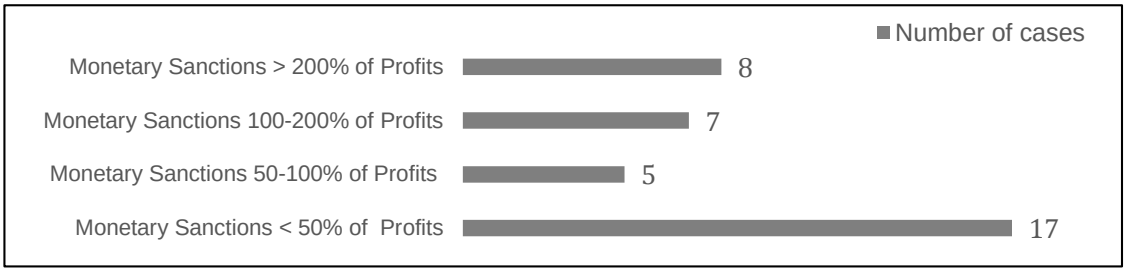

Figure 6.2 Monetary Sanctions as a Percentage of Profits Obtained. Adapted from *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials*.[160]

[159] *Ibid* at 18–20, 28. It is important to note that 69% of sanctions were imposed through settlement procedures, while 31% were imposed through convictions.
[160] *Ibid* at 28.

- For 37 cases out of the 261 involving fines, data was available to determine the distribution of total sanctions imposed as a percentage of the profits gained from payment of the bribe. In 46% of these cases, the monetary sanction was less than 50% of the proceeds obtained by the defendant as a result of bribing foreign public officials.
- In 41% of the cases, monetary sanctions ranged from 100% to more than 200% of the proceeds of the corrupt transaction. The majority of these cases were concluded in the United States where the value of the financial sanction against a company involved in a foreign bribery transaction almost always includes confiscation (or disgorgement) of the proceeds of the foreign bribery offence.
- The highest amount in combined monetary sanctions imposed in a single case totals approximately EUR 1.8 billion; while the highest combined prison sentence imposed in a single case for conspiracy to commit foreign bribery is 13 years.

It is important to note that 69% of sanctions were imposed through settlement procedures, while 31% were imposed through convictions.

6. CHARGING POLICIES

All prosecuting bodies have technical standards and procedures that must be followed in entering criminal charges or launching civil enforcement actions. Examples of these standards are discussed in this section. Notwithstanding these formal guidelines, the near-universal standard employed by prosecutors is whether there is a reasonable likelihood that the defendant can be convicted or found liable on the admissible evidence. Prosecutors generally do not proceed with cases they do not believe they can win.

6.1 US

As described above in Section 3.3.1, the US has two enforcement bodies tasked with prosecuting *FCPA* offenses: (i) the DOJ, which is solely responsible for criminal prosecutions and civil proceedings against non-public issuers; and (ii) the SEC, which is responsible for civil enforcement actions against public issuers (corporations that are publicly traded on a US stock exchange or otherwise required to file securities documents with the SEC), as well as the agents and employees of public issuers.

The jurisdiction of the DOJ and SEC necessarily overlap in a large number of cases. According to Koehler, it is common for the DOJ and SEC to simultaneously prosecute the same *FCPA* offenses and to coordinate the announcement and resolution of their enforcement actions on the same day.[161] The DOJ and SEC may also coordinate with other jurisdictions and announce settlements on the same day. Companies and individuals being

[161] Koehler (2014) at 55.

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investigated for *FCPA* violations must be cognizant of the coordinated power of the DOJ and SEC and may negotiate with the two bodies accordingly. For example, a corporation willing to accept a hefty settlement with the SEC involving disgorgement of profits may be able to negotiate more lenient treatment by the DOJ in the criminal proceedings. The DOJ and SEC may also offset sanctions in light of fines received in foreign jurisdictions.

Koehler is critical of *FCPA* enforcement in the US and believes it is heavily in need of reform. Because of the expense of defending against *FCPA* enforcement actions and the negative effect the process can have on a company's public image, Koehler believes many companies are motivated to accept resolution agreements (discussed below) with the DOJ and SEC even when the case against them is not strong:

> In short, the net effect of the above DOJ and SEC enforcement policies, and the 'carrots' and 'sticks' embedded in them, is often to induce business organizations subject to FCPA scrutiny to resolve enforcement actions for reasons of risk aversion and not necessarily because the enforcement agencies have a superior legal position. Business organizations are further motivated to resolve FCPA enforcement actions, including those based on aggressive enforcement theories, because the DOJ resolution vehicles typically do not result in any actual prosecuted charges against the company and the SEC resolution vehicles typically used traditionally have not required the company admit the allegations.[162]

6.1.1 Criminal Charges

The DOJ has the power to prosecute and pursue criminal convictions. In determining whether to bring criminal charges in an *FCPA* case, DOJ prosecutors consider the factors outlined in *Principles of Federal Prosecution*[163] and *Principles of Federal Prosecution of Business Organizations.*[164]

DOJ prosecutors are guided by the following general principle, pursuant to US Attorney's Manual s. 9-27.220:

> A. The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because:

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[162] *Ibid* at 60.

[163] US Attorney's Manual s 9-27.000, online: <http://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution>.

[164] US Attorney's Manual s 9-28.000, online: <http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>.

1. No substantial Federal interest would be served by prosecution;
2. The person is subject to effective prosecution in another jurisdiction; or
3. There exists an adequate non-criminal alternative to prosecution.

In the context of *FCPA* cases against corporations, DOJ prosecutors also consider "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents" pursuant to US Attorney's Manual s. 9-28.300. Cooperation is defined broadly as helping the DOJ ascertain the identity of corrupt actors and providing the DOJ with disclosure of relevant facts and evidence. However, according to Koehler, the history of DOJ enforcement shows that even raising legal arguments and disputing the DOJ's enforcement theory is classified as "not cooperating" and can lead to the DOJ bringing criminal charges.[165]

The *Principles of Federal Prosecution* cited above also govern the use of alternatives to criminal charges. The use of these alternatives is seen as a desirable middle ground between declining prosecution and pursuing criminal charges. Evaluating the factors described above, DOJ prosecutors may come to the conclusion that they have insufficient evidence to obtain a conviction or that the public interest would not be best served by prosecuting the alleged offender. In such cases, the DOJ prosecutor may choose to pursue an alternative to criminal charges as opposed to declining prosecution altogether.

6.1.1.1 Defense Counsel Submissions to the DOJ ("White Papers")

Given the negative publicity for government and the political repercussions that result from acquittal of defendants in high profile criminal cases, especially international business corruption cases, prosecutors do not proceed with cases they do not feel they can win. It follows that if defense counsel can present compelling reasons why the case against their client will not succeed, they stand an excellent chance of preventing charges from ever being brought or pursued.

In the US, most reasonable federal prosecutors share their theories and view of a case's evidence at the conclusion of a corruption investigation and give defense counsel the opportunity to make oral or written presentations detailing the reasons why charges should not be brought, or why the charges should be reduced to lesser ones.

There are no formal guidelines for these defense counsel presentations, commonly called "white papers" or position papers, but defense counsel generally use the factors outlined in the *Principles of Federal Prosecution* to argue that their clients should not be charged.

White papers are presented in the context of settlement offers and negotiations, so they are privileged documents under the rules of evidence. If a prosecutor proceeds with criminal

[165] Koehler (2014) at 56.

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charges after defense counsel has submitted a white paper, the contents of the paper are inadmissible as evidence against the defendant at trial.

6.1.2 Alternatives to Criminal Charges

As alternatives to criminal conviction, the DOJ and SEC may pursue other resolution agreements referred to above, which include: (i) Non-Prosecution Agreements (NPA); (ii) Deferred Prosecution Agreements (DPA); and (iii) SEC "neither admit nor deny" settlements. These resolution vehicles are discussed below.

6.1.2.1 NPAs

An NPA is a private agreement between the DOJ and the alleged offender agreeing to a certain set of facts and legal conclusions. An NPA is not filed with a court. In essence, an NPA is a contract where both sides provide consideration: the DOJ agrees not to prosecute the alleged offender for its alleged offenses and allows the company to continue doing business in the international marketplace, while the alleged offender agrees to certain terms, including implementing compliance undertakings and paying the equivalent of criminal or civil fines and penalties.

6.1.2.2 DPAs

A DPA is a written agreement between the DOJ and an alleged offender. Unlike NPAs, DPAs are filed with a court; thus on their face, they are more similar to plea agreements. DPAs contain facts and legal conclusions agreed to by both parties and the alleged offender promises to fulfill compliance requirements and pay criminal penalties. In an NPA, the DOJ agrees not to prosecute the alleged offender if the terms of the agreement are satisfied. In a DPA, the DOJ agrees to defer prosecution of the alleged offender for a stipulated period of time (usually 2-4 years). If the terms of the agreement are fulfilled, the DOJ agrees to drop all charges. A DPA allows a person or company to avoid a formal guilty plea and will signal resolution of the matter to important audiences such as lenders, investors and customers.[166]

6.1.2.3 Data on the Use of NPAs and DPAs

According to Koehler, because NPAs and DPAs allow the DOJ to "show results" without bearing the heavy burden of obtaining a criminal conviction, they are the dominant vehicle of choice for resolution of alleged *FCPA* violations. Since 2004, when the DOJ used an NPA in the *FCPA* context for the first time, "NPAs and related DPAs have been used to resolve approximately 85 percent of corporate FCPA enforcement actions and in 2012 NPAs or DPAs were used in connection with 100 percent of corporate FCPA enforcement actions."[167]

[166] Tarun (2013) at 282.

[167] Koehler (2014) at 60–61.

6.1.2.4 Criticism of NPAs and DPAs

Those, like Koehler, who are critical of the dominant use of NPAs and DPAs, point to their lack of transparency.[168] Negotiations for the agreements are privately held behind closed doors and NPAs are not filed with any court. In addition, most NPAs and DPAs include "muzzle clauses" preventing companies from commenting publicly on DOJ investigations, the circumstances of the alleged offenses, or the subsequent NPAs. The consequences for violating a muzzle clause can be severe. According to Koehler, in 2012, a financial institution named Standard Chartered agreed with the DOJ to enter into a DPA with a standard muzzle clause and a criminal penalty of $230 million.[169] A few months later during an earnings call with investors, Standard Chartered's chairman made benign comments about clerical mistakes that the company had made which led to its criminal penalty. Upon hearing of the comments, DOJ prosecutors demanded a transcript of the conference call and threatened to bring criminal charges if the company's chairman did not make a full, public retraction of the comments.[170]

Koehler summarizes his critical view of the imbalanced power dynamic involved in NPA and DPA negotiations as follows:

- The DOJ can use its leverage and the 'carrots' and 'sticks' it possesses to induce business organizations under scrutiny to resolve an enforcement action and pay a criminal fine.
- The DOJ can use an NPA or DPA to insulate its version of facts and enforcement theories from judicial scrutiny.
- In the resolution agreement, the DOJ can include a 'muzzle clause' prohibiting anyone associated with the company from making any statement inconsistent with the DOJ's version of the facts or its enforcement theories.
- If the DOJ believes, in its sole discretion, that a public statement has been made contradicting its version of the facts of its enforcement theories, the DOJ can 'pounce' and threaten to bring actual criminal charges. [171]

On the other hand, some commentators criticize DPAs for allowing companies that are "too big to fail" to escape criminal liability. District Judge Jed S. Rakoff is highly critical of the increasing tendency to prosecute companies instead of individuals, and of the "too big to fail" mentality, which implies that the rich can escape criminal prosecution. On the subject of prosecution of companies and DPAs, Rakoff states:

> Although it is supposedly justified because it prevents future crimes, I suggest that the future deterrent value of successfully prosecuting

[168] *Ibid* at 64–66.
[169] *Ibid* at 65.
[170] *Ibid* at 65-66.
[171] *Ibid* at 66.

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> individuals far outweighs the prophylactic benefits of imposing internal compliance measures that are often little more than window-dressing. Just going after the company is also both technically and morally suspect. It is technically suspect because, under the law, you should not indict or threaten to indict a company unless you can prove beyond a reasonable doubt that some managerial agent of the company committed the alleged crime; and if you can prove that, why not indict the manager? And from a moral standpoint, punishing a company and its many innocent employees and shareholders for the crimes committed by some unprosecuted individuals seems contrary to elementary notions of moral responsibility.[172]

For further discussion of the pros and cons of DPAs, see Section 6.3.2 below.

6.1.3 SEC "Neither Admit nor Deny" Settlements

According to Koehler, the typical vehicle for resolution of an SEC *FCPA* enforcement action is the "neither admit nor deny" settlement where a corporation agrees to pay civil penalties and institute compliance controls without admitting or denying any of the SEC's allegations.[173]

While the SEC announced in 2010 that it approved the use of NPAs and DPAs in civil enforcement actions, the use of such agreements is rare. According to Koehler, NPAs and DPAs by 2014 had only been used to resolve two SEC *FCPA* enforcement actions,[174] but he expects to see greater use of these resolution vehicles in the future.[175] In 2016, the SEC announced two NPAs connected to bribes paid to Chinese officials by foreign subsidiaries of American companies.[176]

Critics of neither admit nor deny resolution methods argue that these settlements are used merely to make the settling of cases more expedient. An alleged offender who disputes the facts and the SEC's enforcement theory will often be motivated to settle with the SEC just to make the case go away. Thus, many companies who dispute any wrongdoing are forced to pay civil penalties. On the other hand, corporations who know they have engaged in egregious conduct can resolve the matter without publicly admitting any wrongdoing.

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[172] Jed S Rakoff, "The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?", *The New York Review of Books* (9 January 2014), online: <http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/?page=1>.
[173] Koehler (2014) at 66.
[174] Koehler (2014) at 68.
[175] *Ibid* at 68.
[176] "SEC Announces Two Non-Prosecution Agreements in FCPA Cases", (7 June 2016), online: <https://www.sec.gov/news/pressrelease/2016-109.html>.

In view of this criticism, the SEC amended its "neither admit nor deny" settlements policy in 2012, announcing "that the settlement language would not be included in SEC enforcement actions involving parallel: (i) criminal convictions; or (ii) NPAs or DPAs that include admissions or acknowledgements of criminal conduct." [177] In 2013, the SEC announced that alleged offenders would not be able to enter into settlement agreements without admitting wrongdoing in certain cases where the alleged misconduct harmed large numbers of investors, was particularly egregious, or where the alleged offender obstructed the SEC's investigative process.[178]

6.1.4 Defense Counsel Submissions to the SEC ("Wells Submissions")

When the SEC contemplates bringing an enforcement action against a respondent, they send a "Wells notice" to the respondent informing them of the substance of the charges that the SEC intends to bring. This notice affords the respondent the opportunity to submit a written statement presenting facts and legal arguments to convince the SEC not to bring any action. Much like white papers in criminal cases, these written statements are called "Wells Submissions" in SEC cases (named after the chair of a committee that recommended the implementation of "Wells Notices" in SEC enforcement actions).

Prior to recommending the commencement of proceedings against a defendant, the SEC investigative staff will hear the Wells Submissions. These submissions may address factual issues, reliability of evidence and the appropriateness of the injunctive relief sought by the SEC. Unlike white papers, Wells submissions are not protected by settlement privilege and they can be used as evidence against a defendant in subsequent proceedings. Counsel must be very careful in what information they include in their Wells submission.

6.1.5 SEC Charging Policies

In determining whether to credit a company for self-policing, self-reporting and cooperation, the SEC is guided by the 2001 *SEC Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, often called the Seaboard Report.[179] The Seaboard Report applies to all SEC matters, as well as *FCPA* offenses, and outlines 13 criteria the SEC will consider.[180] The Seaboard Report also identifies four broad measures of a company's cooperation including:

1. *Self-policing* prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top;
2. *Self-reporting* of misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins and consequences of the misconduct,

[177] *Ibid* at 67.
[178] *Ibid*.
[179] Tarun (2013) at 262.
[180] For a copy of the report including all 13 criteria, see <http://www.sec.gov/litigation/investreport/34-44969.htm>.

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and promptly, completely and effectively disclosing the misconduct to the public, to regulatory agencies and to self-regulatory organizations;

3. *Remediation*, including dismissing or appropriately disciplining wrongdoers, modifying and improving internal controls and procedures to prevent recurrence of the misconduct, and appropriately compensating those adversely affected; and
4. *Cooperation* with law enforcement authorities, including providing the Commission staff with all information relevant to the underlying violations and the company's remedial efforts.[181]

The 13 criteria do not limit the SEC, and even if a company has satisfied all of the criteria, this does not guarantee the SEC will not follow through with an enforcement action.[182]

In January 2010, the Seaboard Report was supplemented and strengthened by a series of measures including the 2010 SEC *Policy Statement Concerning Cooperation by Individuals in Its Investigation and Related Enforcement Actions*.[183] These 2010 measures were designed to clarify the incentives for individuals and companies who provide early assistance in SEC investigations. Furthermore, the 2010 measures formally recognized cooperation tools available in SEC enforcement matters including cooperation agreements, deferred prosecution agreements and non-prosecution agreements.[184] Finally, the 2010 policy on individual cooperation delineated four criteria the SEC will consider when determining whether and how much to credit cooperation by an individual, including:

1. The assistance provided by the cooperating individual;
2. The importance of the underlying matter;
3. The societal interest holding the individual accountable; and
4. The risk profile of the cooperating individual.[185]

These criteria are similar to the 13 criteria in the Seaboard Report for evaluation of company cooperation by the SEC.[186]

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[181] *Enforcement Cooperation Program* (Department of Justice and Securities Exchange Commission, 2016), online: <http://www.sec.gov/spotlight/enfcoopinitiative.shtml>.
[182] Tarun, (2013) at 264.
[183] *Policy Statement of the Securities and Exchange Commission Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions*, SEC Rel. No. 34-61340 (Jan. 13, 2010), (2010 SEC Policy Statement) online: <https://www.sec.gov/rules/policy/2010/34-61340.pdf>.
[184] Tarun (2013) at 265.
[185] 2010 SEC Policy Statement.
[186] For more detailed information on US charging policies, including a list of factors considered by the DOJ and SEC, see Tarun (2013) ch 9.

6.1.6 No Charges

6.1.6.1 Immunity Requests

An employee of a company may wish to cooperate with the SEC and provide information; however, Tarun recommends that defense counsel "seek an immunity request from the SEC before allowing a client to make a statement of cooperation."[187] If an individual can provide testimony and/or facilitate cooperation that will significantly assist in the investigation, the SEC may arrange for an immunity order to protect that individual against criminal prosecution.[188]

6.1.6.2 Declination

According to Tarun, in certain circumstances the DOJ or SEC may decline to charge a company when foreign bribery violations have occurred. Tarun quotes Jeffrey Knox, principal deputy chief of the DOJ's Fraud Section, who states that "declinations are possible where companies facing an *FCPA* problem can demonstrate that they had a strong compliance program in place that, 'for no lack of trying, just didn't detect criminal conduct'."[189] For example, in 2012 the DOJ charged Garth Peterson, the former managing director for Morgan Stanley's Real Estate Group in China, with conspiring to evade internal accounting controls. However, neither the DOJ nor the SEC charged Morgan Stanley.[190] Tarun asserts there were multiple reasons why the DOJ and SEC may elect to decline charging a company: the company was the victim of a rogue employee; the company provides repeated ethics training; the bribe was small; an internal investigation followed the discovery of the problem; remedial action including discipline was taken; the company had strong internal controls in place; or the company voluntarily disclosed the misconduct and fully cooperated with the investigation.[191]

6.1.7 Patterns in *FCPA* Enforcement

As discussed above, the investigation and prosecution of corrupt behaviour can be compromised by strategic State interests (e.g., the UK investigation into BAE's bribes to Saudi Arabian officials). When substantial criminal and civil penalties are in play at the level of prosecution, outside interests can bring intense pressure not to prosecute or engage in enforcement proceedings against defendants. Provisions like Article 36 of UNCAC and Article 5 of the OECD Convention address this by mandating that enforcement bodies should be created with the necessary independence to remain uninfluenced by State Parties' other interests.

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[187] *Ibid* at 273.
[188] *Ibid*.
[189] *Ibid* at 287.
[190] *Ibid* at 284.
[191] *Ibid* at 284-86.

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But is it possible to actually achieve this kind of independence? Law enforcement does not occur in a vacuum, free from all context. In his article, "Cross-National Patterns in FCPA Enforcement," McLean undertakes an empirical analysis of US enforcement actions under the *FCPA*.[192] Using enforcement data over a ten-year period (2001-2011), McLean investigates four possible determinants for decreased or increased enforcement in cases involving foreign officials: i) corruption levels in the foreign country, ii) level of US foreign direct investment (FDI) in the foreign country, iii) level of international cooperation between the US and the foreign country, and iv) US foreign policy interests. Each of the variables was subject to equivocal hypotheses. On one hand, one might expect to see more *FCPA* cases involving countries with high levels of recorded corruption. It seems logical that in countries where corruption is a common part of doing business, more *FCPA* violations will occur. However, if a country has a reputation for widespread corruption, the consequent increased risk of incurring criminal liability by doing business in that country could produce a chilling effect on US business there, leaving fewer *FCPA* cases involving that country.

Similarly, it seems likely that in countries where US FDI is higher and more business transactions are occurring, there is a greater chance that US companies will become ensnared in *FCPA* violations leading to prosecutions. However, more US FDI in a country means that the domestic economic interests of the US are more tied to that country. This kind of State interest can have a suppressive effect on prosecutions if there is a lack of prosecutorial independence because the State does not want corruption prosecutions to hurt its domestic economy.

Due to the challenging cross-border nature of global corruption investigations and the fact that prosecutors generally do not try cases that they cannot win, it seems likely that more cases would be brought where US authorities were able to gather evidence via international cooperation. This would lead to a higher number of *FCPA* cases involving countries with which the US has effective international cooperation agreements. Of course, if there is greater cooperation between the two countries, the US may be more likely to allow the cooperating country's prosecutors to try the case under its own anti-corruption legislation.

Finally, one might expect there to be less *FCPA* cases involving countries with close strategic ties to the US, and more *FCPA* cases involving countries with no strategic importance to the US or with which the US has hostile relations. This would be the worst case scenario, showing that US foreign policy interests lead to selective prosecution of corruption offenses.

Interestingly, McLean's conclusions suggest that *FCPA* cases are not unduly influenced by other US policy interests. Increased *FCPA* enforcement occurs involving countries with

[192] Nicholas McLean, "Cross-National Patterns in FCPA Enforcement" (2012) 121:7 Yale LJ, online: <http://www.yalelawjournal.org/note/cross-national-patterns-in-fcpa-enforcement>. See also Ellen Gutterman, "Banning Bribes Abroad: US Enforcement of the Foreign Corrupt Practices Act" (2015) 53:1 Osgoode Hall LJ 31.

higher levels of corruption, increased US FDI and international cooperation with the US, but there is no variation in *FCPA* enforcement associated with US foreign policy interests.

6.2 UK

6.2.1 Criminal Charges

The SFO is an independent government department in the UK which only prosecutes the most serious or complex cases of fraud.[193]

SFO prosecutors are guided by the following publications:[194]

1. The Code for Crown Prosecutors;[195]
2. Guidance of the Attorney General on Plea Discussions in Cases of Serious or Complex Fraud;[196]
3. Guidance upon Corporate Prosecutions;[197]
4. Guidance on the approach of the SFO to overseas corruption offences;[198]
5. *Bribery Act 2010* Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions;[199]
6. Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States of America;[200] and
7. Deferred Prosecution Agreements Code of Practice.[201]

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[193] Nicholls et al (2011) at 180-81.
[194] Peter Alldridge, "Bribery and the Changing Pattern of Criminal Prosecution" in Jeremy Horder & Peter Alldridge, eds, *Modern Bribery Law: Comparative Perspectives* (Cambridge University Press, 2013) at 224-25.
[195] Director of Public Prosecutions, *The Code for Crown Prosecutors*, online: https://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf.
[196] Attorney General's Office, *Guidance of the Attorney General on Plea Discussions in Cases of Serious or Complex Fraud*, online: <https://www.gov.uk/guidance/plea-discussions-in-cases-of-serious-or-complex-fraud--8>.
[197] Director of Public Prosecutions, *Corporate Prosecutions – Legal Guidance*, online: <http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/>.
[198] See Serious Fraud Office, "Approach of the SFO to Dealing with Overseas Corruption" (Serious Fraud Office, 2009).
[199] *Bribery Act 2010: Joint Prosecution Guidance of the Director of the SFO and the DPP*, [Joint Prosecution Guidance] online: <https://www.compliance-instituut.nl/wp-content/uploads/SFO-UK-BRIBERY-ACT-2010-JOINT-PROSECUTION-GUIDANCE.pdf>.
[200] Attorney General's Office, *Attorney General's Domestic Guidance for Handling Criminal Cases Affecting both England, Wales, or Northern Ireland and the United States of America*, online: <http://www.publications.parliament.uk/pa/ld200607/ldlwa/70125ws1.pdf>.
[201] *DPA Code of Practice*, online: <https://www.cps.gov.uk/publications/directors_guidance/dpa_cop.pdf>.

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As with any criminal case, the SFO begins by applying the Code for Crown Prosecutions (the Code) when deciding whether to prosecute. The Code prescribes a two-stage test for charging an offender (the Code Test): (i) the evidential stage, frequently described by reference to a probability of conviction in excess of 50 percent; and (ii) the 'public interest' stage, involving a decision on whether the public interest requires that a prosecution be brought.[202] Since bribery is considered a serious offence, as evidenced by the maximum sentence of ten years, Alldridge points out that "[t]here is an inherent public interest in bribery being prosecuted in order to give practical effect to Parliament's criminalization of such behaviour."[203] The Code sets out some public interest considerations common to offences under sections 1, 2, 6 and 7 of the *Bribery Act 2010*.[204]

Factors in favour of the prosecution of a bribery case include:

- A conviction is likely to attract a significant sentence;[205]
- Offences were premeditated and included an element of corruption of the person bribed;[206]
- Bribery was accepted within an organization as part of the cost of doing business;
- Offences were committed in order to facilitate more serious offending;[207] and
- Those involved in bribery were in positions of authority or trust and took advantage of that position.[208]

Factors tending against prosecution of a bribery case include:

- The court is likely to impose only a nominal penalty, for example in instances involving very small payments;[209]
- In cases of corporate criminal liability, a corporation had proper policies in place that weren't followed by an individual;
- The bribe payer was in a vulnerable position;
- The harm can be described as minor and was the result of a single incident;[210] and

[202] Alldridge (2013) at 225.
[203] *Ibid* at 226.
[204] *Ibid* at 226.
[205] Code 4.16a.
[206] Code 4.16e and k.
[207] Code 4.16i.
[208] Code 4.16n.
[209] Code 4.17a
[210] Code 4.17e

- There has been a genuinely proactive approach involving self-reporting and any remedial action that has already been taken.[211]

According to Monteith, the SFO's general approach is that "ethical businesses running into difficulties" will not face prosecution, whereas companies that continually engage in corruption and see corruption as a means of getting ahead are likely to be prosecuted.[212] Aggravating and mitigating factors, such as whether there was a breach of position of trust, will also be considered before proceeding with a prosecution.[213] Finally, prosecutors must be careful not to consider national economic interests while making the decision to charge, as this would be contrary to Article 4 of the OECD Convention.[214]

See Chapter 2, Section 4 for more considerations when determining whether to prosecute facilitation payments.

The Director of Public Prosecutions or the Director of the SFO must also give personal consent for prosecutions under the *Bribery Act*.[215]

6.2.2 Plea Agreements

In the UK, all foreign bribery cases against legal persons, as of 2014, have been resolved through settlements or plea agreements rather than proceeding to trial.[216] In criminal cases, plea agreements allow the defendant and the prosecutor to agree on an admission of facts and an appropriate sentence or penalty. A judge makes the final sentencing decision after hearing both sides.

As judicial discretion in sentencing is viewed as a key component of judicial independence in the UK, the court in *R v Innospec*[217] rejected the idea of a judge acting as a rubber stamp for agreements between the SFO and defendants.[218] The agreed-upon statement of facts in a plea agreement also can constrain a judge in sentencing, since the charges are limited by those facts. For example, in the BAE case, bribery was clearly at play, but the admission of facts allowed only for accounting charges.[219] The court warned that in extreme situations, charges might be too inappropriate for a judge to allow the case to proceed. The court also

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[211] Additional factor (a) in the SFO *Guidance on Corporate Prosecutions*, online: <http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/>.
[212] Charles Monteith, "Bribery and corruption: the UK framework for enforcement" in Horder & Alldridge, eds, (2013) 251 at 252.
[213] For a full list of factors see Karen Harrison & Nicholas Ryder, *The Law Relating to Financial Crime in the United Kingdom* (Ashgate Publishing, 2013) at 153.
[210] Nicholls et al (2011) at 186.
[215] Joint Prosecution Guidance at 12.
[216] Jacinta Anyango Oduor et al, *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (StAR/World Bank/UNODC, 2014) at 26.
[217] *R v Innospec Ltd*, [2010] EW Misc 7.
[218] Alldridge (2013) at 231.
[219] *R v BAE Systems plc*, [2010] EW Misc 16.

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criticized the fact that the wording of the SFO press release formed part of the plea agreement with BAE.[220]

The Stolen Asset Recovery Initiative (StAR) has criticized plea agreements in the UK for their lack of transparency.[221] Although a public hearing takes place to determine the sentence, settlement documents are not made public. Agreements are only made public in rare cases, and some settlement agreements include a confidentiality clause preventing prosecutors from disclosing certain information.

6.2.3 Alternatives to Criminal Charges: Civil Forfeiture and DPAs

Civil (non-conviction based) forfeiture, discussed in Chapter 5, Section 2, allows the SFO to recover the proceeds of crime. Non-conviction based civil recovery orders were first intended as a fallback mechanism for situations in which criminal proceedings would not succeed. However, in 2009, the Home Secretary and Attorney General issued guidance advising civil forfeiture as an alternative even when criminal proceedings are possible.[222]Alldridge points out that this shift occurred after a new asset recovery incentive scheme was established, under which 50% of civil recovery goes to the investigating, prosecuting and enforcing body.[223]

Due to the difficulty of meeting the high threshold of initiating a charge and securing the successful prosecution of corporate offenders, the UK also introduced deferred prosecution agreements through the *Crime and Courts Act 2013* as an alternative to criminal prosecution. This occurred after the UK government published initial plans in May 2012 for the introduction of DPAs, receiving an overwhelmingly positive response with 86% of respondents supporting the proposals.[224] The very idea of DPAs is somewhat novel for UK prosecutors, given that plea bargaining is not as significant a part of the criminal justice system as it is in the US.[225] In "Deferred Prosecution Agreements: A Practical Consideration," Bisgrove and Weekes write that the "[i]ntroduction of the alternative is clearly not supposed to be a gold standard for prosecution but a compromise, allowing for effective punishment

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[220] Alldridge (2013) at 239.
[221] Jacinta Anyango Oduor et al, *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (StAR/World Bank/UNODC, 2014) at 28.
[222] Alldridge (2013) at 246.
[223] *Ibid*.
[224] UK, Ministry of Justice, *Deferred Prosecution Agreements: Government Response to the Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations*, Response to Consultation CP(R) 18/2012 (23 October 2012) at para 18, online: <https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/results/deferred-prosecution-agreements-response.pdf>.
[225] See UK, Serious Fraud Office, *Operational Handbook*, "Guilty Pleas and Plea Bargaining" (2012) at 3, online: <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/>. *See R v Innospec Limited*, [2010] EW Misc 7 (EWCC) (in which Thomas LJ sternly warns that plea bargains are improper under UK law and that "no such arrangement should be made again"); *R v Dougall*, [2010] EWCA Crim 1048.

and regulation within a reasonable timeframe, where, in their absence, there might be none."[226] As of November 2016, the UK has only concluded two DPAs.[227]

An SFO prosecutor can invite a person whom the SFO is considering charging criminally to enter into a DPA. The DPA Code of Practice, issued pursuant to the *Crime and Courts Act 2013*, guides the DPA process.[228] The prosecutor's discretionary decision is made on a case-by-case basis, and a person facing charges has no right to be invited to negotiate a DPA.[229] Factors the prosecutor must consider are listed under 2.8.1-2.10 of the DPA Code of Practice.

The DPA Code of Practice prescribes a two-stage test that a prosecutor must apply before entering into a DPA. The first stage is the evidential stage, which is met if (a) the evidentiary stage of the full Code Test is met or (b) there is reasonable identification evidence and grounds to believe that further investigation will establish a realistic prospect of conviction in accordance with the full Code evidentiary test.[230] The second stage is the public interest stage, which is met if the public interest would be served by entering into a DPA rather than a prosecution. The more serious the offence at issue, the more likely prosecution will serve the public interest instead of a DPA.[231] If a DPA is appropriate, it must be approved by a court at a preliminary hearing. A court must also approve the agreement once the terms are settled.[232] The prosecutor will then indict the person, but suspend the indictment pending satisfactory performance of the terms set out in the DPA.[233] Once these terms are satisfied, the SFO will dismiss all charges.

The DPA negotiations are confidential, and information disclosed during the negotiations is subject to the *Crime and Courts Act 2013*. The prosecutor must disclose information to ensure the parties to the negotiation are informed and the information is not misleading.[234] A DPA must be governed by clear, agreed-upon terms that are "fair, reasonable, and proportionate."[235] Generally, terms will include an end date, an agreement to cooperate with the investigation, a financial order, cost of the prosecutor, activity restrictions and reporting obligations.[236] A financial order under a DPA may require victim compensation, payment of

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[226] Michale Bisgrove & Mark Weekes, "Deferred Prosecution Agreements: A Practical Consideration" (2014) Crim LR 416 at 419.
[227] Ben Morgan, "Deferred Prosecution Agreements (DPA): A Practical Guide by Defence and Prosecution" (Serious Fraud Office, 2016), online: <https://www.sfo.gov.uk/2016/10/17/deferred-prosecution-agreements-dpa-practical-guide-defence-prosecution/>.
[228] *DPA Code of Practice*, 1.1, online: <https://www.cps.gov.uk/publications/directors_guidance/dpa_cop.pdf>.
[229] *Ibid* 2.1, 2.6.
[230] *Ibid* 1.2, I, a-b.
[231] *Ibid* 1.2, ii; 2.4.
[232] *Ibid* 9.10.
[233] *Ibid* 1.5.
[234] *Ibid* 4.1, 5.2.
[235] *Ibid* 7.2.
[236] *Ibid* 7.8, 7.10.

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a penalty, charitable donations, or disgorgement of profits.[237] The terms can also require a monitor to ensure compliance and report misconduct.[238] In the event of a breach of the terms of the DPA, the prosecutor must notify the court. Small breaches can be rectified without court intervention, or through a court-approved remedy and cost award. If a material breach occurs or the court does not approve a remedy, the DPA may be terminated.[239] If the DPA is terminated, the prosecutor can lift the indictment and reinstitute criminal proceedings if the full Code Test is established.[240]

Furthermore, as described above in Section 4.3.1 on Voluntary Disclosures, the SFO issued guidance in 2009 to encourage companies to self-report violations of the *Bribery Act*. Companies that voluntarily disclose corruption offences are treated more leniently and may be able to negotiate civil settlements in lieu of criminal sanctions. This is an attractive alternative for companies because they can control publicity and avoid the automatic consequences of a criminal conviction.[241]

In determining whether to negotiate a civil settlement or proceed with criminal charges, the SFO considers the following:

- The sincerity of the board of directors' remorse and their commitment to improving corporate compliance in the future;
- The willingness of the directors to cooperate with the SFO in future investigations;
- The willingness of the directors to resolve the matter transparently, pay a civil penalty and allow external monitoring.

Where directors of a company have profited from corrupt conduct or been personally involved in the offences, the company will be prosecuted criminally, regardless of whether the offence is voluntarily disclosed. This reflects the SFO's "zero tolerance" policy for *Bribery Act* offences. In such cases, however, voluntary disclosure may be favourably taken into account during criminal plea negotiations. See Colin Nicholls et al., *Corruption and Misuse of Public Office*, 2nd ed (Oxford University Press, 2011) at 213-14 for a description of the SFO's process in negotiating civil settlements.

The increased use of non-conviction based forfeiture, DPAs and civil settlements represents a shift away from the use of criminal prosecution to punish bribery. Alldridge is wary of this trend, warning that "[t]he possibility of the power of money operating to prevent adverse publicity and the other effects of convictions is a clear one to which regard must be had".[242]

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[237] *Ibid* 7.9.
[238] *Ibid* 7.12.
[239] *Ibid* 12.2-12.5.
[240] *Ibid* 12.
[241] Alldridge (2013) at 241.
[242] *Ibid* at 239.

6.3 Canada

6.3.1 Prosecution and Policies Guidelines

Section 91(27) of the *Constitution Act, 1867*, gives exclusive jurisdiction to the federal Parliament to enact laws on criminal law and procedure. Thus Canada, unlike the US, has only one *Criminal Code*. However, since 1867, the federal government has delegated its powers to prosecute crimes in the *Criminal Code* to provincial attorneys-general.[243] Domestic bribery offences, including breach of trust by a public officer, are in the *Criminal Code*; thus, provincial prosecutors are responsible for prosecuting those crimes.[244] Each province has its own written and unwritten policies on the prosecution of crimes. For example, provincial prosecutorial guidelines for Ontario and British Columbia are available on their respective websites.[245]

However, Parliament has also chosen to place some crimes in legislation outside of the *Criminal Code*. There are some crimes enacted in other federal statutes such as the *Controlled Drugs and Substance Act*, the *Competition Act*, and the *Customs Act*. The federal government, represented by federal prosecutors, is responsible for prosecuting all crimes that are not in the *Criminal Code*. The Public Prosecution Service of Canada (PPSC) is an independent agency headed by a Director of Public Prosecutions (DPP), which fulfills the role of federal prosecutor in Canada. Bribery of foreign public officials and books and records offences with the purpose of bribing a foreign official are crimes enacted in the *Corruption of Foreign Public Officials Act (CFPOA)*. Thus, the decision to prosecute an offence under the *CFPOA* is ultimately up to the PPSC.[246]

In September, 2014, a new PPSC *Deskbook* was issued containing directives and guidelines for federal prosecutors.[247] Part V of the *Deskbook* deals with specific directions for certain types of prosecutions. Part 5.8 (Corruption of Foreign Public Officials) deals with *CFPOA* offences and prosecutions. The guideline:

- Calls for federal coordination of all *CFPOA* investigations and charges;

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[243] There are a few examples in which the *Criminal Code* grants jurisdiction to prosecute to both federal and provincial authorities.

[244] In Canada, there are 10 provinces and 3 territories. The territories have fewer legislative powers than the provinces. The federal government has not delegated prosecution of criminal offences in the *Criminal Code* to the territories. Thus federal prosecutors are responsible for *Criminal Code* prosecutions in those 3 territories.

[245] Attorney General of Ontario, *Crown Prosecution* Manual, online: <https://www.ontario.ca/document/crown-prosecution-manual/>; BC Ministry of Attorney General, *Crown Counsel Policy Manual*, online: <http://www2.gov.bc.ca/gov/content/justice/criminal-justice/bc-prosecution-service/crown-counsel-policy-manual>.

[246] Boisvert et al (2014) at 29.

[247] Public Prosecution Service of Canada, *Public Prosecution Service of Canada Deskbook*, online: <http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/index.html>.

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- Notes that, since the 2013 amendments to the *CFPOA*, the RCMP are the only police force with authority to lay *CFPOA* charges;
- Provides data collection procedures for *CFPOA* offences to enable the tabling in Parliament of an Annual Report on the implementation of the *CFPOA* as required under s 12 of that Act.

Furthermore, section 3.2 of part 5.8 of the *Deskbook* states:

> Like any decision regarding whether or not to prosecute, prosecutions under the *CFPOA (Corruption of Foreign Public Officials Act)* must be instituted or refused on a principled basis and must be made in accordance with the guideline "*2.3 Decision to Prosecute*". In particular, Crown counsel should be mindful of s. [Article] 5 of the [OECD] *Convention* which states:
>
> > 5. Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.
>
> Crown counsel should record in writing the reasons for deciding or declining to institute proceedings. Such reasons may be highly relevant in dispelling any suggestion of improper political concerns influencing prosecutorial decision-making.

In part 2.3 (Decision to Prosecute), section 3.2 sets out the two-fold test for deciding whether to prosecute. The first step is to determine whether there is a reasonable prospect of conviction. The second step is to determine whether a prosecution would best serve the public interest. In regard to this second step, section 3.2 lists factors that the prosecutor should consider, such as the seriousness or triviality of the offence, the harm caused, the victim impact, the individual culpability of the alleged offender, the need to protect confidential informants and the need to maintain confidence in the administration of justice. Section 3.3 then lists "irrelevant criteria" in the following words:

> A decision whether to prosecute must clearly not be influenced by any of the following:
>
> a. The race, national or ethnic origin, colour, religion, sex, sexual orientation, political associations, activities or beliefs of the accused or any other person involved in the investigation;
> b. Crown counsel's personal feelings about the accused or the victim;
> c. Possible political advantage or disadvantage to the government or any political group or party; or
> d. The possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

In the OECD Phase 3 Evaluation of Canada's compliance with the OECD Convention, the OECD Working Group on Bribery stated:

> 4. Regarding enforcement of the CFPOA, the Working Group recommends that Canada:
>
> a) Clarify that in investigating and prosecuting offences under the CFPOA, considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved are never proper; (Convention, Article 5; Commentary 27; 2009 Recommendation IV, and Annex I, paragraph D)

Canada's response to recommendation 4a) in *Canada: Follow-up to the Phase 3 Report and Recommendations* (2013) was as follows:

> The guidelines to be applied by all prosecutors in the Public Prosecution Service Canada (PPSC) are currently found in the Federal Prosecution Service Deskbook. Canada reiterates that understanding the Deskbook's guidance in its proper context would lead to the conclusion that Article 5 considerations would not come into play in the decision of whether or not to prosecute offences under the CFPOA. First, only where an offence is "not so serious as to plainly require criminal proceedings" would a prosecutor resort to the public interest guidelines, which were the subject of the WGB's criticism. Canadian authorities emphasize that offences under the CFPOA would not be considered as offences "not so serious as to plainly require criminal proceedings"; thus, no resort to the public interest guidelines would be required. Second, in the highly unlikely event that particular violations of the CFPOA were considered to be "not so serious as to plainly require criminal proceedings", the Deskbook sets out as public interest factors whether prosecution would require or cause disclosure of information that would be injurious to international relations, national defence, or national security. Canada maintains this establishes a higher threshold than Article 5 of the Convention, which refers to "considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal person involved".
>
> That said, the PPSC has been re-writing the Federal Prosecution Service Deskbook – a major undertaking given that the existing Federal Prosecution Service Deskbook is comprised of 57 chapters and a number of schedules, and new elements are being added. The chapter of the Deskbook dedicated to the CFPOA is part of this review process, and consideration is being given to including specific reference to Article 5 of the Convention. All revisions are subject to a rigorous and lengthy review process before they can be made public. Canada will be pleased to share the relevant chapters with the WGB

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> once the review process is complete and the new PPSC Deskbook is made public.[248]

As noted, in September 2014, the new PPSC *Deskbook* was issued. In my view, the *Deskbook* does not fully deal with Article 5 of the OECD Convention. In section 3.3 of the *Deskbook*, quoted above, point c states that "political advantage or disadvantage" is not a relevant factor to consider in the decision to prosecute, but that expression does not capture the main concern in Article 5 of the OECD Convention. Article 5 states that decisions to investigate or prosecute "shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved." The discontinuation of the investigation and prosecution in the BAE case in England, discussed in Chapter 1, raises these very factors. Section 3.2 of Part 5.8 on *CFPOA* prosecutions, quoted above, simply says the prosecutor "should be mindful of s.5 of the Convention." The direction to be "mindful" is a far cry from declaring that the factors of national economic interest, etc., should not be considered in making investigation and prosecution decisions for *CFPOA* offences.

The *Corruption in Canada: Definitions and Enforcement* report identifies some further weaknesses in Canadian foreign bribery initiatives:[249]

- Under the *CFOPA* only criminal prosecutions can be brought against legal entities, unlike in the US where the SEC has a parallel civil investigative and prosecutorial power.
- There are no provisions providing for voluntary disclosure or self-reporting to regulatory authorities. If such provisions are enacted they may lead to the use of deferred prosecution agreements, which are already in use in the US and UK.
- Although Canada has disclosure protection law, it does not encourage disclosure by offering financial incentives, as is the case in the US. Incentives may encourage corporations to cooperate with authorities.
- The *CFPOA* does not provide for any debarment sanctions following an individual's or business' conviction for bribery or books and records provisions (although debarment consequences are found elsewhere: see Chapter 7, Section 8.6 of this book).

Nonetheless, Canada has taken some steps to strengthen its anti-corruption initiatives. For example, in its Follow-up Report (2013), the OECD, in addition to making recommendations, recognized that significant progress had been made because of amendments to the *CFPOA*

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[248] Working Group on Bribery in International Business Transactions, *Canada: Follow-Up to the Phase 3 Report & Recommendations* (OECD, 2013) at 3, online:<https://www.oecd.org/daf/anti-bribery/CanadaP3writtenfollowupreportEN.pdf>.

[249] Boisvert et al (2014) at 29.

in Bill S-14.[250] Moreover, in Transparency International's 2014 Progress Report on OECD Convention enforcement, Canada increased from the 'limited enforcement' to the 'moderate enforcement' category.[251] Additionally, on June 1, 2015, the *Extractive Sector Transparency Measures Act* ("*ESTMA*") came into force in Canada. This new legislation requires companies involved in certain parts of the extractive sector to report various types of payments made to domestic and foreign governments. The stated purpose of the Act:

> 6. … is to implement Canada's international commitments to participate in the fight against corruption through the implementation of measures applicable to the extractive sector, including measures that enhance transparency and measures that impose reporting obligations with respect to payments made by entities. Those measures are designed to deter and detect corruption including any forms of corruption under any of sections 119 to 121 and 341 of the Criminal Code and sections 3 and 4 of the Corruption of Foreign Public Officials Act.

The Government of Canada enacted *ESTMA* as part of Prime Minister Harper's commitment at the June 2013 G8 Leaders' Summit. *ESTMA* is further discussed in Chapter 8, Section 8.2.

6.3.2 Bidfell's Proposal for Deferred Prosecution Agreements in Canada

In "Justice Deferred? Why and How Canada Should Embrace Deferred Prosecution Agreements in Corporate Criminal Cases," Bildfell examines the use of DPAs in the US and the UK and the advantages and concerns surrounding their use before proposing that Canada adopt DPAs in limited and controlled circumstances.[252]

(a) US DPAs

First, Bildfell traces the history of DPAs. DPAs were developed in the US in the 1930s in the context of juvenile offenders.[253] When a juvenile was charged with a crime, the prosecutor could extend to the juvenile an offer to defer the prosecution while the juvenile attended a rehabilitation program. If he or she successfully completed the program and promised not to commit any criminal acts in the coming year, the charge would be dropped.

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[250] Working Group on Bribery in International Business Transactions (2013) at 3. For information on the amendments made by Bill S-14 see: <http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=s14&Parl=41&Ses=1>.

[251] Fritz Heimann, Adam Foldes & Gabor Bathory, *Exporting Corruption Progress Report 2014: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery* (Transparency International, 2014) at 2, online: <http://issuu.com/transparencyinternational/docs/2014_exportingcorruption_oecdprogre/24?e=2496456/9826003>.

[252] Connor Bildfell, "Justice Deferred: Why and How Canada Should Embrace Deferred Prosecution Agreements in Corporate Criminal Cases" (2016) 20:2 Can Crim L Rev 161.

[253] Rakoff, (19 February 2015).

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In 1977, the DOJ introduced DPAs into federal criminal law with three principal objectives:

(1) to prevent future criminal activity among certain offenders by diverting them from the traditional prosecution system into community supervision and services;
(2) to save prosecutorial and judicial resources for concentration on major cases; and
(3) to provide, where appropriate, a vehicle for restitution to communities and victims of crime.[254]

By the early 1990s, DPAs found their way into white-collar crime prosecutions.[255] Here, DPAs were seen as a more proportionate response to corporate wrongdoing. A conviction or guilty plea might eradicate or seriously damage a good company that was engaged in socially and economically productive activities but happened to have a few "bad apples." DPAs were seen as offering a middle ground between letting the company off the hook entirely and bringing the full force of the law to bear on the company.

Bildfell observed a surge in the use of DPAs in the US in recent years. Between 2004 and 2014, federal prosecutors entered into 278 such agreements and extracted billions of dollars in penalties.[256] The use of DPAs and non-prosecution agreements (NPAs) in recent years has outstripped the use of plea agreements. Between 2010 and 2012 the Criminal Division of the DOJ entered into 46 DPAs or NPAs with corporations, compared to only 22 plea agreements.[257]

DPAs in the US typically contain three hallmark elements:

(1) payment of a fine or penalty, which may include restitution to victims;
(2) the requirement that company employees undergo education and training on ethics, legal obligations, best practices, and/or other matters relevant to the misconduct at issue; and
(3) the implementation of new or improved compliance programs, sometimes including corporate governance reform measures or firings.[258]

There may also be corporate monitorships, reporting requirements, limits on public statements, civil penalties, restrictions on ongoing business practices, or other measures

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[254] United States Department of Justice, *US Attorneys' Manual*, §9-22.010, online: <http://www.justice.gov/usam/usam-9-22000-pretrial-diversion-program>,
[255] See Peter Spivack & Sujit Raman, "Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements" (2008) 45:2 Am Crim L Rev 159 at 161.
[256] See James R Copland & Isaac Gorodetski, "The U.K.'s New (and Improved) Deferred-Prosecution Agreements", *Manhattan Institute for Policy Research* (3 March 2014), online: <http://www.manhattan-institute.org/html/uks-new-and-improved-deferred-prosecution-agreements-4746.html>.
[257] See David M Uhlmann, "Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability" (2013) 72:4 Md L Rev 1295 at 1317.
[258] Rakoff, (19 February 2015).

deemed appropriate. In the regular course, there is no judicial involvement in the DPA process in the US.

(b) Benefits of DPAs in the US

Bildfell observes that DPA proponents have lauded DPAs as the preferred means of "righting the corporate ship." This sentiment is aptly summarized by Christie and Hanna:

> In contrast to the far more rigid criminal sentencing process, deferred prosecution agreements allow prosecutors and companies to work together in creative and flexible ways to remedy past problems and set the corporation on the road of good corporate citizenship. They also permit us to achieve more than we could through court-imposed fines or restitution alone. These agreements, with their broad range of reform tools, permit remedies beyond the scope of what a court could achieve after a criminal conviction.[259]

DPAs are said to be effective in bringing about cultural reforms in corporations that have fallen astray, as well as ensuring a fair and efficient resolution of allegations of criminality. Thus, proponents point to DPAs as a sensible means of preserving prosecutorial and judicial resources while imposing appropriate sanctions on corporate criminality. Proponents of DPAs also suggest that such agreements mitigate the negative side effects felt by innocent parties—such as company employees, shareholders, and consumers of the company's products or services—as a result of a corporate charge or conviction.

(c) Concerns with DPAs in the US

Bildfell reiterates several points raised in the earlier discussion regarding concerns over DPAs in the US (see Section 6.1.2.4 above), including the concern that DPAs are a threat to the rule of law because they are private resolutions reached behind closed doors instead of in open courts, with parties bound to confidentiality and non-disclosure of details,[260] as well as the concern that the DPA process in the US today is opaque, *ad hoc*, and unpredictable.[261] Bildfell enumerates five additional concerns associated with DPAs:

(1) Under-prosecution: Detractors of DPAs argue that the company or individuals involved in the wrongdoing are not being punished or not being punished adequately. DPAs let companies and individuals "off the hook" and may be used improperly as a means of avoiding prosecutions where the corporation is "too big to prosecute."

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[259] Christopher J Christie & Robert M Hanna, "A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Meyers Squibb Co." (2006) 43:3 Am Crim L Rev 1043 at 1043.

[260] See Copland & Gorodetski (3 March 2014).

[261] Rakoff (19 February 2015).

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(2) Over-prosecution: Other detractors argue that, rather than creating "sweetheart deals," DPAs can have Draconian effects on the corporation. DPAs afford comparatively little procedural protections, and prosecutors can use their leverage to push corporations into accepting unfair deals out of fear of receiving a "corporate death sentence" (i.e., the prosecution of criminal charges). Prosecutors' emphasis on co-operation and negotiation may mask disproportionate prosecutorial leverage. In addition, some corporations may enter into DPAs as a form of risk management, despite there being no demonstrable criminal conduct.

(3) Debarment and loss of privileges: Debarment (i.e., banning a corporation from obtaining government procurement contracts)[262] can be a potential consequence of a corporation's entering into a DPA. Debarment is seen by some as a disproportionate response to white-collar crime, as the effect may be to extinguish companies whose success depends on their ability to secure government contracts.

(4) Questionable incentives: Some have questioned the government's use of DPAs. Detractors suggest that DPAs may be used as an economical, but unfair, means of signalling a victory to the public without pursuing a full-blown prosecution. DPAs may be subject to abuse, as the prosecutor is left to be judge, jury, and executioner. By keeping cases out of the courts, moreover, prosecutors maintain a fog of uncertainty around the boundaries of corporate criminal liability, giving prosecutors enhanced bargaining power at the negotiating table.

(5) Expanding prosecutorial options: Some argue that the expansion of the prosecutorial toolkit should not be seen as a welcome development. Prosecutors should either (a) pursue a full prosecution if they have sufficient evidence or (b) investigate the case further or drop the case entirely if they have insufficient evidence. Some suggest that the "charge or walk away" dichotomy is more principled and fair: If the law and the facts justify prosecution, charges should be pursued; if not, further action should be declined. DPAs represent an uncomfortable "middle ground," as they lack the transparency of a full prosecution. The process by which the DPA is reached is shielded from public scrutiny, and the facts underlying the alleged wrongdoing are never determined in open court.

(d) DPAs in the UK

Bildfell notes that DPAs in the UK, discussed in Section 6.2.3 above, are subject to a distinctly different process than the process applicable in the US. Perhaps most notably, the UK's DPA model requires significant involvement of the courts. Whereas US DPAs are largely shielded from judicial scrutiny, UK authorities have embraced the idea that the courts should play a meaningful role in approving and overseeing the creation and implementation of DPAs. One of the most noteworthy features distinguishing the UK's DPA process from that of the US is that the court will actually review the agreement and make a determination on whether the

[262] See Chapters 7 and 11 for further discussion of debarment.

DPA is in the interests of justice and whether the terms of the agreement are fair, reasonable, and proportionate. More specifically, two hearings are contemplated:

(1) First, there is the preliminary hearing, which takes place privately in order to preserve confidentiality and allow for full and frank discussion of proposed terms without fear of jeopardizing future prosecution. An application with supporting documents including a statement of facts must be submitted to the court before this hearing, and the prosecutor must apply to the Crown Court for a declaration that (a) entering into a DPA with the company is "likely to be in the interests of justice" and (b) "the proposed terms of the DPA are fair, reasonable and proportionate."

(2) Second, at the subsequent final hearing, the prosecutor must apply to the Crown Court for a declaration that (a) "the DPA is in the interests of justice" and (b) "the terms of the DPA are fair, reasonable and proportionate." If the court approves the DPA and makes the requested declaration, it must give its reasons in open court.

The court's involvement—which, on its face, appears to involve something more meaningful than the mere application of a "rubber stamp"—represents a powerful safeguard against the risk of DPAs being used inappropriately or otherwise against the public interest. UK policy makers appear to have recognized that the flexibility and discretion inherent in DPAs, while beneficial in some circumstances, can pose risks and should be moderated, at least to some degree, by the court's involvement and oversight. We might understand the court's role in this respect as a form of "check" on prosecutorial discretion. Unlike the nearly unfettered discretion in the hands of US prosecutors to employ DPAs and shape their terms without judicial oversight, the UK process envisions a process by which prosecutors and the courts each play a meaningful role in shaping the appropriate response to alleged corporate criminality. For those who see the courts as the institution best placed to make an objective determination regarding whether a particular legal outcome would be in the public interest, the UK model represents a significant improvement upon the US model. Furthermore, the UK's DPA process is considerably more open and transparent. Unlike the prevailing state of affairs in the US, where DPAs are negotiated behind closed doors and there is no independent determination made in open court regarding the fairness of the process or the outcome, the UK model espouses a more transparent, open approach. This provides some assurance to the public that DPAs are being used appropriately.

Bildfell further observes that, at present, there is a policy in place in the UK that DPAs will be available only with respect to economic crimes, and only with respect to corporations, not individuals. It remains to be seen whether UK policy makers might remove this restriction and extend the use of DPAs to situations beyond economic crimes, and perhaps to employ DPAs vis-à-vis individuals.

(e) Proposed DPAs for Canada

DPAs are not, Bildfell notes, formally available in Canada at present, but some have called for their introduction. Perhaps most notably, SNC-Lavalin, after having been charged on

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February 19, 2015 with one count of corruption and one count of fraud in connection with alleged activities of former employees in Libya, issued a swift and defiant response that brought the potential availability of DPAs squarely into focus. Referencing DPAs, SNC-Lavalin issued a press release stating that "companies in other jurisdictions, such as the United States and United Kingdom, benefit from a different approach that has been effectively used in the public interest to resolve similar matters while balancing accountability and securing the employment, economic and other benefits of businesses."[263]

Having considered the competing arguments, Bildfell proposes that Canada adopt DPAs in limited and controlled circumstances. The author argues that DPAs, when used appropriately, can contribute to criminal sentencing objectives and can offer a robust means of providing restitution to victims and implementing reforms within the company. DPAs can be used to impose sanctions that are better calibrated to the gravity of the wrongdoing and that protect other public policy values. Notably, DPAs can assist prosecutors in tailoring an appropriate response to corporate criminality while minimizing collateral damage and harm to innocent parties.

In terms of the specific model to be adopted, Bildfell suggests that the UK approach better upholds public confidence in the procedures leading up to and implementing DPAs as compared to the US model. Although requiring court approval of DPAs adds to the time and expense of prosecutions, these marginal costs are far outweighed by the benefits derived from the greater transparency, fairness, and predictability that court involvement injects into the DPA process. He further suggests that Canada enact clear and detailed legislation that provides guidance and transparency with respect to the negotiation, key considerations, and the procedural process for reaching DPAs.

6.3.3 Canadian Government's Gradual Movement Toward Enacting a DPA System

In July 2017, Transparency International Canada published a Report entitled *Another Arrow in the Quiver? Consideration of a Deferred Prosecution Agreement Scheme in Canada*.[264] This report covers much the same ground as the Bildfell article above by setting out the arguments in favour of and against implementing a DPA scheme in general and analyzing the positive and negative experiences in the US and UK with their DPA schemes. The Report also notes that the Australian government has prepared a draft Bill on DPAs as part of its consultation process on whether to enact a DPA scheme.[265] Finally, the TI Report sets out a number of

[263] SNC-Lavalin Group Inc, Press Release, "SNC-Lavalin Contests the Federal Charges by the Public Prosecution Service of Canada, and Will Enter a Non-Guilty Plea" (19 February 2015), online: <http://www.snclavalin.com/en/snc-lavalin-contests-the-federal-charges-february-19-2015>.
[264] Online: <http://www.transparencycanada.ca/wp-content/uploads/2017/07/DPA-Report-Final.pdf>.
[265] *Ibid* at 23.

important questions that the government should consider before deciding whether to create a DPA scheme and, if so, what type of scheme.[266]

In September 2017, the government of Canada instituted a public consultation, which they referred to as "expanding Canada's toolkit to address corporate wrongdoing."[267] A major focus of the consultation was on whether Canada should adopt a DPA scheme. The consultation included a discussion paper for the consultation on DPAs, setting out 10 issues or considerations that should be taken into account in deciding whether to create a DPA system for Canada and if so, what its elements should be.[268] The consultation process, the consultation document and the discussion paper leave me with the impression that the government is on a slow and cautious path toward creating a DPA scheme for Canada. In February 2018, the Canadian government published a report on its consultations.[269] The report indicates that the government received 45 online submissions on the possible adoption of a DPA scheme with 47% from business, 26% from individuals, 20% from law enforcement and other justice sectors, and 7% from NGOs.[270] Government officials also held 40 meetings with 370 participants to hear their views (some on DPAs, others on the procurement process). On the critical question of whether or not to adopt some form of a DPA system, the report indicated that this question "received the most attention from participants, with the majority taking the view that the advantages of having a DPA regime would outweigh the possible disadvantages."[271] The size of the "majority" and its sectoral divisions was not noted. The report summarizes the views the government received as follows:

> **Advantages**
>
> The majority of participants thought that a DPA regime would encourage self-reporting, promote accountability, foster a compliance culture and enhance public confidence in addressing corporate wrongdoing. A DPA regime is also viewed as a means to improve enforcement outcomes and could increase justice system efficiencies by avoiding protracted criminal trials. The extent to which DPAs would encourage self-reporting is dependent on the predictability of the outcome, which in turn is linked to how the DPA regime is structured. While there is little judicial involvement in the US DPA process, under the UK regime, the courts must find that the

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[266] *Ibid* at 23-32.

[267] See the Government of Canada's website devoted to the consultation: <https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/index-eng.html>.

[268] Government of Canada, "Expanding Canada's Toolkit to Address Corporate Wrongdoing: Discussion Paper for Public Consultation", online: <https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/aps-dpa-eng.pdf>.

[269] Government of Canada, "Expanding Canada's Toolkit to Address Corporate Wrongdoing: What We Heard" (22 February 2018), online: <https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/rapport-report-eng.html>.

[270] *Ibid* at 7.

[271] *Ibid* at 14.

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terms are fair and reasonable. This adds a degree of uncertainty, as the court could require that changes be made or may not approve the DPA at all.

Several participants noted that DPAs provide greater flexibility for prosecutors to structure tailored resolutions in appropriate cases, while reducing the negative consequences of a company's conviction for innocent third parties, such as employees.

Other cited advantages include that DPAs may:

- help Canada put in place a tool for prosecutors that is available in other jurisdictions
- provide an alternative means of holding a corporation accountable for misconduct, while avoiding the legal and reputational harm that could result from prosecution and conviction
- facilitate the more timely payment of compensation to victims

Disadvantages

There was a sense among some participants that instituting a DPA regime could give companies a false sense of security as they might consider that they would not be at risk of prosecution, but could, rather, "buy their way" out of trouble through the payment of financial penalties rather than being held accountable by a court of law. If this were to be the case, it could weaken the deterrent effect of the criminal law on corporations and ultimately undermine public confidence in the criminal justice system.

Further disadvantages that were identified include that a DPA regime may:

- shield employees who have played an active role in the misconduct by focusing enforcement on the company rather than on pursuing charges against individual offenders
- allow corporate monitors too much leeway over their mandates, such that the terms of the DPA go beyond what was intended
- result in wasted effort and resources and potentially compromise a subsequent prosecution in cases where significant time is spent trying, unsuccessfully, to negotiate a DPA

Some thought that providing more investigation and prosecution resources would be more effective than adopting a DPA regime in addressing a possible perception that commercial crime and corruption are not sufficiently investigated and prosecuted in Canada.[272]

[272] *Ibid* at 14-15.

While the government has not yet announced that it will proceed with adoption of a DPA system for Canada, a betting person would likely say "It's on its way," while a cynical person might say "The SNC-Lavalin Bill is on its way!"

7. ISSUES OF CONCURRENT JURISDICTION

7.1 Parallel Proceedings

While the global effort to increase enforcement against corruption is generally positive, it does lead to some potentially problematic issues. As Holtmeir notes, when the *FCPA* was enacted in 1977, the US took the lead in global corruption enforcement. Other major global players have recently come on board, including Germany and the UK, which became a more active prosecutor of foreign bribery with the passing of the *Bribery Act* in 2010. China amended its corruption law in 2011 to include corruption of foreign public officials but has done nothing so far to enforce that law.[273] Brazil strengthened its domestic and foreign corruption laws with the *Clean Company Act in* 2003.[274] These and other pieces of legislation have led to instances of overlapping (or concurrent) jurisdiction in which multiple States may prosecute the same corrupt activity. The result is that individuals and corporations charged with corruption offences may find themselves subject to criminal proceedings in multiple jurisdictions.

The potential for a multiplicity of prosecutions is the natural by-product of international cooperation between enforcement bodies. Though a pure, principled desire to fight corruption is the ideal, enforcement bodies are often motivated (for political reasons and otherwise) to justify their operations with highly publicized convictions. Thus, if multiple enforcement bodies have cooperated in a corruption investigation (especially where they have devoted extensive resources), each enforcement body may be motivated to prosecute the corruption offence themselves, regardless of how many other enforcement bodies have jurisdiction.

The idea of "parallel proceedings" in multiple jurisdictions is addressed in both UNCAC and the OECD Convention with a view towards preventing multiple prosecutions. These provisions are non-mandatory, however, and do not prohibit State Parties from prosecuting the same defendant in parallel proceedings.

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[273] Gerry Ferguson, "China's Deliberate Non-Enforcement of Foreign Corruption: A Practice That Needs to End" (2017) 50:3 Intl Lawyer 503.

[274] Jay Holtmeir, "Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities" (2015) 84:2 Fordham L Rev 493 at 494. See also Mariano Predo et al, "The Brazilin *Clean Company Act*: Using Institutional Multiplicity for Effective Punishment" (2015) 53 Osgoode Hall LJ 107.

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Article 42, paragraph 5 of UNCAC states:

> 5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

Similarly, Article 4.3 of the OECD Convention merely requires Parties to consult with one another to discuss the most appropriate jurisdiction for the prosecution.

Parallel proceedings can take different forms. Holtmeier suggests that "carbon copy" prosecutions, in which multiple sovereigns prosecute the same or similar conduct, are the most problematic form.[275] "Carbon copy" prosecutions do present the advantage of allowing the second enforcer to piggyback on the efforts of the original jurisdiction. As corruption often occurs in developing parts of the world, the country where corruption actually occurred may not have the resources to investigate and prosecute the matter. However, if they are able to utilize another jurisdiction's investigation, a successful "carbon copy" prosecution may be possible.

Holtmeier identifies the TSKJ joint venture[276] prosecutions as an example of "carbon copy" prosecutions. The case entailed huge bribes to Nigerian officials for access to liquid natural gas reserves. In 2010, the four companies involved reached a settlement agreement with the authorities in the US for a total of $1.5 billion. A concurrent investigation in Nigeria led to subsequent settlements of $126 million. In addition, a court in the UK approved a civil settlement against one of the companies and all the four companies agreed to penalties imposed by the African Development Bank. Finally, an Italian court imposed fines on one of the companies.[277]

Not all forms of parallel proceedings are simple "carbon copies" of the first jurisdiction's prosecution. The prosecution of a single bribe in a single country may open the door to a larger, more complex web of corruption offences spanning extended periods of time across multiple jurisdictions. In these cases, different authorities may prosecute different aspects of a bribery scheme that occurred in different places at different times. Holtmeier provides the example of enforcement action against Siemens AG. In 2008, Siemens entered into settlements with the US and Germany for $800 million and $569 million respectively. The US settlements involved conduct in Latin America, the Middle East and Bangladesh, while

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[275] Holtmeir, *ibid* at 497-98.

[276] TSKJ is a private limited company registered in Portugal and company of four multi-national companies: Technip SA (of France), Snamprogetti Netherlands, Kellog, Brown Root Inc. (of USA) and Japanese Gasoline Corp (JSG).

[277] Holtmeir, (2015) at 498. See also Marco Arnone & Leonardo Borlini, *Corruption: Economic Analysis and Law* (Cheltenham, UK: Edward Elgar, 2014) at 195–204.

the German charges involved corruption in Spain, Venezuela and China. In the five years following these settlements, Siemens reached settlements with the World Bank in relation to fraud allegations in Russia ($100 million), with Switzerland in relation to a subsidiary's actions in Russia ($65 million), and with Nigeria ($46.5 million) and Greece (£270 million) for corruption in those countries.[278]

Parallel proceedings can promote anti-corruption efforts, particularly when the second jurisdiction would not otherwise have the resources to mount a full investigation and prosecution. However, there are potential drawbacks, including the violation of principles of double jeopardy and the imposition of duplicative penalties. These potential problems are discussed in greater detail below.

7.2 Risks of Parallel Proceedings

7.2.1 Double Jeopardy

Double jeopardy is a principle of fundamental justice that has existed in many justice systems for centuries. *Ne bis in idem*, the Latin form of the principle, concisely summarizes the doctrine: "not twice for the same thing." It is unjust for an accused to be prosecuted and convicted more than once for the same offence.[279]

The international nature of anti-corruption enforcement and the prospect of parallel proceedings in multiple jurisdictions, discussed above, gives rise to double jeopardy concerns. Do parallel proceedings violate international principles of fundamental justice? The answer is not straightforward. The doctrine of "dual sovereignty," developed by the US Supreme Court when faced with double jeopardy issues, could be applicable to international anti-corruption enforcement, as suggested by Colangelo:

> The [dual sovereignty] doctrine "is founded on the...conception of crime as an offense against the sovereignty of the government." It holds that "[w]hen a defendant in a single act violates the (peace and dignity) of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" No violation of the prohibition on double jeopardy results from successive prosecutions by different sovereigns, according to the Court, because "by one act [the defendant] has committed two offences, for each of which he is justly punishable. The defendant, in other words, is not being prosecuted twice for the same "offence," if another sovereign successively prosecutes for the same act-even if the second sovereign prosecutes using a law identical to that used in the first prosecution.[280]

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[278] *Ibid* at 504.

[279] See generally, Martin L Friedland, *Double Jeopardy* (Clarendon Press, 1969).

[280] Anthony J Colangelo, "Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory" (2009) 86:4 Washington U LR 779.

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The principal difficulty with the dual sovereignty doctrine in anti-corruption enforcement (apart from the fact that it appears to leave a loophole in the basic rights of accused persons) is that many corruption investigations and prosecutions depend on the voluntary disclosure and cooperation of the company or individual suspected of corrupt activity. Faced with a multiplicity of prosecutions in various countries with different sanctioning procedures, suspects may be significantly more reluctant to cooperate with enforcement bodies, which has a negative effect on anti-corruption enforcement. The trend today for multinational companies is to try to negotiate a coordinated global settlement with all potential prosecuting countries at the same time (see Section 7.3.2 "Coordinated Actions and Settlements below).

Issues of double jeopardy in anti-corruption enforcement were discussed at the 2011 B20 Summit (an international meeting of business leaders from the G20 countries) in Cannes, France. While supporting the 2010 G20 action plan on combating corruption, B20 leaders recommended enforcement reforms to prevent cases of double jeopardy. In the B20 *Final Report*, B20 leaders recommended the following:

> Enhance inter-governmental cooperation concerning multijurisdictional bribery cases in order to avoid double jeopardy (principle of *ne bis in idem*).
>
> Violations of anti-bribery laws should be vigorously investigated, prosecuted, and remedied in all affected jurisdictions. It is important, however, that enforcement authorities coordinate prosecutions to avoid, where possible, inappropriate multiple proceedings concerning the same offense. Avoidance of duplicate proceedings could in many cases accelerate remediation of the underlying causes of the offense.[281]

The principle contained in Article 4.3 of the OECD Convention and in Article 42 of UNCAC should be "translated" into a more immediate and effective rule in national anti-bribery legislation.

7.2.2 Unnecessary Deterrence

Holtmeier notes that in addition to being fundamentally unfair, multiple enforcement actions can lead to punishments that are more harsh than needed for future deterrence. This can be a waste of resources for enforcement agencies and lead to increased costs of doing business. If penalties are too high, companies will spend increased amounts of money on monitoring, which hinders their ability to provide competitive pricing. This could lead companies, according to Holtmeier, to pull out of a country if the risk of doing business in that country is too great. In its 2010 settlement with Panalpina World Transport (Holding) Ltd., the US DOJ noted that the company had ceased operations in one of the countries in which the corrupt behaviour occurred. In its 2015 settlement with Goodyear Tire & Rubber

[281] November 2011, online: <http://www.b20businesssummit.com/uploads/presse/Final-Report-with-with-appendices-B20-2011.pdf>.

Company, the SEC "touted the divestiture of foreign subsidiaries."[282] Such withdrawal of companies from corrupt countries could be seen as both desirable and undesirable. On one hand, withdrawal from corrupt countries will prevent companies from engaging in and thus supporting bribery in those countries. On the other hand, a company's withdrawal from a corrupt country could be detrimental to the overall economic wellbeing of that country.

7.2.3 Chilling Effect on Self-Reporting

Holtmeier states that a final reason to avoid duplicative enforcement actions is the chilling effect on self-reporting. The author suggests that a "company may be willing to take the risk that misconduct will remain undetected by law enforcement" and direct resources to internal investigations rather than facing the possibility of years of investigations in multiple jurisdictions.[283]

7.3 Approaches to Multijurisdictional Enforcement

As more countries actively pursue corruption cases, there is an increased chance of companies facing concurrent prosecutions. Mechanisms to avoid duplicative punishments are discussed below.

7.3.1 Offsetting Monetary Penalties

Offsetting penalties gives a company "credit" for monetary penalties that have been paid for the same or similar conduct. Holtmeier suggests that offsetting provides a partial remedy for the unfairness of duplicative penalties. However, it may be difficult to determine the right amount to offset, and there is no guarantee that agencies will reduce penalties due to those previously imposed. Holtmeier notes that in its 2014 settlement with Alstom, the US DOJ did not appear to credit penalties paid to Switzerland and the World Bank for similar conduct. In fact, the DOJ pointed to these other penalties as evidence of Alstom's repeated wrongdoing.

7.3.2 Coordinated Actions and Settlements

Companies may enter into settlements with multiple jurisdictions at the same time. For example, in 2011, Johnson & Johnson resolved a *FCPA* violation in the US on the same day that the SFO in the UK announced a civil recovery related to the same matter. Holtmeier sees this as "a step in the right direction," but cooperation and coordination may not produce a single resolution and additional countries could always bring future charges.[284]

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[282] Holtmeir (2015) at 516.

[283] *Ibid* at 516-17.

[284] *Ibid at* 508.

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In 2017, Rolls-Royce announced that it reached agreements in principle with prosecutors in the UK, US and Brazil to resolve multiple bribery and corruption incidents by intermediaries in a number of foreign countries. In the UK, the company has agreed to the payment of $599 million under a DPA plus the costs of the SFO investigation. The DPA must still be approved by a court. The company further agreed to a payment of $170 million to US DOJ and a payment of $25.5 million to Brazil.[285]

7.3.3 Enforcement Comity and Declinations

The doctrine of comity informs international anti-corruption enforcement. Comity generally entails reciprocity and the extension of courtesies from one jurisdiction to another when the laws of both are involved. Though multiple States may legitimately exercise concurrent jurisdiction over corruption offences, the principle of comity might lead one State's enforcement body to defer to another State's enforcement body in the prosecution of corruption offences.[286]

Articles 42.5 and 47 of UNCAC and Article 4.3 of the OECD Convention are provisions regarding enforcement comity. Both UNCAC and the OECD Convention recommend that enforcement bodies communicate with one another during investigations and state that prosecutions should take place in the most appropriate jurisdiction. It appears that enforcement comity is at least a factor in US prosecutions under the *FCPA*. In "The Twilight of Comity," Waller writes that "both the Justice Department and the Federal Trade Commission (FTC) routinely consider comity factors in exercise of their prosecutorial discretion."[287]

According to Holtmeier, one jurisdiction may decline to prosecute a corruption offence on the basis that a company has resolved charges for the same or similar conduct elsewhere.[288] Since a rationale for forgoing prosecution is rarely given, it is difficult to predict situations in which one jurisdiction will drop charges. Holtmeier discusses the DOJ's decision to drop the investigation into Dutch-based SBM Offshore following the company's $240 million settlement with Dutch prosecutors. The DOJ's decision may have been influenced by the fact

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[285] Richard L Cassin, "Rolls-Royce Agrees to Pay $809 Million to Settle Bribery Allegations" (16 January 2017), *The FCPA Blog*, online: <http://www.fcpablog.com/blog/2017/1/16/rolls-royce-agrees-to-pay-809-million-to-settle-bribery-alle.html>.

[286] For a fulsome discussion of enforcement comity as a means of reducing parallel proceedings, see Colangelo, (2009) at 848-57.

[287] Weber Waller, "The Twilight of Comity" (2000) 38 Colum J Transnat'l L 563 at 566.

[288] There is no precise definition of declination, which can be considered broadly as any legal scrutiny that does not lead to an enforcement action or narrowly as an instance in which an enforcement agency has concluded it could succeed in a prosecution but nonetheless decides not to pursue the prosecution. See Mike Koehler, "The Need For A Consensus 'Declination' Definition" (15 January 2013), *FCPA Professor*, online: <http://fcpaprofessor.com/the-need-for-a-consensus-declination-definition/>; Marc Alain Bohn, "Revisiting the Definition of 'Declinations'" (22 January 2013), *The FCPA Blog*, online: <http://www.fcpablog.com/blog/2013/1/22/revisiting-the-definition-of-declinations.html>.

that a potential offsetting of the Dutch penalty could negate any penalty collectible in the US, as well as considerations of jurisdiction and evidence.[289]

[289] Holtmeir (2015) at 511-12.

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CHAPTER 7

CRIMINAL SENTENCES AND CIVIL SANCTIONS FOR CORRUPTION

[Large segments of this chapter were written by Matthew Spencer, under Professor Ferguson's supervision and input. Section 13 was written by Dmytro Galagan.]

PART A: CRIMINAL SENTENCES AND COLLATERAL CONSEQUENCES

1. INTRODUCTION

2. UNCAC

3. OECD CONVENTION

4. US SENTENCING LAW

5. UK SENTENCING LAW

6. CANADIAN SENTENCING LAW

7. CRIMINAL FORFEITURE

8. DEBARMENT AS A COLLATERAL CONSEQUENCE OF A BRIBERY CONVICTION

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PART B: CIVIL AND ADMINISTRATIVE ACTIONS AND REMEDIES

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12. CIVIL ACTIONS AND REMEDIES

13. INTERNATIONAL INVESTMENT ARBITRATION

PART A: CRIMINAL SENTENCES AND COLLATERAL CONSEQUENCES

1. INTRODUCTION

In Chapter 2, the main corruption offences—both domestic and foreign—are described and the maximum punishment for those offences is set out. In this section, the sentencing principles which guide the selection of an appropriate sentence in individual cases are briefly described, and the actual sentences imposed in some corruption cases are provided as illustrations of how those sentencing principles are applied in practice.

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2. UNCAC

UNCAC has very little in the way of requirements or specific guidance for sanctions and sentencing in corruption cases and does not set out any minimum or maximum sentences for corruption offences. Some guidance is provided in the following Articles:

> Article 12(1) provides that "each State Party shall take measures, in accordance with … its domestic law … to provide effective, proportionate and dissuasive civil, administrative or criminal penalties" for violation of corruption prevention standards and offences involving the private sector.
>
> Article 30(1) provides that "each State Party shall make the commission of [corruption] offences … liable to sanctions that take into account the gravity of that offence."
>
> Article 30(7) indicates that State Parties should consider disqualification of persons convicted of corruption from holding public office for a period of time.
>
> Article 37(2) provides that State Parties shall consider mitigation of punishment (or immunity from prosecution under Article 37(3)) for accused persons who provide "substantial cooperation" in the investigation or prosecution of corruption offences.
>
> Article 30(10) indicates that State Parties shall endeavor to promote the reintegration into society of persons convicted of corruption.[1]

3. OECD CONVENTION

The OECD Convention also has very few provisions on sanctions and sentencing for corruption of foreign public officials. Article 3 of the OECD Convention, which is entitled "Sanctions," provides in paragraph 1 that bribery of foreign officials "shall be punishable by effective, proportionate and dissuasive criminal penalties comparable to the penalties for corruption of domestic officials." Article 8(2) has a similar penalty requirement for books and records offences.

Paragraph 2 of Article 3 requires those Parties who do not recognize the concept of "corporate criminal liability" in their legal systems to ensure that corporations are "subject

[1] United Nations Convention Against Corruption, 9 to 11 December 2003, A/58/422, (entered into force 14 December 2005), online: <https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>.

to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions for bribery of foreign public officials."

Paragraph 3 of Article 3 requires each Party to take necessary steps for seizure and confiscation of the proceeds of bribery and paragraph 4 states that each Party shall consider imposing additional civil or administrative sanctions in addition to criminal penalties.[2]

4. US SENTENCING LAW

Bribery of US officials is criminalized under both state and federal criminal law. This book only deals with corruption offenses involving US federal officials under the US Code[3] and foreign public officials under the *Foreign Corrupt Practices Act* (*FCPA*).[4] Sentences for offenders under these laws are guided by the US Sentencing Commission's *Guidelines Manual* (*Guidelines*).[5]

4.1 Federal Sentencing Guidelines

The *Guidelines* were adopted in 1984 and were originally mandatory. In 2005, the US Supreme Court in *US v Booker* held that the mandatory nature of the *Guidelines* violated the US Constitution.[6] Since that time, the sentencing range for each case set out in the *Guidelines* has been treated by sentencing courts as advisory, rather than mandatory. The *Guidelines* are designed to bring a reasonable degree of uniformity to similar offenses committed by similar offenders in similar circumstances. The recommended sentencing range (described in months of imprisonment) is determined by putting the severity of the offense on one axis (there are 43 different offense levels) and the severity of the offender's prior criminal record on the other axis (there are six categories of seriousness for the prior record). Where the two axes intersect, the *Guidelines* give a recommended advisory range of sentence in terms of months. Departures from that range are made where the circumstances of a case warrant departure. The Sentencing Table (see Table 7.1) is also divided into four zones, the effect of which are described below.

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[2] OECD, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, online: <http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf>.

[3] 18 USC.

[4] *Foreign Corrupt Practices Act* of 1977, as amended, 15 USC §§ 78dd-1, et seq.

[5] United States Sentencing Commission, *Guidelines Manual* [Guidelines Manual (2014)] (November, 2014),
online: <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf>.

[6] *United States v Booker*, 125 S Ct 738 (2005).

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4.1.1 Offense Seriousness

In the *Guidelines*, each offense is assigned a "base level" of offense seriousness and that base level will then be increased or decreased depending on the existence of specified aggravating or mitigating circumstances. For example, for offering, giving, soliciting or receiving a bribe, the offense base level is 12. If the offender is a public official, the base level is 14 and if the offense involved more than one bribe, the offense level rises to 16.

4.1.2 Criminal History of the Offender

An offender can receive an elevated sentence due to their prior criminal history. An offender receives one point for each prior sentence,[7] two points if the prior sentence was for a period of incarceration of at least 60 days and three points if the prior sentence was for a period of imprisonment exceeding one year and one month.[8]

4.1.3 Zones

The Sentencing Table is also divided into four zones.[9] Zone A (for the least serious offenses) indicates that a sentence of probation without any prison time would also be a fit sentence. Zone B indicates that the offender should serve at least a short period (no less than 30 days) in prison, while the remainder of the sentence could be served in community confinement (e.g., home detention, etc.). Zone C indicates that offenders should serve at least one half of the sentence in prison and the remainder could be served in community confinement. Zone D indicates that the minimum number of months set out in the specific recommended sentencing range (each range has a minimum and a maximum) should be served in prison.

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[7] As stated in §4A1.2.(a)(1), **"**[t]he term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense" and (c) "[a] conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence." Certain offenses are excluded from calculation, including offenses for which the sentence was imposed more than ten years prior to the instant offense (or five years if the prior offense was committed prior to the offender's 18th birthday) and certain minor offenses such as hitchhiking and public intoxication. The offender can receive a maximum of four points for sentences that do not result in incarceration for at least 60 days, whereas two points are given for each prior sentence of at least 60 days and three points for each prior sentence exceeding one year and one month.

[8] For a full description of the Criminal History and Criminal Livelihood score see Guidelines Manual (2014).

[9] For a full description of the zones and their impact see *ibid*, § 5C1.1 (Imposition of a Term of Imprisonment). For a full description of departures from guidelines ranges, see *ibid*, ch 5, pt K (Departures).

Table 7.1 US Sentencing Table for Imprisonment[10]

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone D	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

[10] Guidelines Manual (2014).

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4.2 Sentencing Procedure and Guiding Principles

The sentencing of a criminal offender has been described as a three-step process. As explained by US District Judge John Adams:

> Criminal sentencing is often described as a three-step process. A district court must begin the process by calculating the advisory guideline range suggested by the United States Sentencing Commission. *Rita v. United States*, 551 U.S. 338, 351, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007) ("The sentencing judge... will normally begin by considering the presentence report and its interpretation of the Guidelines."). In so doing, the Court must determine the offense level for the crimes for which the defendant has been convicted and the defendant's criminal history. *See United States v. Boyd*, No. 3:07-CR-3, 2008 WL 4963198, at *14-16 (E.D.Tenn. Nov. 18, 2008).
>
> Next, the Court must determine whether a variance or departure from the advisory guideline range would be appropriate. *United States v. Collington*, 461 F.3d 805, 807 (6th Cir. 2006).
>
> Finally, a sentencing court must independently evaluate each of the factors in 18 U.S.C. § 3553(a), which details the considerations that a district court must weigh before sentencing a criminal defendant. Although the Guidelines form a starting point in the district court's analysis under 18 U.S.C. § 3553(a), a district court may not presume that the sentence suggested by the Guidelines is appropriate for an individual criminal defendant. A district court may hear arguments by prosecution or defense that the Guidelines sentence should not apply. In this way, a sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing.[11]

Under § 3553 of Title 18 of the US Code, the factors to be considered in imposing a sentence are:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;

[11] *United States of America v Bernard K Watkins*, Case No. 1:09CR490 (ND Ohio 2010). United States District Court of Ohio, Eastern Division 2010 US Dist. LEXIS 90133.

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines [issued by the Sentencing Commission] …

(5) any pertinent policy statement [issued by the Sentencing Commission]— …

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.[12]

4.3 Specific Corruption Related Guidelines

Chapter 2 of the *Guidelines* contains information for offenses which are either directly related to corruption or contain aspects of corruption if they are committed on or by a public official. §2C1.1 of the *Guidelines* deals with the following offenses: Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; and Conspiracy to Defraud by Interference with Governmental Functions. §2C1.1 is one of the most commonly applied guidelines for corruption of a public official. As noted, the base level for this offense is 14 if the defendant is a public official, which in the Sentencing Table (see Table 7.1) corresponds to a guideline range of 15-21 months.

[12] 18 USC § 3553 (Imposition of a sentence), online: <http://www.law.cornell.edu/uscode/text/18/3553>.

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4.3.1 Seriousness of Offense

The following factors are also relevant in determining the offense level. Under §2C1.1 of the *Guidelines*, the offense level can be increased in the following circumstances:

> (1) If the offense involved more than one bribe or extortion, increase by 2 levels.
>
> (2) If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
>
> (3) If the offense involved an elected public official or any public official in a high-level decision-making or sensitive position, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.
>
> (4) If the defendant was a public official who facilitated (A) entry into the United States for a person, a vehicle, or cargo; (B) the obtaining of a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) the obtaining of a government identification document, increase by 2 levels.[13]

As noted in item (2) above, the value of the bribe is relevant and is calculated based on the greatest of the following four measures:

a) the value of the payment,

b) the benefit received or to be received in return for the payment,

c) value of anything obtained or to be obtained by a public official or others acting with a public official,

d) the loss to the government from the offense.

[13] Guidelines Manual (2014), § 2C1.1(b).

The table used to calculate the offense level increase is found in §2B1.1.(b)(1):

Table 7.2 Specific Offense Characteristics[14]

	Loss (Apply the Greatest)	Increase in Level
(A)	$5,000 or less	no increase
(B)	More than $5,000	add 2
(C)	More than $10,000	add 4
(D)	More than $30,000	add 6
(E)	More than $70,000	add 8
(F)	More than $120,000	add 10
(G)	More than $200,000	add 12
(H)	More than $400,000	add 14
(I)	More than $1,000,000	add 16
(J)	More than $2,500,000	add 18
(K)	More than $7,000,000	add 20
(L)	More than $20,000,000	add 22
(M)	More than $50,000,000	add 24
(N)	More than $100,000,000	add 26
(O)	More than $200,000,000	add 28
(P)	More than $400,000,000	add 30

[14] *Ibid* at § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States).

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Using the greatest of the four specified measures can lead to large increases in offense level, as demonstrated in the cases of *Edwards*,[15] *Richard*[16] and *Abbey*.[17]

4.3.2 Positions of Elevated Trust

In cases of public corruption, the position of power and degree of breach of trust is considered in sentencing. As stated, under §2C1.1 of the *Guidelines*, a four-level increase is given if the offense involved an elected public official or high-level decision-making or

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[15] In *United States of America v Jeffery Edwards*, 378 US App DC 86 (2007), an asbestos inspector was sentenced to 33 months in prison for bribery and extortion. As stated by Garland J:

> Jeffrey Edwards was a District of Columbia asbestos inspector who issued a permit to a contracting company that allowed the company to conduct an asbestos abatement project. He told the company that he thought a more costly abatement procedure was required by the applicable regulations, but that he would permit it to use a less costly procedure if it paid him $10,000. Unfortunately for Edwards, the FBI videotaped the transaction, and he was arrested and then convicted for bribery and extortion. The district court sentenced Edwards to 33 months in prison. Edwards now appeals, contending that the court erred in its application of the United States Sentencing Guidelines.

The parties agreed that § 2C1.1 of the *Sentencing Guidelines* was applicable, but disagreed on the amount of level enhancement. Edwards argued the court should consider the value of the bribe, $10,000, and apply a two-level increase. The government argued that the less costly procedure made a difference of $200,000, corresponding to a ten-level increase. The court found the cost difference to be $100,000 and increased the offense level by eight, making the guideline range 30-37 months. The 33-month sentence imposed by the court under this range was upheld on appeal.

[16] In *United States of America v Quincy Richard Sr*, 775 F (3d) 287 (2014), the offender, a former member of a school board, pledged to support an applicant for School Board Superintendent in exchange for $5,000. A co-accused also was to receive $5,000. The applicant for Superintendent was a government informant. Following a trial, Richard was found guilty of conspiracy to commit bribery and two counts of bribery. Richard was sentenced to 33 months in prison and three years' supervised release per count to be served concurrently. The district court increased the offense level by two levels because the two bribes totaled $10,000. Richard appealed on various grounds, including that he should be responsible for, at most, $5,000. The Court of Appeal upheld the entire sentence including the two-level increase, noting that the total bribe was the greatest amount of the bribe or loss to the government.

[17] In *United States of America v Charles Gary-Don Abbey*, 560 F (3d) 513 (2009), Abbey, a city administrator, accepted a free building lot from a land developer. He was convicted of conspiracy to bribe a public official, solicitation of a bribe, and extortion by a public official and was sentenced to 15 months imprisonment. The sentencing court applied a four-level enhancement due to the value of the lot exceeding $20,000. Abbey argued on appeal "that the land was basically worthless because he had to pay certain assessments on it after receipt, and further that the only relevant criteria was his subjective impression of the property's value." The court rejected this argument, finding the value of loss ordinarily means the fair market value and is determined objectively. The government presented evidence of surrounding lots selling for more than $20,000 and the bank from whom Abbey sought a mortgage estimated the lots' value at $40,000. The district court applied the value over $20,000 and the Court of Appeal held that value was "not clearly erroneous" and upheld the sentence.

sensitive position, and if the resulting offense level is less than 18, it is to be increased to level 18.

In *United States of America v Bridget McCafferty*,[18] McCafferty, a former judge, was convicted of 10 counts of making false statements to FBI agents arising out of a corruption investigation of another public official. The offense level was 6, with its corresponding guideline range for sentencing from 0-6 months. The district court applied a 5-level adjustment moving the range to 8-14 months and sentenced McCafferty to 14 months. The upward departure and ultimate sentence were both upheld on appeal, with the court stating: "For a sitting judge to knowingly lie to FBI agents after she had unethically steered negotiations in a case to benefit her associates is a shock to our system of justice and the rule of law."[19]

In one of the highest profile corruption cases in the last decade, former Illinois Governor Rod Blagojevich was sentenced to 14 years in prison following 18 corruption convictions, most notably his attempt to "sell or trade" the United States Senate seat that had become vacated following Barack Obama's election in 2008. Other charges included racketeering conspiracy, wire fraud, extortion conspiracy, attempted extortion and making false statements to federal agents.[20] In sentencing Blagojevich to 14 years in prison, Judge James Zagel stated "[t]he harm here is not measured in the value of property or money. The harm is the erosion of public trust in government."[21] On appeal, the 7th Circuit Court of Appeals vacated five of the convictions on a technicality and ordered a re-sentencing; further leave to the Supreme Court was denied. Despite the reduced number of convictions, the 14-year sentence was upheld at a re-sentencing in August, 2016. Blagojevich's lawyer further appealed the sentence,[22] but on April 21, 2017 the 7th Circuit Court of Appeals upheld the original sentence.[23]

United States of America v Richard Renzi involved the trial and sentencing of a former Arizona Congressman in respect to a $200,000 bribe payment (resulting in a 10-level enhancement).[24] Renzi was sentenced to 36 months imprisonment and his friend and business partner was sentenced to 18 months imprisonment. In affirming the sentences, the Court noted the substantial power granted to Renzi, stating:

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[18] *United States of America v Bridget McCafferty*, 2012 US Lexis 11247 (6th Cir 2012).
[19] *Ibid* at VIII C.
[20] For the full indictment, see <https://www.justice.gov/archive/usao/iln/chicago/2009/pr0402_01a.pdf>.
[21] Monica Davey, "Blagojevich Sentenced to 14 Years in Prison", *The New York Times* (7 December 2011), online: <http://www.nytimes.com/2011/12/08/us/blagojevich-expresses-remorse-in-courtroom-speech.html?_r=0>.
[22] "Ex-Gov. Rob Blagojevich to appeal 14-year prison sentence", *Chicago Tribune* (23 August 2016), online: <http://www.chicagotribune.com/news/local/breaking/ct-rod-blagojevich-appeal-prison-sentence-20160823-story.html>.
[23] "Ex-Gov. Rob Blagojevicj loses appeal as judges quickly uphold 14-year prison term", *Chicago Tribune* (21 April 2017), online: <http://www.chicagotribune.com/news/local/breaking/ct-rod-blagojevich-appeal-20170421-story.html>.
[24] *United States of America v Richard G Renzi*, 769 F (3d) 731 (9th Cir 2014).

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> The Constitution and our citizenry entrust Congressmen with immense power. Former Congressman Renzi abused the trust of this Nation, and for doing so, he was convicted by a jury of his peers. After careful consideration of the evidence and legal arguments, we affirm the convictions and sentences of both Renzi and his friend and business partner, Sandlin.[25]

United States of America v Richard McDonough[26] involved the trial and sentencing of McDonough Salvatore DiMasi, the former Speaker of the Massachusetts House of Representatives, for bribes in relation to business transactions. DiMasi received a sentence of 96 months (8 years) imprisonment (the guideline range was 235 to 293 months) and McDonough was sentenced to 84 months (7 years) imprisonment (the guideline range was 188 to 235 months). The guideline range for DiMasi and McDonough was identical except for the enhancement given to DiMasi as a public official.

United States of America v Joseph Paulus involved the sentencing of Paulus, a former district attorney who accepted 22 bribes over the course of a two-year period for agreeing to favourable treatment of a defence lawyer's clients.[27] Paulus was sentenced to 58 months imprisonment (nearly 5 years), an upward departure from the guideline range of 27 to 33 months. The court justified their upward departure based on the nature of the trust breached, the number of bribes over a substantial period of time and the difficulty in detecting corruption. The court stated:

> Bribery, by its very nature, is a difficult crime to detect. Like prostitution, it occurs only between consenting parties both of whom have a strong interest is concealing their actions. And often, when it involves public corruption as in this case, one of the parties occupies a position of public trust that makes him, or her, an unlikely suspect. In light of these facts, it is unusual to uncover even one instance of bribery by a public official, let alone twenty-two. This fact takes the case outside of the heartland …. That there was interference with a government function to an unusual degree and a loss of public confidence in government as a result of his offense are facts that this court has found. But the question of how to measure such impact and assign a numeric adjustment in the applicable offense level under the Guidelines is a matter of judgment. Such matters cannot be quantified, or at least easily quantified. For these reasons, and for the reasons set forth on the record in court, the defendant is sentenced to a term of fifty-eight months.[28]

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[25] *Ibid* at IX.

[26] *United States of America v Richard McDonough*, 727 F (3d) 143 (1st Cir 2013).

[27] *United States of America v Joseph Paulus*, 331 F Supp (2d) 727 (ED Wis).

[28] *Ibid* at para 16.

While §2C1.1 deals with one of the most common corruption offenses, there are other guidelines which apply to offenses which are either directly related to corruption or have an element of corruption if they are committed by a public official.[29]

4.4 Imposition of Fines

Criminal offenders can also be fined as part of their sentence. Under 18 USC § 3571, fines for individual offenders may be no more than the greatest of:

(1) the amount specified in the law setting forth the offense;
(2) the applicable amount under subsection (d) of this section [not more than the greater of twice the value of the loss caused to another by the offense or twice the value of the defendant's gain from their criminal behaviour, unless this option would unduly complicate or lengthen the sentencing process];
(3) for a felony, not more than $250,000;

The factors governing the imposition of a fine are found in 18 USC § 3572, which states:

> (a) **Factors To Be Considered —** In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553 (a)—
>
> (1) the defendant's income, earning capacity, and financial resources;
>
> (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;
>
> (3) any pecuniary loss inflicted upon others as a result of the offense;
>
> (4) whether restitution is ordered or made and the amount of such restitution;

[29] For the full guideline text of these provisions, see: <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/CHAPTER_2.pdf>.

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(5) the need to deprive the defendant of illegally obtained gains from the offense;

(6) the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence;

(7) whether the defendant can pass on to consumers or other persons the expense of the fine; and

(8) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

(b) **Fine Not to Impair Ability to Make Restitution —** If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, other than the United States, the court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.[30]

For the offense of bribery of domestic public officials and witnesses in 18 USC § 201, fines are determined by the above sections or may be up to three times the value of the thing given or offered to the official. This applies to both the bribe payer and the bribe receiver, meaning the penalty for both may be based on the amount of the bribe. Rose-Ackerman notes that this symmetry in the maximum fine fails to reflect the "asymmetries in gains between bribe payers and recipients."[31] Under subsection (2) above, the bribe payer's gains may be taken into account; however, Rose-Ackerman argues that gains should be multiplied to reflect the probability of detection in order to effectively deter bribery.

4.5 Sentencing Corporations and Other Organizations

The *Guidelines* provide the following general principles for the sentencing of organizations:

> First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused.

[30] 18 USC § 3572 (Imposition of sentence of fine and related matters), online: <http://www.law.cornell.edu/uscode/text/18/3572>.

[31] Susan Rose-Ackerman, "The Law and Economics of Bribery and Extortion" (2010) 6 Annual Rev Law Soc Sci 217 at 225.

> Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets.
>
> Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the greatest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by six factors that the sentencing court must consider. The four factors that increase the ultimate punishment of an organization are: (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice. The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.
>
> Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.
>
> These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program. The prevention and detection of criminal conduct, as facilitated by an effective compliance and ethics program, will assist an organization in encouraging ethical conduct and in complying fully with all applicable laws.[32]

The *Guidelines* set out the base fine for an organization:

> (a) The base fine is the greatest of:
>
> (1) the amount from the table in subsection (d) below corresponding to the offense level determined under §8C2.3 (Offense Level); or
>
> (2) the pecuniary gain to the organization from the offense;[33] or
>
> (3) the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly.[34]

[32] Guidelines Manual (2014) ch 8, intro comment.
[33] Rose-Ackerman argues that fines should be a multiple of the gain to the organization, since the chances of being caught are far below 100%. See Rose-Ackerman, (2010) at 225.
[34] *Ibid,* § 8C2.4.

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The *Guidelines* set out a fine of $5,000 for an offense level of 6 or less and gradually rise to $72.5 million for offense level of 38 or more. Each offense level increases the amount of the fine. For example:

Table 7.3 Offense Level Fine Table[35]

Offense Level	Fine
6 or less	$5000
8	$10,000
15	$125,000
22	$1,200,000
30	$10,500,000
36	$45,500,000
38 or more	$72,500,000

Fines are also multiplied based on the organization's culpability score. The culpability score is based on a number of factors including prior criminal history, involvement of high-level officials, whether the organization had a pre-existing compliance program, and voluntary disclosure and cooperation:

Table 7.4 Minimum and Maximum Multipliers[36]

Culpability Score	Minimum Multiplier	Maximum Multiplier
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0	0.05	0.20

[35] Guidelines Manual (2014), § 8C2.4.

[36] *Ibid*, § 8C2.6**.** For a full description of the sentencing guidelines for organizations (including a discussion of restitution, effective compliance and ethics programs, determination of fines including departures from guideline fine ranges, organizational probation, and violations of probation), see *ibid*.

4.6 *FCPA* Sentencing

The *FCPA* sets out the criminal penalties for corruption offenses. All *FCPA* criminal offenses are prosecuted by the Department of Justice (DOJ). The *Resource Guide to the FCPA* (*Resource Guide*), produced by the DOJ and the Securities Exchange Commission (SEC), sets out nine factors to guide the DOJ and SEC in determining whether to seek indictment or an NPA, DPA or SEC civil settlement, and in determining the terms of those dispositions. The *Resource Guide* repeatedly emphasizes that voluntary early disclosure of possible *FCPA* violations and cooperation in the investigation of those violations will be key factors in obtaining more lenient treatment from the DOJ or SEC. The *Resource Guide* states that the nine factors are considered in conducting an investigation, determining whether to charge a corporation, and negotiating plea or other agreements:

- the nature and seriousness of the offense, including the risk of harm to the public;
- the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
- the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
- the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;
- the existence and effectiveness of the corporation's pre-existing compliance program;
- the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or improve an existing one, replace responsible management, discipline or terminate wrongdoers, pay restitution, and cooperate with the relevant government agencies;
- collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;
- the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
- the adequacy of remedies such as civil or regulatory enforcement actions.[37]

[37] *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Department of Justice and Securities Exchange Commission, 2012) at 53, online: <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>.

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The following excerpt from the *Resource Guide* discusses penalties:[38]

BEGINNING OF EXCERPT

What Are the Potential Consequences for Violations of the FCPA?

The FCPA provides for different criminal and civil penalties for companies and individuals.

Criminal Penalties

For each violation of the anti-bribery provisions, the FCPA provides that corporations and other business entities are subject to a fine of up to $2 million. Individuals, including officers, directors, stockholders, and agents of companies, are subject to a fine of up to $250,000 and imprisonment for up to five years.

For each violation of the accounting provisions, the FCPA provides that corporations and other business entities are subject to a fine of up to $25 million. Individuals are subject to a fine of up to $5 million and imprisonment for up to 20 years. Under the Alternative Fines Act, 18 U.S.C. § 3571(d), courts may impose significantly higher fines than those provided by the FCPA—up to twice the benefit that the defendant obtained by making the corrupt payment, as long as the facts supporting the increased fines are included in the indictment and either proved to the jury beyond a reasonable doubt or admitted in a guilty plea proceeding. Fines imposed on individuals may not be paid by their employer or principal.

U.S. Sentencing Guidelines

When calculating penalties for violations of the FCPA, DOJ focuses its analysis on the U.S. Sentencing Guidelines (Guidelines) in all of its resolutions, including guilty pleas, DPAs, and NPAs. The Guidelines provide a very detailed and predictable structure for calculating penalties for all federal crimes, including violations of the FCPA. To determine the appropriate penalty, the "offense level" is first calculated by examining both the severity of the crime and facts specific to the crime, with appropriate reductions for cooperation and acceptance of responsibility, and, for business entities, additional factors such as voluntary disclosure, cooperation, pre-existing compliance programs, and remediation.

The Guidelines provide for different penalties for the different provisions of the FCPA. The initial offense level for violations of the anti-bribery provisions is determined under § 2C1.1, while violations of the accounting provisions are assessed under §

[38] *Ibid* at 68-69.

2B1.1. For individuals, the initial offense level is modified by factors set forth in Chapters 3, 4, and 5 of the Guidelines to identify a final offense level. This final offense level, combined with other factors, is used to determine whether the Guidelines would recommend that incarceration is appropriate, the length of any term of incarceration, and the appropriate amount of any fine. For corporations, the offense level is modified by factors particular to organizations as described in Chapter 8 to determine the applicable organizational penalty. … For violations of the accounting provisions assessed under § 2B1.1, the procedure is generally the same, except that the specific offense characteristics differ. For instance, for violations of the FCPA's accounting provisions, the offense level may be increased if a substantial part of the scheme occurred outside the United States or if the defendant was an officer or director of a publicly traded company at the time of the offense. For companies, the offense level is calculated pursuant to §§ 2C1.1 or 2B1.1 in the same way as for an individual—by starting with the base offense level and increasing it as warranted by any applicable specific offense characteristics. The organizational guidelines found in Chapter 8, however, provide the structure for determining the final advisory guideline fine range for organizations.

…

Civil Penalties

Although only DOJ has the authority to pursue criminal actions, both DOJ and SEC have civil enforcement authority under the FCPA. DOJ may pursue civil actions for anti-bribery violations by domestic concerns (and their officers, directors, employees, agents, or stockholders) and foreign nationals and companies for violations while in the United States, while SEC may pursue civil actions against issuers and their officers, directors, employees, agents, or stockholders for violations of the anti-bribery and the accounting provisions.

For violations of the anti-bribery provisions, corporations and other business entities are subject to a civil penalty of up to $16,000 per violation. Individuals, including officers, directors, stockholders, and agents of companies, are similarly subject to a civil penalty of up to $16,000 per violation, which may not be paid by their employer or principal. For violations of the accounting provisions, SEC may obtain a civil penalty not to exceed the greater of (a) the gross amount of the pecuniary gain to the defendant as a result of the violations or (b) a specified dollar limitation. The specified dollar limitations are based on the egregiousness of the violation, ranging from $7,500 to $150,000 for an individual and $75,000 to $725,000 for a company. SEC may obtain civil penalties both in actions filed in federal court and in administrative proceedings. [Footnotes omitted.]

END OF EXCERPT

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The size of penalties for *FCPA* cases has continued to increase. All ten of the ten largest penalties have been imposed since 2008. Richard Cassin lists the top ten largest combined DOJ and SEC penalties of October 2016:

Table 7.5 Top Ten Largest *FCPA* Penalties[39]

Company	Amount	Year
Siemens	$800 million (DOJ - $450 million) (SEC - $350 million)	2008
Alstom	$772 million (DOJ - $772 million)	2014
KBR / Halliburton	$579 million (DOJ - $402 million) (SEC - $177 million)	2009
Och-Ziff	$412 million (DOJ - $213 million) (SEC - $199 million)	2016
BAE	$400 million (DOJ - $400 million)	2010
Total SA	$398 million (DOJ - $245 million) (SEC - $153 million)	2013
VimpelCom	$397.6 million (DOJ - $230.1 million) (SEC - $167.5 million)	2016
Alcoa	$384 million (DOJ - $209 million fine, $14 million forfeiture) (SEC - $161 million)	2014
Snamprogetti Netherlands B.V. / ENI S.p.A	$365 million (DOJ - $240 million) (SEC - $125 million)	2010
Technip SA	$338 million (DOJ - $240 million) (SEC - $98 million)	2010

Several of these mega-corruption cases have also led to additional penalties imposed by foreign jurisdictions. For example, the 2010 BAE Systems Plc (BAE) case currently ranks as

[39] Richard Cassin, "Och-Ziff takes fourth spot on our new Top Ten list" (4 October 2016), *The FCPA Blog*, online: <http://www.fcpablog.com/blog/2016/10/4/och-ziff-takes-fourth-spot-on-our-new-top-ten-list.html - sthash.mYslwT7F.dpuf>.

the fifth largest *FCPA* settlement. BAE, a multinational defense contractor headquartered in the UK, pleaded guilty to conspiring to defraud the US by impairing and impeding its lawful functions, to make false statements about its *FCPA* compliance program, and to violate the *Arms Export Control Act (AECA*) and *International Traffic in Arms Regulations (ITAR)*. BAE agreed to pay a $400 million dollar penalty to the US Treasury[40] and to make a £30 million ex-gratia payment to authorities in the UK and Tanzania.[41] Furthermore, in 2011, BAE entered into a civil settlement with the US Department of State and agreed to pay a $79 million civil penalty.[42] BAE falsely represented its efforts to comply with the *FCPA* and took steps to conceal its relationship with marketing advisors retained to assist BAE in securing sales.[43]

Although the UK Serious Fraud Office (SFO) declared the £30 million payment to be a triumph for the UK, Pieth, the chairman of the OECD Anti-Bribery Working Group, expressed disappointment with the settlement. He argues that the penalty formed only a small part of the bribes involved in the cases under investigation. He views the penalties imposed by the US as adequate, but notes that the BAE case was "essentially a UK case and the UK should have dealt with it." In his opinion, the "case casts a shadow on Britain's ability to react to corruption."[44] It should be noted that the BAE case preceded the coming into force of the new UK *Bribery Act* and the significantly increased enforcement efforts in the UK since 2010.

Koehler presents a more detailed examination into the top ten mega-corruption cases:

- In most cases the corruption was widespread in terms of the countries involved (spanning the entire globe) and occurred rather systematically over many years; for example, the Siemens AG corruption charges spanned more than ten years and occurred in eleven countries on five continents.

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[40] Jacinta Anyango Oduor et al, *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (World Bank, 2014) at 109.

[41] For the full SFO press release see: http://webarchive.nationalarchives.gov.uk/20101220171831/ http://www.sfo.gov.uk//press-room/latest-press-releases/press-releases-2010/bae-systems-plc.aspx. The reparation payment was slated for Tanzania's education needs. The Tanzania government, with the help and advice of the UK Department for International Development (UK DFID), submitted a detailed proposal for the allocation of the funds to the SFO. The proposal was accepted and the UK DFID continues to assist Tanzania in its use of the funds. See Larissa Gray et al, *Few and Far: The Hard Facts on Stolen Asset Recovery* (World Bank and OECD, 2014) at 6, online: <https://star.worldbank.org/star/publication/few-and-far-hard-facts-stolen-asset-recovery>.

[42] For the media note on the settlement with the Department of State see: <http://www.state.gov/r/pa/prs/ps/2011/05/163530.htm>.

[43] For the full DOJ press release see: <http://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine>.

[44] Siri Schubert, "BAE: How Good a Plea Deal Was It?", *PBS Frontline World* (9 February 2010), online: <http://www.pbs.org/frontlineworld/stories/bribe/2010/02/bae-too-good-a-deal-says-chair-of-anti-bribery-group.html>.

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- All of the *FCPA* cases were settled. Often settlements involve guilty pleas to books and records and internal control offenses rather than bribery offenses, allowing companies to avoid debarment from public procurement contracts. For example, the US DOJ allowed Siemens to plead to accounting offenses due to its cooperation with investigations, even though corruption was clearly entrenched within the company. This was demonstrated by the fact that an accountant in the telecommunications group oversaw an annual bribery budget of $40-50 million. Siemens paid bribes for contracts in both highly corrupt countries like Nigeria and highly developed countries like Norway. When bribery laws changed in the 1990s, Siemens pursued more effective concealment of its bribery rather than complying. In spite of these blatant violations, Siemens avoided debarment from US public procurement due to the use of accounting offenses.[45] BAE was also charged with non-corruption-related offenses by the DOJ, thereby avoiding debarment from contracting with the Pentagon, which provided approximately half of its revenue.[46]
- Five or more of the cases were settled in whole or in part by Deferred Prosecution Agreements (DPAs) and several involved Cooperation Agreements (whereby company officials agreed to full cooperation in the corruption investigation in exchange for charge immunity or charge and sentence reductions).
- There were very few US prosecutions of individual company officials with the exception of the KBR/Halliburton case and the Alcatel case. In KBR, two agents and the CEO of KBR were prosecuted; the CEO (Stanley) had his tentative sentence of 84 months imprisonment reduced to 30 months based on his cooperation; one of the agents (Tesler), who also cooperated, received 21 months imprisonment and agreed to forfeiture of nearly $149 million; the second agent (Chodan) received one year probation (largely due to his age and poor health). In the Alcatel case, a former executive (Sapsizian) pled guilty to two *FCPA* offenses and was sentenced to 30 months im-prisonment, three years of supervised release and forfeiture of $261,500.
- The fact that company officials were not generally prosecuted in the US did not prevent their prosecution as individual offenders in other countries; in these ten cases, there currently are or have been individual prosecutions of these company officials in at least five other countries (France, Greece, Latvia, Costa Rica, and Argentina). [47]

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[45] Siri Schubert, "At Siemens, Bribery Was Just a Line Item", *The New York Times* (21 December 2008), online: <http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html?pagewanted=all&_r=0>.

[46] Schubert (9 February 2010).

[47] Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Edward Elgar Publishing, 2014) at 169-233.

4.7 Other Financial Consequences

While these settlements involve large dollar amounts, Koehler notes that criminal fines are only one aspect of financial exposure when one comes under *FCPA* scrutiny. Koehler outlines what he describes as the 'three buckets' of *FCPA* financial exposure as "(i) pre-enforcement action and professional fees and expenses; (ii) fine, penalty and disgorgement amounts in an actual FCPA enforcement action; and (iii) post-enforcement action professional fees and expenses."[48] Koehler notes that, while the second amount generates the most attention, the first category is often the most expensive.[49]

According to Koehler, pre-enforcement action is highly expensive because, before agreeing to resolve any enforcement action, enforcement agencies will often ask where else the conduct may have occurred in a company's international dealings. After this question is asked, the "next thing the company knows, it is paying for a team of lawyers (accompanied by forensic accountants and other specialists) to travel around the world and answer the 'where else' question."[50]

Koehler cites Avon as an example of the expense of pre-enforcement action. As stated, Avon agreed to pay $135 million to settle SEC charges and a parallel criminal case. However, according to Avon's disclosures, pre-enforcement expenses reached $350 million from 2009-2011 and amounted to $110,000 per working day as of March 2012.[51]

DPAs and Non-Prosecution Agreements (NPAs) often contain a clause requiring the company to report compliance efforts for a period of two or three years. This leads to the third bucket of financial exposure, post-enforcement action professional fees and expenses. Koehler cites Willbros Group and Faro Technologies as examples of expenses incurred in the third bucket of exposure. Willbros Group settled their matter for $32 million dollars, but the company estimates the cost of ongoing monitoring expenses to be approximately $10 million dollars.[52] Faro Technologies agreed to pay approximately $3 million in fines. The company disclosed that monitoring expenses amount to $1 million in just one quarter.[53]

4.8 Comments on *FCPA* Enforcement

It is interesting to observe the enforcement patterns for corporate corruption. Between 2008 and 2012, the DOJ settled 53 cases involving corporate corruption—42 public companies and

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[48] Koehler (2014) at 178.
[49] *Ibid*.
[50] *Ibid* at 180.
[51] *Ibid* at 178, citing Peter Henning, "The Mounting Costs of Internal Investigations", *The New York Times* (5 March 2012), online: <http://dealbook.nytimes.com/2012/03/05/the-mounting-costs-of-internal-investigations/?_r=0>.
[52] *Ibid* at 192.
[53] *Ibid* at 193.

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11 private companies. Rather than prosecuting and convicting both the company and the responsible company officers and agents, in 34 of the 42 public company cases (81%), no officers or agents were prosecuted or convicted. On the other hand, in the private company cases, there was a significantly higher rate of prosecuting the responsible officers as well as the company (55% of the cases [6 of 11] involved prosecution of both, whereas only 19% of the public corporation cases involved prosecution of both).[54]

There is another form of double standard, Koehler notes, in some of the largest corruption cases. By agreeing to SEC civil enforcement of books and records violations, many of these giant multinational corporations avoided the stigma and adverse consequences of a criminal bribery conviction. Koehler refers to such cases as "bribery yet not bribery enforcement actions."[55] For example, after discussing the cases of Siemens and BAE, Koehler states that some of the most egregious *FCPA* violations appear immune from bribery charges, since they are instead dealt with through books and records and other non-bribery offenses. Not surprisingly, these companies are usually major suppliers to the US government of goods and services considered critical to national security.[56]

Koehler outlines several other criticisms of *FCPA* enforcement, including a lack of transparency, the DOJ and SEC's lack of success when put to the burden of proof, and the fact that *FCPA* enforcement is a lucrative prospect for the US government as well as foreign governments.

Since almost all *FCPA* resolutions involve a DPA or NPA, Koehler states that "nearly all corporate FCPA enforcement actions in this new era are negotiated behind closed doors in the absence of meaningful judicial scrutiny."[57] With DPAs, the DOJ calculates the value of the benefit allegedly received in a non-transparent way, and when resolution is via a NPA, the calculation of the fine amount is not transparent.[58] Because of this lack of transparency, Koehler is an advocate for the abolition of DPAs and NPAs. He argues that the government should be confronted with the choice to either indict or walk away.

While enforcement agencies have been able to leverage large *FCPA* settlements, Koehler maintains that "when put to its burdens of proof in the context of an adversarial system, the enforcement agencies have had substantially less success,"[59] and notes that the DOJ lost both of the two corporate *FCPA* prosecutions that they did pursue to trial.[60]

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[54] *Ibid* at 205.
[55] *Ibid* at 197.
[56] *Ibid* at 199.
[57] *Ibid* at 195.
[58] *Ibid* at 183.
[59] *Ibid* at 36.
[60] *Ibid* at 195. Koehler states that "it is believed the SEC has never been put to its burden of proof in a corporate FCPA action."

Koehler writes that "[t]here are many who believe that FCPA enforcement in this new era represents a cash cow for the government as settlement amounts in FCPA enforcement actions simply flow into the U.S. treasury."[61] He cites the enforcement action against Total in support of this view, noting that "the enforcement action was against a French oil and gas company for making improper payments to an Iranian foreign official through use of an employee of a Swiss private bank and a British Virgin Island Company," leaving as the sole jurisdictional nexus a 1995 wire transfer from a New York bank account of $500,000 (less than 1% of the alleged bribe payments). The same conduct was the focus of an investigation in France (Total's home country). The alleged conduct occurred between 1995 and 1997, years before the 2013 settlement, so old in fact that the DOJ stated in the DPA that there were "evidentiary challenges."[62]

Koehler is also critical of the fact the DOJ and SEC appear to be "double-dipping" and collecting duplicative penalties in *FCPA* cases, citing the Total case as a clear example. Out of the $398 million penalty, Koehler estimates that $150 million was a double dip.[63] Corruption enforcement is not just lucrative to the US government, but brings substantial returns and political points to governments of other nations as well. The author notes that an increasing number of *FCPA* actions "are followed by 'tag-a-long' or 'carbon copy' foreign law enforcement investigations and enforcement actions,"[64] likening these actions to "a piñata breaking at a party, with multiple hands eager to catch the resulting candy."[65] Concurrent enforcement and carbon copy prosecutions are discussed in Chapter 6, Section 7 of this book.

The OECD Convention states that: "When more than one Party has jurisdiction over an alleged offence described in this Convention, the parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution."[66] However, Koehler notes this has not been followed, stating "the reality is that countries often find themselves in competition with each other to bring enforcement actions based on the same core conduct and/or divide the enforcement proceedings."[67]

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[61] *Ibid* at 238.
[62] *Ibid* at 239.
[63] *Ibid* at 186.
[64] *Ibid* at 261.
[65] *Ibid* at 263.
[66] OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, art 4.3, online: <http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm>.
[67] Koehler (2014) at 265.

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5. UK SENTENCING LAW

5.1 General Principles of Sentencing

The principles of sentencing under UK law are set out in Part 12 of the *Criminal Justice Act 2003*.[68] Section 142(1) lists the five common purposes of sentencing, namely punishment, deterrence, rehabilitation, protection of the public and reparation. Section 143 provides that in determining an offence's seriousness, the court must consider both the offender's culpability and the harm or risk of harm. In regard to the imposition of fines, section 164 states that before deciding on the amount of a fine, the court must inquire into the financial circumstances of the offender and impose a fine that reflects the seriousness of the offence and takes into account other circumstances of the case.

The sentencing structure for corruption-related offences has been modified significantly in recent years. The *Bribery Act 2010* introduced new penalties for corruption-related offences. As the *Bribery Act* is not applied retrospectively, there are still numerous cases before the courts that fall under a previous statute. The UK Sentencing Council also introduced sentencing guidelines for corruption-related offences.[69] These guidelines are applicable to sentences imposed on or after October 1, 2014, regardless of when the offences occurred. The UK also introduced deferred prosecution agreements (DPAs) as an alternative disposition in corruption cases.

5.2 Sentencing Cases before the *Bribery Act 2010*

Nicholls et al. described the sentences imposed in a number of corruption cases before the enactment of the *Bribery Act 2010*.[70] First, they summarize the sentences imposed on officials such as police, prison and immigration officers as follows:

> Seeking guidance on sentencing in corruption cases is difficult as the sentences have been quite varied, as illustrated by those involving police, prison, and immigration officers. In *R v Donald* a total sentence of eleven years (the court having imposed consecutive sentences) was upheld in the case of a detective constable who pleaded guilty late to four counts of corruption under the 1906 Act for agreeing to accept £50,000 (he only received £18,000) from a defendant for disclosing confidential information and destroying surveillance logs. In *R v McGovern* a defendant charged with

[68] *Criminal Justice Act 2003* (UK), c 44, online: <http://www.legislation.gov.uk/ukpga/2003/44/contents>.
[69] United Kingdom, Sentencing Council, *Fraud, Bribery and Money Laundering Offences – Definitive Guideline*, [Sentencing Council Guidelines] online: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud_bribery_and_money_laundering_offences_-_Definitive_guideline.pdf>.
[70] Colin Nicholls et al, *Corruption and Misuse of Public Office*, 2nd ed (Oxford University Press, 2011) at 208-209.

> burglary who offered a £200 bribe to a police officer had his sentence reduced by the Court of Appeal to nine months. In *R v Oxdemir* an offender who offered a free meal or £50 to a police officer for not reporting a driving offence had his sentence reduced to three months' imprisonment. In *R v Garner* the Court of Appeal upheld sentences of eighteen months and twelve months respectively imposed on prison officers who pleaded guilty to providing luxury items to a prisoner. A sentence of two years' imprisonment was imposed in a similar case. In *R v Patel* an immigration administrator was sentenced to two years' imprisonment for accepting a £500 bribe to stamp a passport granting leave to remain, and ordered to forfeit the bribe. In *Attorney General's Reference (No 1 of 2007)* the defendant, a serving police officer, pleaded guilty to misfeasance in a public office after he befriended a known criminal and despite warnings from his superiors continued to associate with him and to pass on sensitive information about two individuals whom the criminal wanted to speak with over a drugs and assault matter. A sentence of eighteen months' custody was initially imposed but was reduced to nine months suspended for two years plus community service due to time served on remand, service of unpaid work, and other factors. [Footnotes omitted.]

Second, Nicholls et al. describe a number of sentences imposed in regard to corruption involving public procurement:[71]

> A similar variation exists in public procurement cases. In 1974, when the maximum sentence for an offence under the 1889 and 1906 Acts was two years, the architect, John Poulson, was sentenced to a total of seven years' imprisonment for paying bribes to members of Parliament, police officers, and health authorities to obtain building contracts. T Dan Smith, the Labour leader of Newcastle-upon-Tyne, was sentenced to a total of six years' imprisonment and William Pottinger, a senior civil servant in the Scottish Office was sentenced to a total of five years' imprisonment. In *Foxley* a 71-year-old Ministry of Defence employee, convicted of four counts of corruption under the 1906 Act, was sentenced to four years' imprisonment for receiving over £2 million in the placing of defence contracts. A confiscation order was made for £1,503.901.08. In *Dearnley and Threapleton* a council employee and supplier of security services who was convicted of misrepresenting a loan to pay off a personal debt, had his sentence reduced to twelve months' imprisonment because of strong mitigation. In *R v Allday*, a case under the 1889 Act, council employees accepted bribes from waste contractors to tip waste. They were sentenced to eight and six months' imprisonment each and the contractors were sentenced to three months each. [Footnotes omitted]

[71] *Ibid* at 209.

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5.3 Sentences under the *Bribery Act 2010* (Pre-Guidelines)

The *Bribery Act 2010* came into force on July 1, 2011. The Act sets out the general offences of offering a bribe (section 1), being bribed (section 2) and bribery of foreign public officials (section 6). Commercial organizations may also commit an offence under section 7 of the Act if they fail to prevent bribery. Section 11 sets out maximum penalties for the offences:

> 11 Penalties
>
> (1) An individual guilty of an offence under section 1, 2 or 6 is liable—
>
> (a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both,
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, or to a fine, or to both.
>
> (2) Any other person guilty of an offence under section 1, 2 or 6 is liable—
>
> (a) on summary conviction, to a fine not exceeding the statutory maximum,
>
> (b) on conviction on indictment, to a fine.
>
> (3) A person guilty of an offence under section 7 is liable on conviction on indictment to a fine.
>
> (4) The reference in subsection (1)(a) to 12 months is to be read—
>
> (a) in its application to England and Wales in relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003, and
>
> (b) in its application to Northern Ireland, as a reference to 6 months.[72]

The maximum term of imprisonment for a summary conviction offence is twelve months in England and Wales, and six months in Northern Ireland. The maximum statutory fine for a summary conviction offence is £10,000 in Scotland. The maximum fine for an indictable offence is unlimited.

One of the first cases under the *Bribery Act 2010* stemmed from an investigation into Associated Octel Corporation, which subsequently changed its name to Innospec. As stated by the Serious Fraud Office, "Innospec itself pleaded guilty in March 2010 to bribing state officials in Indonesia and was fined $12.7 million in England with additional penalties being imposed in the USA."[73] Subsequently, in 2014, four individuals were sentenced for their role in the corruption in both Indonesia and Iraq. Two of the defendants pled guilty and two

[72] *Bribery Act 2010* (UK), c 23, online: <http://www.legislation.gov.uk/ukpga/2010/23/contents>.
[73] Online: <https://www.sfo.gov.uk/2014/08/04/four-sentenced-role-innospec-corruption/>.

were tried and found guilty. The sentencing reasons show that a guilty plea and cooperation can be major mitigating factors. As the Serious Fraud Office reports, the individuals and sentences were:

- Dennis Kerrison, 69, of Chertsey, Surrey, was sentenced to 4 years in prison.
- Paul Jennings, 57, of Neston, Cheshire, was sentenced to 2 years in prison.
- Miltiades Papachristos, 51 of Thessaloniki, Greece, was sentenced to 18 months in prison.
- David Turner, 59, of Newmarket, Suffolk, was sentenced to a 16 month suspended sentence with 300 hours unpaid work.[74]

The sentencing decision for these four individuals was released on August 4, 2014 before the sentencing guidelines on bribery came into force on October 1, 2014. In any event, the court stated:

BEGINNING OF EXCERPT

These four defendants, David Turner, David Kerrison, Paul Jennings and Miltiades Papachristos appear for sentence following conviction for corruption of public officials in Indonesia and Iraq. David Turner pleaded guilty to three charges of conspiracy to commit corruption in January 2012 in relation to Indonesia and Iraq. Paul Jennings pleaded guilty in June 2012 to two charges of conspiracy to commit corruption and to a further change of conspiracy to commit corruption in Indonesia and Iraq in July 2012. David Kerrison and Miltiades Papachristos were convicted of conspiracy to commit corruption in June 2014 after a trial of approximately three months.

At different times, each of the defendants was in a position of responsibility in a company called Innospec, previously called Octel…. Innospec corruptly paid millions of dollars to agents in Indonesia to be handed over to government officials to delay lead free fuel. We cannot quantify the corrupt payments as some payments to agents were for legitimate purposes. In Iraq, payments were made to sabotage the test results of rival products. This was the intention of those authorising the payments even if this result wasn't achieved.

…

The corruption was endemic, ingrained and institutional…. A company is a separate legal entity. It is not an automated machine. Decisions are made by human minds. It

[74] *Ibid*.

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follows that those high up in the company should bear a heavy responsibility under the criminal law.

Those who pleaded guilty are entitled to a reduction in their sentence. The others mustn't have their sentences increased for fighting the case. However, their sentence cannot be discounted in the same way as for those who pleaded guilty. As the Judge I am bound by the jury's verdict.

All four men are middle aged or older, family men, of previous good character; they have done work in communities and worked well with colleagues. There have been a number of character witnesses testifying to this. All have come from modest backgrounds, went to university and worked their way up. None of these defendants would consider themselves in the same category as common criminals who commit crimes of dishonesty or violence.

…

David Kerrison

As Chief Executive Officer from 1996 to 2005, over a period of 8 years, he must accept major responsibility for the corruption he is convicted of. He didn't instigate the corruption but he allowed it to continue. He could have stopped it but he didn't. I am satisfied that the jury's verdict is correct, that he became aware early on of the existence of corrupt payments and didn't stop it.

I take into account his good character account, that he has a wine business in South Africa, that he has improved the lot of black workers there, provided them with accommodation and healthcare, which is all commendable but doesn't detract from the crime.

Mr Kerrison is now 70, in poor health and his wife is in less than good health.

I make a reduction due to age, health and caring responsibility to his wife, and I have seen the medical reports. If he was 5 years younger I would have imposed a sentence of 5 years. The most lenient sentence I can give is 4 years.

Paul Jennings

Mr Jennings was CEO from April 2005 in succession to David Kerrison. He served until 2008 and he was formally dismissed in June 2009. He inherited an existing situation and didn't instigate it. He allowed the corruption to continue. He said that the Chairman told him that this was the way it was always done. By pleading guilty,

he accepts he knew and intended to be part of the corruption. As CEO he must accept substantial responsibility but less than David Kerrison.

Mr Jennings is also of good character. I have read the 50 character references. These show that he encouraged cooperation between management and the workforce, that he had a positive management effect and revitalised the workforce.

Mr Jennings cooperated with the American authorities, paying $230,000. He has two young sons aged nine and seven. This case has been the background of their lives. The delay has not been his fault as he had to wait before he could be sentenced. I have read the doctor's report and read the references from his children's teachers.

In ordinary circumstances, I would impose a sentence of 4 years in prison after a trial. I reduce this starting point due to his cooperation firstly to 3 years. Before, I thought a 25% reduction was appropriate as he pleaded guilty after Dr Turner. However, it was always clear that he wasn't going to contest therefore the sentence should be reduced to 2 years, which also takes into account the effect on his family.

Mr Jennings is ordered to pay £5000 in prosecution costs.

Miltiades Papachristos

I cannot reduce his sentence as he did not plead guilty. Dr Papachristos is an impressively qualified scientist. He had no management responsibility. He was involved in TEL and then Plutosene which were small parts of the general business activities. He had a lesser but not insignificant role. He was relatively inexperienced when it came to management and was largely acting under the control of others. The Jury's verdict was that he was involved in the corruption.

A sentence of 18 months imprisonment is the least amount of time I can impose. For all the defendants, they will serve half of their sentence in prison and then they will be released on license based on specific terms. If they break these terms, they will go back to prison. These three defendants can now go down.

David Turner

In many ways, this is the most difficult. As Business Director he must accept substantial responsibility. The corruption went on for a number of years and he accepts he had an active part in it in Indonesia and Iraq as he pleaded guilty…. A defendant who enters into a cooperation agreement is entitled to more than a third discount… There is a public interest in providing an inducement for defendants to cooperate…. An inducement is an inverse deterrence. Just as sometimes it is

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appropriate to sentence as a deterrent, it is also appropriate to encourage others to cooperate.

…

The starting point is 4 years if convicted by trial. He is entitled to having a third discounted and then half, or to a two thirds discount. [The discount of a third is for his guilty plea and then a discount of half of that is for his cooperation agreement.] The result either way is the same, a 16 month sentence. Should this 16 month be suspended? The important factors are:

1. the quality of his evidence;
2. the delay/lapse of time which was not his fault; and
3. that he made a voluntary repayment of $40,000 to the US authorities so there can be no further confiscation order against him.

It is a combination of these factors which persuades me to suspend this 16 month sentence for 2 years.

There must be a punishment. Mr Jennings will do 300 hours of unpaid work and will pay £10,000 towards prosecution costs.[75]

END OF EXCERPT

Sweett Group PLC was the first company to be sentenced under section 7 of the *Bribery Act 2010.* Media allegations led to an internal investigation, which discovered that a subsidiary made corrupt payments to help secure a contract in Abu Dhabi. The company admitted to failing to prevent bribery and was sentenced to a fine of £1.4 million, a confiscation order of £850,000 and £95,000 in costs.[76]

In a case concerning Sustainable Agroenergy Plc, individuals received prison sentences ranging from 6-13 years. The company operated a Ponzi scheme. Charges fell under multiple statutes, including the *Bribery Act 2010*. The longest sentence was given to Chief Commercial Officer, Gary West, who was convicted by a jury of bribery under the *Bribery Act 2010* as well

[75] Sentencing decision for David Turner, David Kerrison, Paul Jennings, Militiades Papachristos and David Turner, online: <http://thebriberyact.com/2014/08/11/supersize-me-innospec-4-sentencing-remarks-do-much-more-than-they-say-on-the-tin/>.

[76] "Sweett Group sentenced after first ever corporate conviction for failing to prevent bribery", *Eversheds* (2 February 2016), online: <http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/Fraud_and_financial_crime/Sweett_group_sentenced>. See also Serious Fraud Office, "Sweett Group PLC sentenced and ordered to pay £2.25 million after Bribery Act conviction" (19 February 2016), online: <https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/>.

as offences under the *Criminal Law Act 1977* and *Companies Act 2006*. West received 13 years imprisonment, a £52,805 confiscation order and a 15-year disqualification from acting as a company director.[77]

5.4 Sentencing Guidelines for Corruption-Related Offences by Human Offenders

The Sentencing Council published guidelines for fraud, bribery and money laundering offences (Guidelines).[78] These Guidelines are applicable to sentences imposed on or after October 1, 2014.[79] For bribery offences, the Guidelines dictate sentences can range from a discharge to eight years imprisonment.[80] Money laundering offences are punishable by up to 14 years imprisonment.[81]

The Guidelines lay out an eight-step process for determining the sentence for human offenders:

1) Step One – Determining the Offence Category
2) Starting Point and Category Range
3) Consider any factors which indicate a reduction such as assistance to the prosecution
4) Reduction for guilty pleas
5) Totality Principle
6) Confiscation, compensation and ancillary orders
7) Reasons
8) Consideration for time spent on bail.[82]

Note: Guidelines for corporate offenders are set out in Section 5.5 below.

The Guidelines set out a grid for determining a sentencing range based on a combination of culpability and harm. Culpability is to be determined "by weighing up all the factors of the case to determine the offender's role and the extent to which the offending was planned and

[77] Serious Fraud Office, "Sustainable Agroenergy Plc and Sustainable Wealth Investments UK Ltd" (17 November 2016), online: <https://www.sfo.gov.uk/cases/sustainable-agroenergy-plc-sustainable-wealth-investments-uk-ltd/>.
[78] Sentencing Council Guidelines.
[79] *Ibid* at 4.
[80] *Ibid* at 41.
[81] *Ibid* at 35.
[82] *Ibid* at 41-45.

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the sophistication with which it was carried out."[83] Culpability is measured in three levels: A (high culpability), B (medium culpability), and C (lesser culpability).[84]

Harm is to be "assessed in relation to any impact caused by the offending (whether to identifiable victims or in a wider context) and the actual or intended gain to the offender."[85] Harm is measured in four levels, listed as categories 1 (most serious) to 4 (least serious).[86]

The following tables from the Guidelines demonstrate how the sentences are calculated for natural persons:[87]

[83] *Ibid* at 42.
[84] *Ibid*.
[85] *Ibid.*
[86] *Ibid*.
[87] *Ibid* at 42–45.

BEGINNING OF EXCERPT

STEP ONE
Determining the offence category

The court should determine the offence category with reference to the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The level of **culpability** is determined by weighing up all the factors of the case to determine the offender's role and the extent to which the offending was planned and the sophistication with which it was carried out.

Harm is assessed in relation to any impact caused by the offending (whether to identifiable victims or in a wider context) and the actual or intended gain to the offender.

Culpability demonstrated by one or more of the following:
A – High culpability
A leading role where offending is part of a group activity
Involvement of others through pressure, influence
Abuse of position of significant power or trust or responsibility
Intended corruption (directly or indirectly) of a senior official performing a public function
Intended corruption (directly or indirectly) of a law enforcement officer
Sophisticated nature of offence/significant planning
Offending conducted over sustained period of time
Motivated by expectation of substantial financial, commercial or political gain
B – Medium culpability
All other cases where characteristics for categories A or C are not present
A significant role where offending is part of a group activity
C – Lesser culpability
Involved through coercion, intimidation or exploitation
Not motivated by personal gain
Peripheral role in organised activity
Opportunistic 'one-off' offence; very little or no planning
Limited awareness or understanding of extent of corrupt activity

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Harm demonstrated by one or more of the following factors:	
Category 1	• Serious detrimental effect on individuals (for example by provision of substandard goods or services resulting from the corrupt behaviour) • Serious environmental impact • Serious undermining of the proper function of local or national government, business or public services • Substantial actual or intended financial gain to offender or another or loss caused to others
Category 2	• Significant detrimental effect on individuals • Significant environmental impact • Significant undermining of the proper function of local or national government, business or public services • Significant actual or intended financial gain to offender or another or loss caused to others • Risk of category 1 harm
Category 3	• Limited detrimental impact on individuals, the environment, government, business or public services • Risk of category 2 harm
Category 4	• Risk of category 3 harm

Risk of harm involves consideration of both the likelihood of harm occurring and the extent of it if it does. Risk of harm is less serious than the same actual harm. Where the offence has caused risk of harm but no (or much less) actual harm, the normal approach is to move to the next category of harm down. This may not be appropriate if either the likelihood or extent of potential harm is particularly high.

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STEP TWO
Starting point and category range

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

Section 1 Bribery Act 2010: Bribing another person
Section 2 Bribery Act 2010: Being bribed
Section 6 Bribery Act 2010: Bribery of foreign public officials
Maximum: 10 years' custody

	Culpability		
Harm	**A**	**B**	**C**
Category 1	**Starting point** 7 years' custody	**Starting point** 5 years' custody	**Starting point** 3 years' custody
	Category range 5 – 8 years' custody	**Category range** 3 – 6 years' custody	**Category range** 18 months' – 4 years' custody
Category 2	**Starting point** 5 years' custody	**Starting point** 3 years' custody	**Starting point** 18 months' custody
	Category range 3 – 6 years' custody	**Category range** 18 months' – 4 years' custody	**Category range** 26 weeks' – 3 years' custody
Category 3	**Starting point** 3 years' custody	**Starting point** 18 months' custody	**Starting point** 26 weeks' custody
	Category range 18 months' – 4 years' custody	**Category range** 26 weeks' – 3 years' custody	**Category range** Medium level community order – 1 year's custody
Category 4	**Starting point** 18 months' custody	**Starting point** 26 weeks' custody	**Starting point** Medium level community order
	Category range 26 weeks' – 3 years' custody	**Category range** Medium level community order – 1 year's custody	**Category range** Band B fine – High level community order

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender.

Identify whether any combination of these or other relevant factors should result in an upward or downward adjustment from the starting point.

Consecutive sentences for multiple offences may be appropriate where large sums are involved.

Factors increasing seriousness
Statutory aggravating factors:
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
Offence committed whilst on bail
Other aggravating factors:
Steps taken to prevent victims reporting or obtaining assistance and/or from assisting or supporting the prosecution
Attempts to conceal/dispose of evidence
Established evidence of community/wider impact
Failure to comply with current court orders
Offence committed on licence
Offences taken into consideration
Failure to respond to warnings about behaviour
Offences committed across borders
Blame wrongly placed on others
Pressure exerted on another party
Offence committed to facilitate other criminal activity

Factors reducing seriousness or reflecting personal mitigation
No previous convictions **or** no relevant/recent convictions
Remorse
Good character and/or exemplary conduct
Little or no prospect of success
Serious medical conditions requiring urgent, intensive or long-term treatment
Age and/or lack of maturity where it affects the responsibility of the offender
Lapse of time since apprehension where this does not arise from the conduct of the offender
Mental disorder or learning disability
Sole or primary carer for dependent relatives
Offender co-operated with investigation, made early admissions and/or voluntarily reported offending

STEP THREE

Consider any factors which indicate a reduction, such as assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FOUR

Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP FIVE

Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour.

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STEP SIX

Confiscation, compensation and ancillary orders

The court must proceed with a view to making a confiscation order if it is asked to do so by the prosecutor or if the court believes it is appropriate for it to do so.

Where the offence has resulted in loss or damage the court must consider whether to make a compensation order.

If the court makes both a confiscation order and an order for compensation and the court believes the offender will not have sufficient means to satisfy both orders in full, the court must direct that the compensation be paid out of sums recovered under the confiscation order (section 13 of the Proceeds of Crime Act 2002).

The court may also consider whether to make ancillary orders. These may include a deprivation order, a financial reporting order, a serious crime prevention order and disqualification from acting as a company director.

STEP SEVEN

Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP EIGHT

Consideration for time spent on bail

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

END OF EXCERPT

On February 12, 2015, Nicholas and Christopher Smith, a father and son involved in a printing business, were sentenced for corruption relating to bribery of officials in Kenya.[88] The offenders were convicted under the *Prevention of Corruption Act 1906*, as the offences pre-dated the *Bribery Act 2010*. However, since the sentencing post-dated October 1, 2014, the Sentencing Council's new Guidelines applied. The sentencing decision provides one of the first applications of the Guidelines.

Nicolas Smith received three years imprisonment, while Christopher Smith received 18 months imprisonment, which was suspended for two years on condition that he commit no further offences. The suspended sentence was characterized by Higgins J as "an act of mercy."[89] Christopher was also sentenced to 250 hours unpaid work and a three-month curfew. Both offenders were disqualified from being the director of a company for six years. Later, the company received a fine of £2.2 million. Additionally, Nicholas and Christopher

[88] "Opinion: It was so easy to avoid: Chickengate: Smith & Ouzman Sentencing Remarks in full under new sentencing guidelines" (15 February 2014), *thebriberyact.com*, online: <http://thebriberyact.com/2015/02/15/opinion-it-was-so-easy-to-avoid-chickengate-smith-ouzman-sentencing-remarks-in-full-under-new-sentencing-guidelines/>.

[89] *Ibid.*

were ordered to pay a confiscation order of £18,693 and £4,500 and each was ordered to pay costs of £75,000.

The Smiths' corrupt activities followed a decision to expand their business into Africa. Between 2006 and 2010, bribes were "routine and common place."[90] The bribes included a payment of £5,000 to a Kenyan government official, which was a large bribe in light of the official's salary of £40,000. Other bribes included payments of just under £400,000 to receive contracts worth £2 million. The pricing of the product was not elevated aside from the bribery uplift. However, as the product included electoral ballot papers, the bribe risked undermining the integrity of and confidence in the electoral system.

Using the Sentencing Council's Guidelines, Higgins J found that the level of culpability was high based on four factors:

1. A leading role was played
2. There was intended corruption of a public official
3. The offences were of a sophisticated nature
4. The motive was for substantial financial gain[91]

Examining harm, Higgins J considered the fact that governance in Kenya and Mauritania was undermined and financial gain for the Smiths was substantial, while a loss was incurred by Kenya and Mauritania due to the inclusion of bribes in the price of products sold to those countries. Higgins J found that the harm caused placed the offence in category 2, meaning the offence falls under A(2) in the Guidelines. A(2) has a starting point of 5 years' custody and a range of 3-6 years' custody (see the above excerpt from the Guidelines).

Based on the aggravating factors, which included negative impacts on good governance and the cross-border nature of the offence, and the mitigating factors, which included good character and Christopher Smith's health and age, Higgins J found that the "terms of A (2) should be reduced."[92] Nicholas Smith's sentence of three years imprisonment fell at the bottom end of the range, while Christopher Smith's sentence fell below that range.

5.5 Sentencing Guidelines for Corporate Offenders

The Sentencing Council's Guidelines are also used for sentencing corporations in respect to the offences of fraud, bribery and money laundering. The Guidelines are as follows:[93]

[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid.*
[93] Sentencing Council Guidelines.

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BEGINNING OF EXCERPT

STEP ONE
Compensation

The court must consider making a compensation order requiring the offender to pay compensation for any personal injury, loss or damage resulting from the offence in such an amount as the court considers appropriate, having regard to the evidence and to the means of the offender.

Where the means of the offender are limited, priority should be given to the payment of compensation over payment of any other financial penalty.

Reasons should be given if a compensation order is not made.

(See section 130 Powers of Criminal Courts (Sentencing) Act 2000)

STEP TWO
Confiscation

Confiscation must be considered if either the Crown asks for it or the court thinks that it may be appropriate.

Confiscation must be dealt with before, and taken into account when assessing, any other fine or financial order (except compensation).

(See Proceeds of Crime Act 2002 sections 6 and 13)

STEP THREE
Determining the offence category

The court should determine the offence category with reference to **culpability** and **harm**.

Culpability
The sentencer should weigh up all the factors of the case to determine **culpability**. **Where there are characteristics present which fall under different categories, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**
Culpability demonstrated by the offending corporation's role and motivation. May be demonstrated by one or more of the following **non-exhaustive** characteristics.
A – High culpability
Corporation plays a leading role in organised, planned unlawful activity (whether acting alone or with others)
Wilful obstruction of detection (for example destruction of evidence, misleading investigators, suborning employees)
Involving others through pressure or coercion (for example employees or suppliers)
Targeting of vulnerable victims or a large number of victims
Corruption of local or national government officials or ministers
Corruption of officials performing a law enforcement role
Abuse of dominant market position or position of trust or responsibility
Offending committed over a sustained period of time
Culture of wilful disregard of commission of offences by employees or agents with no effort to put effective systems in place (section 7 Bribery Act only)
B – Medium culpability
Corporation plays a significant role in unlawful activity organised by others
Activity not unlawful from the outset
Corporation reckless in making false statement (section 72 VAT Act 1994)
All other cases where characteristics for categories A or C are not present
C – Lesser culpability
Corporation plays a minor, peripheral role in unlawful activity organised by others
Some effort made to put bribery prevention measures in place but insufficient to amount to a defence (section 7 Bribery Act only)
Involvement through coercion, intimidation or exploitation

Harm	
Harm is represented by a financial sum calculated by reference to the table below	
Amount obtained or intended to be obtained (or loss avoided or intended to be avoided)	
Fraud	For offences of fraud, conspiracy to defraud, cheating the Revenue and fraudulent evasion of duty or VAT, harm will normally be the actual or intended gross gain to the offender.
Bribery	For offences under the Bribery Act the appropriate figure will normally be the gross profit from the contract obtained, retained or sought as a result of the offending. An alternative measure for offences under section 7 may be the likely cost avoided by failing to put in place appropriate measures to prevent bribery.
Money laundering	For offences of money laundering the appropriate figure will normally be the amount laundered or, alternatively, the likely cost avoided by failing to put in place an effective anti-money laundering programme if this is higher.
General	Where the actual or intended gain cannot be established, the appropriate measure will be the amount that the court considers was likely to be achieved in all the circumstances. In the absence of sufficient evidence of the amount that was likely to be obtained, 10–20 per cent of the relevant revenue (for instance between 10 and 20 per cent of the worldwide revenue derived from the product or business area to which the offence relates for the period of the offending) **may** be an appropriate measure. There may be large cases of fraud or bribery in which the true harm is to commerce or markets generally. That may justify adopting a harm figure beyond the normal measures here set out.

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STEP FOUR
Starting point and category range

Having determined the culpability level at step three, the court should use the table below to determine the starting point within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

The harm figure at step three is multiplied by the relevant percentage figure representing culpability.

	Culpability Level		
	A	B	C
Harm figure multiplier	**Starting point** 300%	**Starting point** 200%	**Starting point** 100%
	Category range 250% to 400%	**Category range** 100% to 300%	**Category range** 20% to 150%

Having determined the appropriate starting point, the court should then consider adjustment within the category range for aggravating or mitigating features. In some cases, having considered these factors, it may be appropriate to move outside the identified category range. (See below for a **non-exhaustive** list of aggravating and mitigating factors.)

Factors increasing seriousness
Previous relevant convictions or subject to previous relevant civil or regulatory enforcement action
Corporation or subsidiary set up to commit fraudulent activity
Fraudulent activity endemic within corporation
Attempts made to conceal misconduct
Substantial harm (whether financial or otherwise) suffered by victims of offending or by third parties affected by offending
Risk of harm greater than actual or intended harm (for example in banking/credit fraud)
Substantial harm caused to integrity or confidence of markets
Substantial harm caused to integrity of local or national governments
Serious nature of underlying criminal activity (money laundering offences)
Offence committed across borders or jurisdictions

Factors reducing seriousness or reflecting mitigation
No previous relevant convictions or previous relevant civil or regulatory enforcement action
Victims voluntarily reimbursed/compensated
No actual loss to victims
Corporation co-operated with investigation, made early admissions and/or voluntarily reported offending
Offending committed under previous director(s)/ manager(s)
Little or no actual gain to corporation from offending

General principles to follow in setting a fine

The court should determine the appropriate level of fine in accordance with section 164 of the Criminal Justice Act 2003, which requires that the fine must reflect the seriousness of the offence and requires the court to take into account the financial circumstances of the offender.

Obtaining financial information

Companies and bodies delivering public or charitable services

Where the offender is a company or a body which delivers a public or charitable service, it is expected to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case.

1. *For companies*: annual accounts. Particular attention should be paid to turnover; profit before tax; directors' remuneration, loan accounts and pension provision; and assets as disclosed by the balance sheet. Most companies are required to file audited accounts at Companies House. Failure to produce relevant recent accounts on request may properly lead to the conclusion that the company can pay any appropriate fine.

2. *For partnerships*: annual accounts. Particular attention should be paid to turnover; profit before tax; partners' drawings, loan accounts and pension provision; assets as above. Limited liability partnerships (LLPs) may be required to file audited accounts with Companies House. If adequate accounts are not produced on request, see paragraph 1.

3. *For local authorities, fire authorities and similar public bodies*: the Annual Revenue Budget ("ARB") is the equivalent of turnover and the best indication of the size of the defendant organisation. It is unlikely to be necessary to analyse specific expenditure or reserves unless inappropriate expenditure is suggested.

4. *For health trusts*: the independent regulator of NHS Foundation Trusts is Monitor. It publishes quarterly reports and annual figures for the financial strength and stability of trusts from which the annual income can be seen, available via www.monitor-nhsft.gov.uk. Detailed analysis of expenditure or reserves is unlikely to be called for.

5. *For charities*: it will be appropriate to inspect annual audited accounts. Detailed analysis of expenditure or reserves is unlikely to be called for unless there is a suggestion of unusual or unnecessary expenditure.

STEP FIVE
Adjustment of fine

Having arrived at a fine level, the court should consider whether there are any further factors which indicate an adjustment in the level of the fine. The court should 'step back' and consider the overall effect of its orders. The combination of orders made, compensation, confiscation and fine ought to achieve:

- the removal of all gain
- appropriate additional punishment, and
- deterrence

The fine may be adjusted to ensure that these objectives are met in a fair way. The court should consider any further factors relevant to the setting of the level of the fine to ensure that the fine is proportionate, having regard to the size and financial position of the offending organisation and the seriousness of the offence.

The fine must be substantial enough to have a real economic impact which will bring home to both management and shareholders the need to operate within the law. Whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence.

In considering the ability of the offending organisation to pay any financial penalty the court can take into account the power to allow time for payment or to order that the amount be paid in instalments.

The court should consider whether the level of fine would otherwise cause unacceptable harm to third parties. In doing so the court should bear in mind that the payment of any compensation determined at step one should take priority over the payment of any fine.

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The table below contains a **non-exhaustive** list of additional factual elements for the court to consider. The Court should identify whether any combination of these, or other relevant factors, should result in a proportionate increase or reduction in the level of fine.

Factors to consider in adjusting the level of fine
Fine fulfils the objectives of punishment, deterrence and removal of gain
The value, worth or available means of the offender
Fine impairs offender's ability to make restitution to victims
Impact of fine on offender's ability to implement effective compliance programmes
Impact of fine on employment of staff, service users, customers and local economy (but not shareholders)
Impact of fine on performance of public or charitable function

STEP SIX

Consider any factors which would indicate a reduction, such as assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP SEVEN

Reduction for guilty pleas

The court should take into account any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP EIGHT

Ancillary Orders

In all cases the court must consider whether to make any ancillary orders.

STEP NINE

Totality principle

If sentencing an offender for more than one offence, consider whether the total sentence is just and proportionate to the offending behaviour.

STEP TEN

Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

END OF EXCERPT

5.6 Deferred Prosecution Agreements in the UK

Like the US, the UK has begun utilizing DPAs as a method of disposition in corruption cases. The first DPA was entered into with Standard Bank Plc, which was indicted for failing to prevent corruption. Standard Bank agreed to pay $25.2 million USD to the UK and a further

$7 million in compensation to the Government of Tanzania, as well as costs of £330,000.[94] The UK's second corruption-related DPA was entered into by a company that cannot be named due to ongoing related prosecutions. This second DPA involved financial orders of £6.5 million.[95] For further discussion of DPAs in the US and UK, see Chapter 6, Sections 6.1 and 6.2 respectively.

6. CANADIAN SENTENCING LAW

6.1 Sentencing Principles in General

The general principles of sentencing are set out in the Canadian *Criminal Code*. Section 718 indicates that the fundamental purpose of sentencing is to impose a "just sanction" that contributes to respect for the law and to the maintenance of a safe society by pursuing one or more of the following objectives:

> (a) to denounce unlawful conduct and the harm done to victims and the community;
> (b) to deter the offender and other persons from committing offences;
> (c) to separate offenders from society, where necessary;
> (d) to assist in rehabilitating offenders;
> (e) to provide reparations for harm done to victims or to the community; and
> (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to the victims and to the community.[96]

The *Criminal Code* states that proportionality is the "fundamental" sentencing principle:

> 718.1 A sentence must be proportionate to the gravity of the offence and degree of responsibility of the offender.[97]

[94] Serious Fraud Office, "SFO agrees first UK DPA with Standard Bank" (30 November 2015), online: <https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/>.
[95] Serious Fraud Office, "SFO Secures Second DPA" (8 July 2016), online: <https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/>.
[96] *Criminal Code*, RSC 1985, c C-46, s 718.
[97] *Ibid*, s 718.1.

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Section 718.2 then sets out other sentencing principles:

> (1) sentences should be increased or decreased to account for aggravating or mitigating factors related to the offence or the offender;
> (2) parity – similar sentences for similar cases;
> (3) totality – "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh";
> (4) restraint – use least restrictive sanction that is reasonable and appropriate in the circumstances.[98]

For corruption offences, the courts have indicated that the objectives of denunciation and deterrence are usually primary. For example, in *R v Serre*, Justice Aitken stated:

> It is well established that, in cases of this nature involving breach of trust by a public official, the most important objectives are general deterrence and denunciation. (See *R. v. Hinchey*, [1996] 3 S.C.R. 1128, at 1138; *R. c. Wong*, [2005] Q.J. No. 22795 (C.Q.); *R. v. Zhang* 2006 QCCA 1534.) It has been held in numerous cases that breach of trust by a public official generally calls for a custodial sentence, even where there are significant mitigating factors. (See *R. v. MacInnis* (1991), 95 Nfld. & P.E.I.R. 332 (S.C.); *R. c. Wong*, [2005] Q.J. No. 22795 (C.Q.); *R. v. Zhang* 2006 QCCA 1534; *R. v. Macaluso*, 2006 QCCS 2301; *R. v. Blanas* (2006), 207 O.A.C. 226 (C.A.); *R. c. Liu*, 2006 QCCS 1211; and *R. v. Gonsalves-Barriero*, [2012] O.J. No. 4369 (Ct. J.).). All too frequently, white collar crime can appear to be harmless and victimless. However, it is anything but that. All Canadians, and our society as a whole, are victims when public officials breach the trust placed in them.[99]

While the effectiveness of general deterrence is seriously questioned in the research literature on sentencing, courts nonetheless give considerable weight to deterrence on the basis of the choice and risk-reward calculation that corruption offences frequently embody. In *R v Drabinsky*, a corporate securities fraud case, the Ontario Court of Appeal stated:

> The deterrent value of any sentence is a matter of controversy and speculation. However, it would seem that if the prospect of a long jail sentence will deter anyone from planning and committing a crime, it would deter people like the appellants who are intelligent individuals, well aware of potential consequences, and accustomed to weighing potential future risks against potential benefits before taking action.[100]

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[98] *Ibid*, s 718.2(b-e).
[99] *R v Serre*, 2013 ONSC 1732 at paras 28–29.
[100] *R v Drabinsky*, 2011 ONCA 582 at para 158.

6.2 Sentencing Principles for Corporations and Other Organizations

Section 718.21 of the *Criminal Code* sets out additional factors to be considered when a court is sentencing a corporation. The section states:

> A court that imposes a sentence on an organization shall also take into consideration the following factors:
>
> (a) any advantage realized by the organization as a result of the offence;
>
> (b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
>
> (c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not about to pay a fine or make restitution;
>
> (d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
>
> (e) the cost to the public authorities of the investigation and prosecution of the offence;
>
> (f) any regulatory penalty imposed on the organization or one of its representatives in respect of conduct that formed the basis of the offence;
>
> (g) whether the organization was – or any of its representatives who were involved in the commission of the offence were – convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
>
> (h) any penalty imposed by the organization on a representative for their role in the commission of the offence;
>
> (i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
>
> (j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

While corporate entities cannot be sentenced to imprisonment, they can be fined or placed on probation with conditions. Section 732.1(3.1) sets out optional conditions that courts may impose when sentencing a corporation to probation:

> (3.1) The court may prescribe, as additional conditions of a probation order made in respect of an organization, that the offender do one or more of the following:
>
> (a) make restitution to a person for any loss or damage that they suffered as a result of the offence;

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(b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;

(c) communicate those policies, standards and procedures to its representatives;

(d) report to the court on the implementation of those policies, standards and procedures;

(e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;

(f) provide, in the manner specified by the court, the following information to the public, namely,

(i) the offence of which the organization was convicted,

(ii) the sentence imposed by the court, and

(iii) any measures that the organization is taking — including any policies, standards and procedures established under paragraph (*b*) — to reduce the likelihood of it committing a subsequent offence; and

(g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.

(3.2) Before making an order under paragraph (3.1)(*b*), a court shall consider whether it would be more appropriate for another regulatory body to supervise the development or implementation of the policies, standards and procedures referred to in that paragraph.

The Canadian *Criminal Code* does not have a set of detailed sentencing guidelines like those in the US or UK. The *Criminal Code* simply sets out the maximum sentence for each offence. For some offences, but not bribery or corruption offences, a mandatory minimum penalty is also prescribed. Starting points and ranges for some offences have been developed by appellate courts slowly over time. A starting point is the level (or quantum) of sentence that generally seems to fit for that type of offence. That starting point sentence can then be adjusted up or down depending on the aggravating and mitigating factors in each case. A range gives a court the low and high end of the quantum of sentence that is normally fit for that type of offence. Starting points and ranges are created through case law and are advisory, not mandatory. A starting point or range sentence is fine-tuned by the judge with consideration to aggravating and mitigating factors. For corruption offences, courts usually consider large bribes, bribes occurring over a long time and previous related convictions as significant aggravating factors. The courts typically consider a guilty plea as a mitigating factor but no specific percentage reduction for a guilty plea is suggested in Canadian case law. Self-reporting, cooperating with authorities and remorse are also cited as mitigating factors in corruption cases.

Corruption cases are often resolved by a bargained-for guilty plea. Part of the bargain may involve the prosecutor reducing the number or severity of offences charged. Another part of

the bargain will often involve the prosecutor and the defence agreeing on the sentence they will recommend to the judge. Canadian case law has consistently held that sentencing judges should following a joint sentencing submission unless the submission is clearly and demonstrably unfit in regard to all of the circumstances, including the importance of having the case resolved by a negotiated guilty plea. If the judge is leaning toward rejecting the joint submission, the judge must give the Crown and defence an opportunity to further explain why the joint sentencing proposal is appropriate, or at least not demonstrably unfit.

6.3 Sentencing Cases for Domestic Corruption and Bribery

Bribery of judges, politicians and police officers is treated as the most serious type of bribery offence in Canada and is punishable by a maximum of 14 years imprisonment. As stated by Justice Fish, then of the Quebec Court of Appeal, "[a]ny attempt to corrupt a police officer amounts to an attack on the integrity of an important social institution. Where the purpose of the bribe is to pervert the course of justice, especially in relation to a serious crime, the offenders must be severely punished."[101] In *R v Kozitsyn*,[102] the offender was sentenced to five months imprisonment and two years of probation for offering a bribe to a police officer. Kozitsyn had approached a police officer and proposed that if a massage parlor she was going to purchase was not issued tickets, she would make donations to a charity chosen by the officer. In a second meeting, which was taped, Kozitsyn repeated the offer of an unspecified amount of money derived from a percent of revenues, without reference to donations made to charity. In sentencing Kozitsyn, Justice Bourque noted that the amount offered would not have been insignificant, would have been paid over an extended period of time and could have led to further crimes and acts of corruption. Mitigating the sentence was Kozitsyn's lack of a criminal record and some contrition. Justice Bourque also noted that the offender was from Russia, stating that "there are many cultural issues as to why Ms. Kozitsyn may have had some difficulty in coming to grips with the seriousness of the matter. I accept that she was born into and raised in a country which historically has problems with corruption at all levels of its society."[103] Justice Bourque reviewed the following authorities on sentencing:

> **15** All of the cases that I've looked at strongly suggest that the bribery or attempted bribery of a person who is in position to directly affect the administration of justice, is an extremely serious matter and general deterrence is an important factor. Where there is not a joint submission, sentences have ranged anywhere from 90 days to 24 months in prison.
>
> **16** In *R. v. Dennis* [2001] O.J. No. 1983, the Superior Court judge refused to accept a joint submission for a conditional sentence [a sentence of

[101] *R v De Francesco* (1998), 131 CCC (3d) 221 (Que CA) at para 42.
[102] *R v Kozitsyn*, 2009 ONCJ 455 at para 26.
[103] *Ibid* at para 9.

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> imprisonment served at home] for a clerk in the Crown Attorney's office who accepted a bribe to remove some documents from a file. The trial judge sentenced her to 12 months in custody. The Court of Appeal at [2002] O.J. No. 237, found that the trial judge had not given sufficient reasons for departing from the joint submission and set aside the custodial sentence and imposed the conditional one which was initially the subject of the joint submission.
>
> **17** In *R. v. Dennis*, at last [*sic*] at the Superior Court level, the court refers to authorities from the Courts of Appeal in Alberta and Quebec. I realize that they are not binding upon me, however the[y] do give me some instruction. The longer sentence[s] of imprisonment in those cases involved factual situations where there is a background of organized crime and the actual bribery itself is a mere tip of the iceberg. Sentences range in those cases from six to 12 months.
>
> **18** In *R. v. Shaegal* [1984] O.J. No. 971, a decision of the Ontario Court of Appeal. The court imposed a sentence of 90 days on a man who contacted a police officer and attempted to bribe him to drop a shoplifting charge against him. The defendant in that case had no criminal record and was a teacher. It was clear that the affect [*sic*] on that defendant of the sentence would have been devastating to his career.[104]

While the offering of a bribe to a public official is considered a serious offence, when a public official accepts or solicits a bribe, the breach of trust is highly aggravating. In *R v David*,[105] Justice Duncan sentenced the offender, a deputy sheriff, to four years in a penitentiary under section 120(a)(i) of the *Criminal Code*. This sentence ran concurrently to various other sentences, the longest being four years and nine months for possession of Schedule I drugs for the purposes of trafficking. David pled guilty to nine offences of possession of controlled substances for the purpose of trafficking and one count of bribery of an officer. Justice Duncan considered it aggravating that David was in a position of trust as a correctional officer and breached this trust by taking advantage of his reduced screening at the prison.[106]

In *R v Ticne*,[107] a correctional officer was sentenced to 39 months in prison for bribery under section 120(a) of the *Criminal Code.* That sentence was concurrent to a 39-month sentence for obstruction of justice under section 139(2) of the *Criminal Code*. The offender assisted an inmate's escape based on the inmate's promise to pay $50,000, which the offender never received. The Crown appealed, seeking a sentence of seven years. The majority of the British Columbia Court of Appeal dismissed the appeal, noting that appellate courts must give substantial deference to the sentences imposed by trial judges. Dissenting, Justice Frankel

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[104] *Ibid* at paras 15-18.
[105] *R v David*, 2013 NSSC 83.
[106] *R v David*, 2013 NSSC 83 at paras 25, 78.
[107] *R v Ticne,* 2009 BCCA 191.

would have allowed the Crown's appeal. In his view, the appropriate range for these types of sentences was eight to twelve years. He stated:

> The offences here can, individually and collectively, encompass a wide range of misconduct. What Mr. Ticne did approaches the worst-case end of that spectrum. In my view, absent mitigating factors, the need to maintain a properly functioning system for the detention of those whom our collective interest requires be detained, calls for the imposition of sentences close to the maximum permitted by law. Those who are prepared to accept a bribe to set a prisoner free are betraying the trust that has been placed in them. They should normally expect to be deprived of their own liberty for between eight and twelve years.[108]

In *R v Morency*,[109] the offender received concurrent sentences of three years imprisonment for bribery and two years imprisonment for breach of trust. Morency, a Crown prosecutor, had been under suspicion for dubious practices. During an unrelated wiretap, a suspect spoke about bribing Morency to avoid a criminal record following an impaired driving arrest. A sting operation was put in place to see if Morency would intercede on another impaired driving offence, which he did. To assist in the sentencing decision, Justice Morand appended a table of 62 corruption-related cases in which the offender was a public official such as a prosecutor, police officer or politician.[110] Justice Morand excluded sentences at the extreme ends of the range and provided the following broad outline of the table:

- Except in rare cases, the objectives of general deterrence and societal condemnation are predominant;
- In nearly a third of the decisions, the courts imposed prison sentences to be served in the community for periods varying between twelve months and two years less one day, the average being around eighteen months;
- In a majority of cases, the courts ordered prison sentences ranging between three months and six years; the average, however, was between two and a half and three years, despite the presence of numerous mitigating circumstances such as guilty pleas, the absence of criminal records, remorse, non-existent risks of re-offending, and social reintegration that was well underway or even assured;
- In most cases involving attorneys practising their profession, judges insisted on the importance of using the prison sentence to clearly express the particular seriousness of the offence when it is

[108] *Ibid* at para 28.
[109] *R v Morency*, 2012 QCCQ 4556.
[110] *Ibid* at Schedule I.

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> committed by an officer of the court whose professional conduct must be completely honest.[111]

6.3.1 Bribery and Breach of Trust of Government Officials and Employees

Bribery and other corruption offences committed by government officials and employees are punishable by a maximum sentence of five years imprisonment under sections 121-125 of the *Criminal Code*.

In *R v Murray*, the offender was sentenced to a two-year penitentiary term followed by a two-year probation order as well as an order of restitution.[112] Murray was the Director of Financial Services for the House of Assembly in Newfoundland and Labrador. Using this position, Murray falsified expense claims. An agreed statement of facts provided that Murray received close to $400,000, which went directly to feeding a $500 a day gambling addiction. Justice Fowler considered the addiction a mitigating circumstance, alongside Murray's lack of a previous record, assumption of responsibility, remorse for his actions, agreement to make restitution, early guilty plea and lack of danger to the community. However, Justice Fowler stated that the breach of a high level of trust and the long-term nature of the offence were serious aggravating factors. Justice Fowler noted that cases of this nature have a broad range of sentencing options, ranging from a conditional sentence to a penitentiary term, the upper reaches of which appeared to be in the four-year range.

In *R v Gyles*, Justice Wein of the Ontario Superior Court imposed a sentence of two years imprisonment for municipal corruption and a concurrent sentence of two-and-a-half years for breach of trust.[113] In the following excerpt, Justice Wein provides a helpful overview of the case law for sentencing of these forms of bribery and corruption:

> **17** The maximum sentence for breach of trust by a public officer, under s. 122 of the *Criminal Code*, and for municipal corruption, under s. 123(1) of the *Criminal Code*, is five years' imprisonment. The range of conduct referred to in the caselaw, and consequently the range of sentences imposed on conviction, is quite broad.
>
> **18** The underlying wrong addressed by these offences is of fundamental importance in a democratic society. It is a self-evident and long-standing principle that no concealed pecuniary self-interest should bias the judgment of a public officer: *R.* v. *McKitka* (1982), 66 C.C.C. (2d) 164 (B.C.C.A.)
>
> **19** In some cases, where there has been a plea of guilty, where the offence was instigated by others, or where the offender was following orders

[111] *Ibid* at para 72.
[112] *R v Murray*, 2010 NLTD 44.
[113] *R v Gyles*, [2003] OJ No 6249.

of senior officials, conditional sentences or even a fine have been found to be appropriate: *R.* v. *Bedard,* [2000] N.W.T.J. No. 90 (S.C.); *R.* v. *MacEachern,* [1999] P.E.I.J. No. 85 (S.C.); *R.* v. *Currie*, [1994] O.J. No. 1440 (Gen. Div.); *R.* v. *Power*, [1992] N.S.J. No. 311 (Co. Ct.).

20 All of these cases are distinguishable, as they involved mitigating factors not present here, such as a plea of guilty or lack of personal gain.

21 In more serious cases, such as those involving repeated conduct, significant amounts of money, or a well-planned scheme, substantial periods of incarceration ranging from mid to upper range reformatory through to penitentiary terms have been imposed or upheld on appeal: *R.* v. *Bergeron* (1972), 17 C.R.N.S. 85 (Que. C.A.) (one year plus fine); *R.* v. *Gorman* (1971), 4 C.C.C. (2d) 330 (Ont. C.A.) (two years less a day definite and one year indeterminate); *R.* v. *Robillard* (1985), 18 C.C.C. (3d) 266 (Que. C.A.) (one year for one offender, eight months for others); *R.* v. *McLaren,* [1995] S.J. No. 565 (Q.B.) (three and one half years total, including two years on breach of trust); *R.* v. *Gentile*, [1994] O.J. No. 4446 (Ont. Ct. Gen. Div.) per Van Camp J. (Sept. 20, 1994), (two years total); *R.* v. *Achtem* (1978), 13 C.R. (3d) 199 (Alta. C.A.) (three years); *R.* v. *Cooper (No. 2)* (1977), 35 C.C.C. (2d) 35 (Ont. C.A.) (eighteen months reduced to twelve months); *R.* v. *Boudreau* (1978), 39 C.C.C. (2d) 75 (N.S.S.C.(A.D.)) (twelve months); *R.* v. *McKitka*, [1982] B.C.J. No. 2258, 7 W.C.B. 527 (B.C.C.A.) (three years)

22 Each of these cases balances different factors. The sentencing decision in *Gentile* is comparable in some respects. *Gentile* was convicted of breach of trust in relation to his duties as a municipal councillor by accepting benefits from a developer. He received about $164,000 over a two-year period in various benefits including restaurant billings, credit cards, clothing and debt repayment. Like Mr. Gyles, Mr. Gentile had a well-deserved reputation for his long-standing involvement in the community. He too had no prior record. Although he did not plead guilty, the trial was based on an issue of law and as a result the trial was greatly shortened. A sentence of two years in the penitentiary was imposed. The Crown persuasively argued that the type of conduct considered in *Gentile* could be said to be less serious, since it involved the exercise of a subtle influence by introducing a developer to other city councillors rather than a blatant demand for cash, akin to extortion, as in the case of Mr. Gyles. I agree that it is an important aggravating factor that Mr. Gyles instigated the offences, and that they were obvious bribes.

23 Similar cases have attracted penitentiary sentences. In *McKitka,* the mayor of a city was charged with breach of trust and municipal corruption. A three-year sentence was upheld on appeal. The Court

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emphasized that "corruption in public services cannot be countenanced". In *McLaren,* a sentence of three and a half years' imprisonment in total was imposed on charges of fraud, theft and breach of trust. The offences had higher maximum penalties and the circumstances involved larger quantities of money, but the accused pleaded guilty. Two years concurrent was given on the breach of trust count. The court held that although a long sentence was not needed to deter or reform the accused, it was necessary to deter others and to maintain the public's confidence in the administration of justice.

…

28 In general, it has been held that a serious breach of trust requires a sentence of incarceration:

> ... the crimes are serious. No violence, of course, but on the other hand, they involve the underhanded deceit of a person who, holding a position of confidence in the public service, undermines the system for personal gain. Such behaviour, in my view, calls for deterrence, ... which would give rise to a term of imprisonment. To hold otherwise, would in my view bring the administration of justice into disrepute.
>
> *R. v. Robillard (supra)* at 273-4.

…

30 In this case, considering the inherent seriousness of the offences, the repetition of the crime in separate instances, the length of time involved, and the need for effective deterrence, it is my view that only a sentence of penitentiary length will suffice to meet the needs of justice. Mitigating factors such as a plea of guilty or genuine remorse that are present in cases where shorter sentences are imposed, are not present here. The contribution that Mr. Gyles can now make to his community is to serve as a warning to others who might be tempted to abuse a position of public power. Realistically, the only effective way he can do this is by serving a sentence of incarceration.

31 While the facts of this case may be considered as serious or even more serious than those that have led the other courts to impose sentences of up to three and a half years in the penitentiary, recognition should be given to the fact that Mr. Gyles is now almost 60, and suffering from some health problems, partly as a result of the stress relating to these court proceedings. Weight must be given to the fact of his prior record of long public service.[114]

[114] *Ibid* at paras 17–31.

6.3.2 Corruptly Defrauding the Government

In many cases of corruption, there is an underlying offence such as fraud or theft. In some instances, the individual is charged with a corruption offence alongside an underlying offence; in other instances the underlying offence is the only offence charged. The latter phenomenon occurred in the well-known Federal Sponsorship scandal. The sponsorship program ran from 1996 to 2004, but was shut down after widespread corruption was discovered. Several individuals were charged. The sentences of those individuals are briefly summarized below.

Jean LaFleur pled guilty to 28 fraud charges against the federal government involving over $1.5 million. The offences took place over three years and involved 76 fraudulent invoices. Justice Coupal sentenced LaFleur to 42 months imprisonment, as well as restitution payments, and a $14,000 victim surcharge. Mitigating the offence was the absence of a criminal record, remorse and an early guilty plea – 22 days after being charged. Aggravating factors included the breach of public trust. Justice Coupal noted that Lafleur "derived significant financial benefit from public funds, which were gathered in part through income tax paid by honest citizens, most of whom can never hope for a financial situation comparable to that of the accused."[115]

Charles Guite, a senior civil servant, was found guilty of five counts of fraud after a trial by jury. Justice Martin imposed a sentenced of 42 months. While Guite did not benefit from the fraud, his breach of trust and fiduciary duty were key aggravating factors. In his capacity as a senior civil servant, Guite awarded five contracts, two of which were fictitious and three of which resulted in little or no benefit to the government. The total value of the fictional contracts was over $2 million. In sentencing Guite, Justice Martin stated:

> **16** The purpose of the Government's rules and regulations are of course to ensure transparency and fairness. It is only in this way that the citizenry can expect to receive value for money. Guité systematically flouted these rules in order to confer an advantage in excess as I have said of over two million ($2,000,000) dollars upon Brault and Groupaction Marketing.
>
> **17** Having regard for the authority which he possessed a breach of financial duty is nothing short of a breach of trust. In the context of sentencing, it is an important aggravating factor.[116]

Paul Coffin pled guilty to 15 counts of fraud against the government, with an estimated loss exceeding $1.5 million. At first instance, Coffin received a conditional sentence of two years less a day (which did not involve house arrest, but simply a 9 pm-7 am curfew). The Quebec Court of Appeal allowed the Crown's appeal and substituted a sentence of 18 months

[115] *R v Lafleur*, 2007 QCCQ 6652 at para 37.
[116] *R v Guite*, 2006 QCCS 3927.

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incarceration.[117] The Court referred to the 18-month sentence of imprisonment imposed in a very similar case.[118] The Court then stated:

> The fallacious argument that "stealing from the government is not really stealing" cannot be used to downplay the significance of this crime. The government of the country has no assets itself; rather, it manages sums common to all of its citizens. Defrauding the government is equivalent to stealing from one's fellow citizens. The respondent drew up 373 fraudulent invoices, one by one, over a period of more than five years. This cannot be dismissed as a momentary lapse of judgment. We also should not lose sight of the total amount stolen nor of the additional fact that the respondent has made only partial restitution. Finally, even though the respondent's actions do not amount to a breach of trust within the meaning of section 336 *Cr.C.*, the fact remains that he illegitimately took advantage of his privileged position to misappropriate public funds for his own personal use. In short, the crime committed by the respondent is a particularly serious one, and the trial judge should have taken this fact into account. Denunciation and deterrence are crucial objectives. Their significance was downplayed by the trial judge, even though he did acknowledge it during oral argument and in his judgment.[119]

In the last chapter of the sponsorship scandal, former Liberal party organizer Jacques Corriveau, considered the central figure in the sponsorship scandal, was convicted of fraud against the government, forgery and laundering proceeds of crime in November, 2016. Despite the fact that he was 83 years old, he was sentenced to four years in prison. He is appealing the verdict and the sentence.

6.4 Sentencing Cases for Corruption and Bribery of Foreign Public Officials

The *CFPOA* prohibits the bribery of foreign officials. Since 2013, the two offences under the *CFPOA* are both punishable by a maximum of 14 years imprisonment. As stated in Chapter 2, prior to 2013, the maximum penalty for bribery of a foreign public official was five years. Under sections 730 and 742.1 of the *Criminal Code,* conditional sentences and conditional or absolute discharges are not available for offences punishable by a maximum of fourteen years imprisonment.[120] Fines for organizations convicted under the *CFPOA* have no upper

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[117] *R v Coffin*¸2006 QCCA 471. *Coffin* also includes a comprehensive list of sentencing decisions in fraud cases (see under "Case law cited by the Crown").
[118] *R v Bogart* (2002), 61 OR (3d) 75, leave to appeal to SCC refused.
[119] *Ibid* at paras 46-49.
[120] Transparency International Canada has noted that this lack of availability of conditional sentences or discharges is problematic for the prosecution of less severe violations of the *CFPOA*: Transparency International Canada, *Review of Canada's Implementation of UNCAC* (October 2013) at 9.

limit. The sentencing jurisprudence on the *CFPOA* is still very limited. To date, three corporations have been sentenced following plea agreements and one natural person was convicted at trial and sentenced.

The first corporation to be charged and convicted of a crime under the *CFPOA* was Hydro Kleen Systems.[121] In *R v Watts*, Hydro Kleen, Mr. Watts (president and major shareholder of Hydro Kleen) and Ms. Bakke (Hydro Kleen's operations coordinator) were charged with bribing a foreign public official.[122] Hydro Kleen engaged in business in the US. To facilitate the easier passage of their employees into the US, the company hired Garcia, an American immigration officer who was stationed at the Calgary airport. Garcia's services were retained through his company Genesis Solutions 2000.

The agreed statement of facts, reproduced as part of the judgment, provided:

> **50** Garcia's services were retained by Hydro Kleen Systems Inc. in order to reduce legal fees paid to immigration lawyers and also because he knew all of the subtleties of the United States law, particularly as they vary over time.
>
> **51** Garcia's services would better ensure that fewer, if any, difficulties would confront Hydro Kleen Systems Inc. or its employees in attempting to enter the United States.
>
> **56** In return for these payments, as an immigration consultant, Garcia attended the Hydro Kleen Systems Inc. offices in Red Deer from time to time and advised Hydro Kleen Systems Inc. employees on what to say when crossing the border. As part of the process, he exchanged emails and telephone calls with Hydro Kleen Systems Inc. employees.
>
> **57** Garcia also assisted Hydro Kleen Systems Inc. officials and employees in drafting letters and documents that the Hydro Kleen Systems employees would use to apply for L1 visas and/or to gain entry at United States port of entry.
>
> **58** Under the terms of his employment with the Immigration and Naturalization Services, Garcia was prohibited from taking on outside work without permission from his superiors. At no time did he advise his superiors of his work for Hydro Kleen Systems, nor did he have permission to do this work.
>
> **59** Bakke told one of the Hydro Kleen Systems Inc. employees, Lisa Thiessen, not to acknowledge Garcia's employment with Hydro Kleen Systems Inc. in the event of outside inquiries.

[121] Norm Keith, *Canadian Anti-Corruption Law and Compliance* (LexisNexis Canada, 2013) at 115.
[122] *R v Watts*, [2005] AJ No 568.

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> **60** Watts told Randy Cooper that Hydro Kleen Systems Inc. had a United States immigration officer on the payroll as a consultant. He also told Cooper that on one occasion Garcia attended at the Hydro Kleen Systems Inc. offices in uniform and that he, Watts, asked Garcia to put on his overcoat so that the rest of the employees would not see him in his Immigration and Naturalization Services uniform.
>
> **61** Without the knowledge of Hydro Kleen Systems Inc. and without instructions from Hydro Kleen Systems Inc., Garcia undertook an investigation of a number of persons employed by firms in competition with Hydro Kleen Systems Inc. It was his opinion that these persons were illegally gaining entry into the United States.
>
> **62** In particular, his investigation focussed on employees of Hydro Kleen Systems Inc.'s competitors, namely Innovative Coke Expulsion Inc., which is referred to as ICE, and Eliminator Pigging, referred to as Eliminator.
>
> **64** As a result of Garcia's actions, these individuals were denied entry into the United States, in some cases after further questioning by Immigration and Naturalization Services' officers.[123]

Under a plea agreement, Hydro Kleen pled guilty to making 33 payments totalling $28,299.98 to an American immigration officer and the charges against Watts and Bakke were withdrawn. The Crown and defence made a joint submission suggesting a fine of $25,000 against Hydro Kleen, which was accepted by the court.

At the sentencing hearing, the president of Innovative Coke Expulsion Inc, Hydro Kleen's competitor, read a victim impact statement indicating that Hydro Kleen's corrupt activities had a serious economic impact on his company, as well as a moral impact.[124] He stated that "the damage inflicted went beyond the monetary value of the corrupt payment to Garcia by Hydro Kleen Group. Our own employees questioned the point in maintaining our own ethical values. What's the use, was the most asked question."[125]

As stated above, Justice Sirrs accepted the joint sentencing submission. Regarding the amount of the fine, Justice Sirrs stated that, "[w]hether a $25,000 fine is significant or not, I

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[123] In separate proceedings, Garcia was charged under the *Criminal Code* and pleaded guilty to accepting secret commissions. He was sentenced to six months imprisonment. The court rejected Garcia's argument that his sentence should be a conditional sentence (i.e., served in the community). The court was informed that Garcia would also be prosecuted in the US once his Canadian sentence was completed.

[124] Section 722 of the *Criminal Code* states: "For the purpose of determining the sentenced to be imposed on an offender…the court shall consider any statement that may have been prepared in accordance with subsection (2) of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence."

[125] *R v Watts*, [2005] AJ No 568 at paras 128-29.

can only determine that Mr. Beattie [the Crown prosecutor] must have canvassed the significance and the amount of the fine and what effect it might have on Hydro Kleen as being a significant amount."[126] Justice Sirrs expressed some discomfort with the idea of Watts and Bakke escaping criminal conviction and punishment, stating that "[i]t bothers the court that these people are able to plea from a corporation to protect the operating minds of the company from the stigma attached to a criminal record. However, the court does take into consideration that the operating minds of this corporation do not escape with their integrity intact."[127] Justice Sirrs also acknowledged the mitigating effect of a guilty plea:

> In this case, I take into consideration Mr. Wilson's statements that a guilty plea has been entered. In these types of charges, especially the mens rea elements are difficult for the Crown to prove. A guilty plea means that a three-week trial was avoided, that the individual has accepted responsibility. A significant fine has been agreed to, and on those factors, I am not able to determine that the sentence is unfit and would thus justify my interference with the penalty arrangements that counsel have worked out amongst themselves.[128]

In the Phase 3 Report on Implementing the OECD Convention in Canada, there was legitimate criticism of the sentence imposed in *Watts*. The authors of the report stated:

> [G]iven that the fine imposed in Hydro Kleen amounted to less than the bribe given to the foreign public official, which was around CAD 30 000, no proceeds obtained from the bribery act were forfeited, no restitution appears to have been paid to the victim company, and the Court did not consider whether measures were taken by the company to prevent further foreign bribery acts, the lead examiners find it difficult to see how the penalty imposed in Hydro Kleen could be an effective general or specific deterrent. Moreover, it is difficult to see how the penalty imposed takes into account the main factors that the PPSC [Public Prosecution Services of Canada] told the lead examiners are to be considered on a case-by-case basis, according to the jurisprudence – i.e. the size of the bribe and the proceeds of the bribery, as well as the circumstances of the offence.[129]

The first significant *CFPOA* conviction was in *R v Niko Resources Ltd*.[130] Niko Bangladesh, a wholly owned subsidiary of Niko Canada, gave a motor vehicle worth $190,948 CAD and approximately $5,000 as travel expenses to the Bangladeshi State Minister for Energy and

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[126] *Ibid* at para 184.
[127] *Ibid* at para 185.
[128] *Ibid* at para 188.
[129] OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada* (March 2011) at para 58.
[130] *R v Niko Resources Ltd,* 101 WCB (2d) 118, 2011 CLB 37508 (Alta QB).

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Mineral Resources in order to influence the Minister.[131] Niko Canada acknowledged its funding of the acquisition of the vehicle and its responsibility under Canadian criminal law. A fine of $8,260,000 and a 15% victim surcharge fine[132] resulted in a total penalty of $9,499,000.[133] In addition, Niko Resources was placed on probation for three years and was to bear the costs of the probation order.[134] In accepting the joint submission on sentencing, Justice Brooker stated:

> **58** The fine reflects that Niko Canada made these payments in order to persuade the Bangladeshi Energy Minister to exercise his influence to ensure that Niko was able to secure a gas purchase and sales agreement acceptable to Niko, as well as to ensure the company was dealt with fairly in relation to claims for compensation for the blowouts, which represented potentially very large amounts of money. The Crown is unable to prove that any influence was obtained as a result of providing the benefits to the Minister.
>
> …
>
> **61** It is also agreed that the sentence imposed appropriately reflects the degree of planning and duration and complexity of the offence. It further accepts that Niko Canada did not attempt to conceal its assets,

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[131] As stated in the judgment: "The relationship between Niko Canada and Niko Bangladesh was as follows: Niko Canada is the public company which owned 100% of Niko Resources Caymans, which was a holding company. The holding company in turn owned 100% of Niko Bangladesh. Niko Bangladesh was incorporated in Barbados. Although it was not incorporated in Bangladesh it does, however, maintain an office in Dhaka, which is the capital city of Bangladesh. Niko Bangladesh was funded solely by Niko Canada. Typically, money was transferred from Niko Canada's accounts in Calgary, to Niko Resources Caymans then to the Niko Bangladesh accounts in Barbados and finally to the Niko Bangladesh accounts in Bangladesh. The CEO of Niko Canada sat on the Board of Directors of Niko Bangladesh." See *ibid* at paras 10, 11.

[132] Note that the victim surcharge contributes to provincial victim services rather than the victims of a particular offence (which, in cases of foreign corrupt practices, would be citizens of the bribed official's country).

[133] Poonam Puri notes that this sentence, when compared with *R v Watts*, is evidence of a "troubling lack of consistency" in enforcement of the *CFPOA*. Hydro Kleen's fine was roughly equal to the amount of its bribe, whereas Niko Resources was required to pay a $9.5 million fine for a $200,000 bribe. See Jennifer Brown, "Are anti-corruption laws really tackling the problem?", *Canadian Lawyer* (10 November 2014), online: <http://www.canadianlawyermag.com/5350/Are-anti-corruption-laws-really-tackling-the-problem.html>. On the other hand, the same judge a year later in *Griffiths Energy International* (discussed on the next page) imposed a fine of approximately $10 million for a $2 million bribe.

[134] Niko Resources was required to adhere to compliance requirements in the probation order. Under s 32.1 of the *Criminal Code*, courts may order implementation of policies or procedures to prevent future crimes. Boisvert et al point out that such probation orders are underused and could provide a valuable tool in foreign bribery cases: Anne-Marie Lynda Boisvert et al, "Corruption in Canada: Definitions and Enforcement", Report No. 46, prepared for Public Safety Canada by Deloitte LLP (Her Majesty the Queen in Right of Canada, 2014) at 47.

> or convert them to show it was unable to pay the fine or comply with the Probation Order.
>
> **62** In addition the Probation Order takes into consideration steps already taken by Niko Canada to reduce the likelihood of it committing a subsequent related offence.
>
> **63** In addition the sentence takes into consideration the fact that the company has never been convicted of a similar offence nor has it been sanctioned by a regulatory body for a similar offence.
>
> …
>
> **65** The plea agreement in this case also takes into consideration the fact that the company agreed to enter a plea prior to charges formally being laid, and that the company agreed to enter a guilty plea without the requirement of a preliminary hearing or trial.[135]

The second significant *CFPOA* case is *R v Griffiths Energy International*.[136] In *Griffiths Energy*, the corporation paid a bribe of over $2,000,000 to the wife of Chad's ambassador to Canada. The purpose of the bribe was to persuade the ambassador to use his influence and help Griffiths Energy International secure a production sharing contract in Chad. A joint submission of a $9,000,000 fine and a 15% victim surcharge, for a total penalty of $10,350,000, was accepted by the court. In this case, Justice Brooker stated:

> **8** The bribing of a foreign official by a Canadian company is a serious matter. As I said in *R. v. Niko Resources Ltd.*, such bribes, besides being an embarrassment to all Canadians, prejudice Canada's efforts to foster and promote effective governmental and commercial relations with other countries; and where, as here, the bribe is to an official of a developing nation, it undermines the bureaucratic or governmental infrastructure for which the bribed official works.
>
> **9** Accordingly, the penalty imposed must be sufficient to show the Court's denunciation of such conduct as well as provide deterrence to other potential offenders.
>
> . . . .
>
> **14** The major aggravating factor in this case is the size of the bribe made. It was a considerable sum; far more than the Toyota Land Cruiser and trips in the *Niko* case.
>
> **15** On the other hand, there are a significant number of mitigating factors present in this case. There is a new management team at Griffiths. The people involved in authorizing the bribe are no longer with the

[135] *Ibid*.

[136] *R v Griffiths Energy International*, [2013] AJ No 412 (Alta QB).

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company. Most importantly, in my view, when new management came in at Griffiths and discovered the bribe, they acted quickly and decisively to fully investigate the matter and they self-reported the crime to the various relevant law enforcement authorities. Conceivably, had they not done so, this crime might never have been discovered.

16 Then, having reported the matter, Griffiths cooperated fully with the authorities, sharing the results of their investigation with the authorities, including privileged information and documents which the authorities were not otherwise entitled to.

17 In the end, to borrow Ms. Robidoux's submission, Griffiths delivered to the RCMP the evidence package "nicely organized and ready for prosecution."

18 The cost of this investigation is said to be in the range of $5 million and thus sharing this information with the RCMP has obviously saved the prosecution a significant amount of money.

19 Further, I am satisfied from the representations made to me that Griffiths has instituted an effective, comprehensive and robust anti-corruption program such that it is unlikely that there will be any repetition of such illegal conduct.

. . . .

23 I have been referred by counsel to a number of American cases, but they are not particularly helpful given that the sentencing regime in the U.S. is quite different and involves grids, offence levels, culpability scores and advisory ranges. However, what the U.S. cases to which I have been referred demonstrate is a significant reduction in penalty for self-reporting and cooperation in the investigation. Thus, for example, in the *Maxwell Technologies Inc.* case of January 2011, a one-count indictment for a bribe of $2.789 million to a foreign official resulted in an $8 million fine, which represented an approximate 25 percent discount from the bottom of the advisory fine range because of the company's voluntary disclosure and cooperation with the Department of Justice in the U.S.

24 In the *Data Systems & Solutions LLC* case of June 2012, a bribe of $339,000 resulted in a fine of $8.82 million, which was approximately a 30 percent reduction from the bottom end of the advisory fine range. This reduction was said to recognize the company's extraordinary cooperation with the Department of Justice.

25 Based on the cases referred to me by counsel, the range of fine seems to run from a low of $25,000 in Canada to a high of approximately $12 million in the U.S.A.

> **26** I am satisfied, therefore, that the proposed fine of $9 million is within the range.[137]

R v Karigar was the first sentence imposed under the *CFPOA* on a natural person, as well as the first sentence following a conviction at trial rather than a guilty plea.[138] In *Karigar*, a total of $450,000 in bribes was given, while the entire scheme contemplated payment of millions of dollars and stock benefits over time. The purpose of the bribes was to win a multi-million dollar contract to sell facial recognition software to Air India. The Crown sought a penalty of three to five years imprisonment while the defence sought a community-based sentence. Justice Hackland imposed a sentence of three years imprisonment. In so doing, Justice Hackland stated:

> **5** The over-arching principle here is that bribery of foreign public officials should be subject to similar sanctions as would be applied to the bribery of Canadian public officials occurring in Canada.
>
> …
>
> **11** I would identify the following aggravating factors in this case.
>
> (a) This was a sophisticated and carefully planned bribery scheme intended to involve senior public officials at Air India and an Indian Cabinet Minister. If successful, it would have involved the payment of millions of dollars in bribes and stock benefits, over time. The sum of $450,000 was advanced for the purpose of bribery while Mr. Karigar remained involved with this scheme.
>
> (b) In addition to the contemplated bribes, the accused's participation in the bidding process involved other circumstances of dishonesty such as the entry of a fake competitive bid to create the illusion of a competitive bidding process and the receipt and use of confidential insider information in the bid preparation.
>
> (c) The accused behaved throughout with a complete sense of entitlement, candidly relating to a Canadian trade commissioner that bribes had been paid and then urging the Canadian Government's assistance in closing the transaction.
>
> (d) Mr. Karigan personally conceived of and orchestrated the bribery proposal including providing the identity of the officials to be bribed and the amounts proposed to be paid as reflected in financial spreadsheets he helped to prepare.

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[137] *Ibid*.

[138] *R v Karigar*, 2013 ONSC 5199 (conviction); 2014 ONSC 3093 (3-year sentence of imprisonment); 2017 ONCA 576 (conviction appeal dismissed); leave to appeal to SCC refused, March 15, 2018.

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Mitigating Factors

12 I would identify the following mitigating factors:

(a) There was a high level of co-operation on the accused's part concerning the conduct of this prosecution. Indeed he exposed the bribery scheme to the authorities following a falling out with his co-conspirators. He unsuccessfully sought an immunity agreement. A great deal of trial time was avoided as a result of the accused's extensive admissions concerning the documentary evidence.

(b) Mr. Karigar appears to have been a respectable business man all of his working life, prior to his involvement in this matter. He has no prior criminal involvements. He is also in his late 60s and not in the best of health.

(c) Of considerable importance is the fact that the entire bribery scheme was a complete failure. The accused and his co-conspirators failed to obtain the sought after contract with Air India, or any other benefits. The harm resulting from this scheme was likely restricted to the promotion of corruption among a limited group of foreign public officials.

…

36 The evidence in this case discloses that you had a leading role in a conspiracy to bribe Air India officials in what was undoubtedly a sophisticated scheme to win a tender for a Canadian based company. Canada's Treaty Obligations as well as the domestic case law from our Court of Appeal requires, in my view, that a sentence be pronounced that reflects the principals [*sic*] of deterrence and denunciation of your conduct. Any person who proposes to enter into a sophisticated scheme to bribe foreign public officials to promote the commercial or other interests of a Canadian business abroad must appreciate that they will face a significant sentence of incarceration in a federal penitentiary.[139]

The Crown presented evidence of the OECD Working Group on Bribery's concerns about Canada's enforcement leniency in the *Watts* case as well as evidence on the US Sentencing Guidelines. Like Justice Brooker in *Niko Resources*, Justice Hackland mostly rejected the notion that sentencing in corruption cases in the US should be given much weight, stating:

8 While helpful background, I am of the view that this information is not directly relevant to the sentencing issues at hand. Similarly, the evidence of U.S. sentencing guidelines based on tariffs and somewhat

[139] *Ibid*.

> similar British guidelines are simply inapplicable in Canada. I do however take notice of the obvious reality that the corruption of foreign public officials, particularly in developing countries, is enormously harmful and is likely to undermine the rule of law. The idea that bribery is simply a cost of doing business in many countries, and should be treated as such by Canadian firms competing for business in those countries, must be disavowed. The need for sentences reflecting principles of general deterrence is clear.[140]

Justice Hackland also noted that the offence carried a maximum penalty of 5 years at the time of the conviction although the maximum was subsequently raised to 14 years. According to Justice Hackland, the higher penalty illustrated "Parliament's recognition of the seriousness of this offence and of Canada's obligation to implement appropriate sanctions."[141] It is possible that, given the increase of the maximum penalty under the *CFPOA*, individuals convicted in similar circumstances in the future may face longer prison sentences.

Following Karigar's sentencing, the RCMP charged three individuals in connection with the same scheme. Two of the individuals are US citizens and one is a UK citizen. The publication notes that the "willingness of Canadian officials to prosecute foreign citizens is a new development."[142]

The limited jurisprudence under the *CFPOA* makes it difficult to predict how sentencing for corruption of foreign public officials will be treated as more convictions are obtained. It is noteworthy that two of the four judgments rejected arguments relating to American jurisprudence. It seems clear that Canadian judges will continue to sentence on a case-by-case basis rather than attempting to define a scale by which certain conduct merits certain punishments akin to the sentencing guideline table used in the US. Factors such as the size of the bribe are and will continue to be important in determining the sentence, but unlike the US, where a large bribe or loss to the government can result in an escalation of the guideline range despite potentially significant mitigating factors, all factors will be considered and weighed in a more holistic sense.

Canadian judges do appear to be considering guilty pleas, cooperation and subsequent measures to improve *CFPOA* compliance as significant mitigating factors. This mirrors the approaches taken in the US and UK. All three jurisdictions have recognized that the

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[140] *Ibid*.

[141] *Ibid* at para 6. By increasing the maximum sentence for all forms of foreign bribery under the *CFPOA* to 14 years, Karigar's form of bribery (punishable if committed domestically to a maximum of 5 years: s 121(1)(a) of the *Criminal Code*) is now punishable by a higher maximum when committed in respect to the foreign official in that case.

[142] Shearman & Sterling LLP, *FCPA Digest – Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act* (January 2015) at 11, online: <http://www.shearman.com/~/media/Files/NewsInsights/Publications/2015/01/Recent-Trends-and-Patterns-only-LT-010515.pdf>.

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complexity of corruption leads to difficulty in uncovering corruption offences, as well as difficulties and costs in prosecuting these crimes.

However, as pointed out by Berman and Wansbrough, the benefits of self-reporting potential violations of the *CFPOA* are unclear due to limited jurisprudence and the lack of formal guidelines on leniency and immunity for self-reporting companies and individuals.[143] Griffiths Energy self-reported and received a smaller fine in relation to its bribe than Niko Resources, which cooperated, but did not self-report. However, other mitigating factors were at play in *Griffiths Energy*, such as the company's contribution to investigation costs. In *Karigar*, the mitigating effect of self-reporting was lessened by other aggravating factors. This indicates that the benefit of self-reporting depends on the facts of each case. Because of this uncertainty and lack of assurance, companies may be reluctant to self-report breaches of the *CFPOA*. As mentioned below in Section 8.6, some critics argue that the appeal of self-reporting is further reduced by Canada's relatively harsh debarment regime and the unavailability of DPAs or NPAs to avoid that regime.[144]

7. CRIMINAL FORFEITURE

Criminal forfeiture is introduced in a general way in Chapter 5, Section 2.4.1. The laws and procedures for criminal forfeiture under UNCAC and the OECD Convention and in the US, UK and Canada are discussed in Sections 3.1, 3.2, 4.1, 4.2 and 4.3 respectively of Chapter 5.

8. DEBARMENT AS A COLLATERAL CONSEQUENCE OF A BRIBERY CONVICTION

Debarment is a sanctioning tool by which an individual or corporation convicted of a corruption offence may face a period of ineligibility from bidding on government contracts. For companies that rely on public contracts and tenders as a large portion of their business, the prospect of debarment is a significant additional punishment.[145] For example, after debarment, a company may lose clients, suffer reputational damage, face insolvency or even go out of business.[146] The debarment process can be complex and multiple variables must be

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[143] Wendy Berman & Jonathan Wansbrough, "A Primer on Canada's Foreign Anti-Corruption Enforcement Regime" (Cassels Brock & Blackwell LLP, 2014) at 25, online: <http://www.mondaq.com/canada/x/345442/White+Collar+Crime+Fraud/Risky+Business+A+Primer+on+Canadas+Foreign+AntiCorruption+Enforcement+Regime>.

[144] John Manley, "Canada needs new tools to fight corporate wrongdoing", *The Globe and Mail* (29 May 2015).

[145] Nicholas Lord, *Regulating Corporate Bribery in International Business: Anti-Corruption in the UK and Germany* (Ashgate Publishing, 2014) at 113.

[146] *Ibid* at 113.

considered, such as the length of the debarment; whether it is automatic or discretionary; and the jurisdictions and organizations where the debarment applies.[147] Moreover, the impact of debarment can be multiplied by cross-debarment whereby departments, governments, or other institutions or organizations agree to mutually enforce each other's debarment actions. One such example is a cross-debarment agreement between the Multilateral Development Banks (MDBs), consisting of the African Development Bank Group, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank and the World Bank Group. As stated by the MDBs, "cross debarment creates a formidable additional deterrent to firms and individuals engaged in fraud and corruption in MDB-financed development projects, and possibly provides an incentive for firms to clean up their operations."[148]

8.1 UNCAC

> Article 34
>
> With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.[149]

The reference in Article 34 to "any other remedial action" is clearly broad enough to include debarment of offenders from participation in public procurement.

8.2 OECD

> Article 3
>
> Sanctions
>
> 4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.
>
> Commentary
>
> Re paragraph 4:

[147] *Ibid* at 113.
[148] Asian Development Bank, *Cross Debarment – Agreement for Mutual Enforcement of Debarment Decisions Among Multilateral Development Banks*, online: <http://lnadbg4.adb.org/oai001p.nsf/>.
[149] United Nations Convention Against Corruption, 9 to 11 December 2003, A/58/422, (entered into force 14 December 2005), online: <https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>.

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> 24. Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; *temporary or permanent disqualification from participation in public procurement* or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.[150] [Emphasis added.]

8.3 The World Bank

The World Bank, a supra-national organization set up by member states, is comprised of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The World Bank Group consists of the World Bank and three other supra-national agencies: the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID).

The World Bank and the World Bank Group provide billions of dollars in loans to developing countries every year, funding large-scale infrastructure projects throughout the developing world. To control corruption, the World Bank has developed its own sanctions system. Although the World Bank cannot impose criminal sanctions, debarment from bidding on World Bank-financed projects provides a powerful weapon and is the World Bank's default sanction.[151] In the World Bank President's 2011 Address, then-President Robert B. Zoellichk stated:

> For more than 10 years, our sanctions system has played a crucial role within the Bank Group's anticorruption efforts. Sanctions protect Bank Group funds and member countries' development projects by excluding proven wrongdoers from our operations and financing. Sanctions also deter other participants or potential bidders in Bank Group-financed operations from engaging in fraud, collusion, or corruption. By holding companies and individuals accountable through a fair and robust process, the Bank Group's sanctions system promotes integrity and levels the playing field for those committed to clean business practices.
>
> Being in the forefront of antifraud and anticorruption efforts among multilateral development institutions, the Bank Group has continually explored new structures and strategies to deal most effectively with allegations of fraud and corruption. These efforts led, for instance, to the

[150] OECD, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, online: <http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf>.
[151] Graham Steele, *Quebec's Bill 1: A Case Study in Anti-Corruption Legislation and the Barriers to Evidence-Based Law-Making* (LLM Thesis, Dalhousie University Faculty of Law, 2015) [unpublished] at 54, online: <http://dalspace.library.dal.ca/handle/10222/56272>.

> establishment of the Sanctions Board in 2007 as a new and independent body providing final appellate review. Composed of a majority of external members since its establishment, the Sanctions Board has also been led by an external Chair since 2009. The Bank Group worked with the regional multilateral development banks to reach a groundbreaking agreement on cross-debarment in 2010. Those who cheat and steal from one will be debarred by all. Most recently, the Bank Group took a major step toward greater transparency and accountability by authorizing the publication of decisions in new sanctions cases initiated in 2011 and onward.[152]

As of June 30, 2015, the World Bank has debarred or otherwise sanctioned over 700 firms and individuals.[153] The World Bank Sanctions Board considers the totality of the circumstances and all the potential aggravating and mitigating factors to determine an appropriate sanction.[154] The following excerpt is from the World Bank Sanctioning Procedures:

BEGINNING OF EXCERPT

ARTICLE IX

SANCTIONS

Section 9.01. Range of Possible Sanctions

(a) ***Reprimand.*** The Respondent is reprimanded in the form of a formal "Letter of Reprimand" of the Respondent's conduct.

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[152] The World Bank Group Sanctions Board, *Law Digest* (December 2011) at 5, online: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,contentMDK:23065125~pagePK:64168445~piPK:64168309~theSitePK:3601046,00.html>.

[153] The World Bank Office of Suspension and Debarment, *Report on Functions, Data and Lessons Learned 2007-2015*, 2nd ed (World Bank Publications, 2015) at 4 online: <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/OSDReport.pdf>.

[154] Sanctions Board Decision No 75 at para 27, online: <http://siteresources.worldbank.org/INTOFFEVASUS/Resources/3601037-1346795612671/SanctionsBoardDecisionNo.75(SanctionsCaseNo.260).pdf>. The full World Bank Sanctions Procedures can be found at: <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WBGSanctionsProceduresJan2011.pdf>. In an effort to promote transparency in the debarment process, The World Bank has produced a sanctions digest. Sanctions Board decisions can be found at: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,contentMDK:23059612~pagePK:64168445~piPK:64168309~theSitePK:3601046,00.html>.

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(b) ***Conditional Non-Debarment.*** The Respondent is required to comply with certain remedial, preventative or other conditions as a condition to avoid debarment from World Bank Group projects. Conditions may include (but are not limited to) verifiable actions taken to improve business governance, including the introduction, improvement and/or implementation of corporate compliance or ethics programs, restitution or disciplinary action against or reassignment of employees.

(c) ***Debarment.*** The Respondent is subject to one or both of the following forms of ineligibility:

(i) For cases subject to the Bank's Anti-Corruption, Procurement or Consultant Guidelines, the Respondent is declared ineligible, either indefinitely or for a stated period of time, (x) to be awarded a contract subject to such Guidelines for any Bank Project; (y) to be a nominated14sub-contractor, consultant, manufacturer or supplier, or service provider of an otherwise eligible firm being awarded a Bank-financed contract; and (z) to receive the proceeds of any loan made by the Bank or otherwise to participate further in the preparation or implementation of any Bank Project; and

(ii) For cases involving the violation of a Material Term of the VDP Terms & Conditions, where the only applicable sanction shall be a ten (10)-year debarment, the Respondent shall be debarred for a period of ten (10) years, pursuant to sub-paragraph (i) above, as the Evaluation Officer or Sanctions Board, as the case may be, deems appropriate under the circumstances.

The ineligibility resulting from debarment shall extend across the operations of the World Bank Group. Debarment arising out of an IFC, MIGA or Bank Guarantee Project shall also render the Respondent ineligible to be awarded a contract for a Bank Project or to receive the proceeds of any loan made by the Bank or otherwise to participate further in the preparation or implementation of any Bank Project.

(d) ***Debarment with Conditional Release.*** The Respondent is subject to one or more of the forms of ineligibility outlined in Section 9.01(c) and is released from debarment only if the Respondent demonstrates compliance with certain remedial, preventative or other conditions for release, after a minimum period of debarment. Conditions may include (but are not limited to) verifiable actions taken to improve business governance, including the introduction, improvement and/or implementation of corporate compliance or ethics programs, restitution or disciplinary action against or reassignment of employees. Debarment with conditional release shall also result in extension cross the operations of the World Bank Group as outlined in Section 9.01(c).

(e) ***Restitution or Remedy.*** The Respondent is required to make restitution to the Borrower or to any other party or take actions to remedy the harm done by its misconduct.

Section 9.02. Factors Affecting the Sanction Decision

Except for cases involving violation of a Material Term of the VDP Terms & Conditions for which there is a mandatory ten (10)-year debarment, the Evaluation Officer or Sanctions Board, as the case may be, shall consider the following factors in determining an appropriate sanction:

(a) the severity of the misconduct;
(b) the magnitude of the harm caused by the misconduct;
(c) interference by the sanctioned party in the Bank's investigation;
(d) the sanctioned party's past history of misconduct as adjudicated by the Bank Group or by another multilateral development bank in cases governed by Article XII;
(e) mitigating circumstances, including where the sanctioned party played a minor role in the misconduct, took voluntary corrective action or cooperated in the investigation or resolution of the case, including through settlement under Article XI;
(f) breach of the confidentiality of the sanctions proceedings as provided for in Section 13.06;
(g) in cases brought under Section 1.01(c)(ii) following a determination of non-responsibility, the period of ineligibility decided by the Director, GSD;
(h) the period of temporary suspension already served by the sanctioned party; and
any other factor that the Evaluation Officer or Sanctions Board, as the case may be, reasonably deems relevant to the sanctioned party's culpability or responsibility in relation to the Sanctionable Practice.[155]

END OF EXCERPT

In light of the gravity of the consequences of a World Bank debarment, some lawyers, particularly defence lawyers in the US, are wary of the fact that the World Bank is not required to follow any country's rules of procedure or subscribe to American concepts of

[155] World Bank Sanctioning Procedures (2011), online: <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WBGSanctionsProceduresJan2011.pdf>.

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due process.[156] The World Bank has developed its own procedures, but in a global context it can be argued that those procedures do contain a healthy dose of due process. Cross-debarment is also criticized as unfair, since the various development banks involved have different investigation and sanctioning procedures.

8.4 US Law

Under the US *Federal Acquisition Regulations*, an individual or corporation can be debarred from federal contracts for a number of reasons, including bribery or the commission of an offence indicating a lack of business integrity. Debarment from one government agency typically results in debarment from other agencies.[157] In May 2014, the Government Accountability Office reported a dramatic increase in suspension and debarment actions, increasing from 19 in 2009 to 271 in 2013.[158]

The decision to debar is not made by the DOJ or SEC, but rather designated officials in other affected agencies. The decision to debar is always discretionary. As the US debarment regulations state:

> It is the debarring official's responsibility to determine whether debarment is in the Government's interest. The debarring official may, in the public interest, debar a contractor for any of the causes in 9.406-2, using the procedures in 9.406-3. The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision.[159]

Causes for debarment include a conviction or civil judgment for commission of fraud or a criminal offense in conjunction with obtaining, attempting to obtain, or performing a public contract or sub-contract; commission of an offence indicating a lack of business integrity; and violating federal criminal law involving fraud, conflict of interest or gratuity violations.[160]

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[156] Julie DiMauro, "World Bank combats corruption – but questions linger about process" (22 May 2014), *The FCPA Blog*, online: <http://www.fcpablog.com/blog/2014/5/22/world-bank-combats-corruption-but-questions-linger-about-pro.html>.

[157] United States Federal Register, "Executive Order 12549 - Debarment and Suspension", online: <http://www.archives.gov/federal-register/codification/executive-order/12549.html>.

[158] United States Government Accountability Office, "Federal Contracts and Grants" (2014) online: <http://www.gao.gov/assets/670/663359.pdf>.

[159] US Government Publishing Office, *Electronic Code of Federal Regulations - Subpart 9.4 - Debarment, Suspension, and Ineligibility* at 9.406-1, online: <http://www.ecfr.gov/cgi-bin/text-idx?SID=9c026b9ecb084babcf763d793f929f64&node=48:1.0.1.2.9.4&rgn=div6#se48.1.9_1406_61>.

[160] *Ibid* at 9406-2.

Factors considered by the debarment official include standards of conduct and internal controls, self-reporting in a timely manner, internal investigation, cooperation with external investigation, payment of any fines, disciplinary actions and remedial measures.[161]

The regulations state that the period of debarment shall be commensurate with the seriousness of the cause(s) and generally should not exceed three years. The period can be extended if necessary to protect government interest. Contractors can request a reduction based on reasons including reversal of conviction or civil judgment, bona fide change in ownership or management and elimination of other causes for which debarment was imposed.[162]

In addition to public procurement debarment, *FCPA* violations may lead to ineligibility to receive export licenses and SEC suspension and debarment from the securities industry.[163]

8.5 UK Law

The UK debarment provisions are found in the *Public Contracts Regulations 2006*. The regulations state:

> **Criteria for the rejection of economic operators**
>
> **23.**—(1) Subject to paragraph (2), a contracting authority shall treat as ineligible and shall not select an economic operator in accordance with these Regulations if the contracting authority has actual knowledge that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted of any of the following offences—
>
> (a) conspiracy within the meaning of section 1 of the Criminal Law Act 1977(a) where that conspiracy relates to participation in a criminal organisation as defined in Article 2(1) of Council Joint Action 98/733/JHA(b);
>
> (b) corruption within the meaning of section 1 of the Public Bodies Corrupt Practices Act 1889(c) or section 1 of the Prevention of Corruption Act 1906(d);
>
> (c) the offence of bribery;
>
> (d) fraud, where the offence relates to fraud affecting the financial interests of the European Communities as defined by Article 1 of

[161] *Ibid* at 9406-1.

[162] *Ibid* at 9.406-4.

[163] See Robert W Tarun, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 3rd ed (American Bar Association, 2013) at 28. For the full list of the United States Federal Acquisition Regulations, see: <http://www.acquisition.gov/far/>.

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the Convention relating to the protection of the financial interests of the European Union, within the meaning of—

(i) the offence of cheating the Revenue;

(ii) the offence of conspiracy to defraud;

(iii) fraud or theft within the meaning of the Theft Act 1968(a) and the Theft Act 1978(b);

(iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985(c);

(v) defrauding the Customs within the meaning of the Customs and Excise Management Act 1979(d) and the Value Added Tax Act 1994(e);

(vi) an offence in connection with taxation in the European Community within the meaning of section 71 of the Criminal Justice Act 1993(f); or

(vii) destroying, defacing or concealing of documents or procuring the extension of a valuable security within the meaning of section 20 of the Theft Act 1968;

(e) money laundering within the meaning of the Money Laundering Regulations 2003(g); or

(f) any other offence within the meaning of Article 45(1) of the Public Sector Directive as defined by the national law of any relevant State.

(2) In any case where an economic operator or its directors or any other person who has powers of representation, decision or control has been convicted of an offence described in paragraph (1), a contracting authority may disregard the prohibition described there if it is satisfied that there are overriding requirements in the general interest which justify doing so in relation to that economic operator.

(3) A contracting authority may apply to the relevant competent authority to obtain further information regarding the economic operator and in particular details of convictions of the offences listed in paragraph (1) if it considers it needs such information to decide on any exclusion referred to in that paragraph.

(4) A contracting authority may treat an economic operator as ineligible or decide not to select an economic operator in accordance with these Regulations on one or more of the following grounds, namely that the economic operator—

…

(d) has been convicted of a criminal offence relating to the conduct of his business or profession;

(e) has committed an act of grave misconduct in the course of his business or profession;

The *Public Procurement (Miscellaneous Amendments) Regulations 2011* added section 1(ca), which adds convictions for "bribery within the meaning of section 1 or 6 of the Bribery Act 2010" to the list of offences leading to debarment.[164]

8.6 Canadian Law

Public Works and Government Services Canada (PWGSC) is responsible for acquiring goods and services on behalf of the departments and agencies of the Government of Canada. PWGSC awards hundreds of contracts annually and spends more than $6 billion per year.[165]

It can be fairly stated that PWGSC has developed a strong framework to support accountability and integrity in its procurement process. This framework includes policies, procedures and governance measures to ensure fairness, openness and transparency. In the past 20 years, PWGSC has put in place many measures that demonstrate a real commitment to transparency and integrity in the federal government procurement process.

PWGSC is responsible for implementing the federal government's debarment policies. The history leading up to Canada's current debarment policies reflects a trend of increasing severity, resulting in resistance from the business community and various interest groups, followed by attempts to introduce greater leniency into the debarment regime.[166]

In November 2007, PWGSC began including a *Code of Conduct for Procurement* in its solicitation documents.[167] This code included provisions relating to debarment. The intent was to use debarment to ensure that government contracts are awarded only to "reliable and dependable" contractors. The primary purpose of debarment was seen as preserving the integrity of the public procurement process.

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[164] *Public Procurement (Miscellaneous Amendments) Regulations 2011*, SI 2011/2053, s 15, online: <http://www.legislation.gov.uk/uksi/2011/2053/pdfs/uksi_20112053_en.pdf>.

[165] Public Works and Government Services Canada, "Overview of the Department", online: <https://www.tpsgc-pwgsc.gc.ca/apropos-about/cdi-mbb/1/survol-overview-eng.html>.

[166] To track the evolution of Canada's debarment policies, see Public Works and Government Services Canada, "Integrity Provisions", Policy Notification 107 (9 November 2012), online: <https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107>; Public Works and Government Services Canada, "Integrity Provisions", Policy Notification 107U1 (1 March 2014), online: <https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107U1>; Public Works and Government Services Canada, "New Integrity Regime", Policy Notification 107R1 (3 July 2015), online: <https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107R1>; Public Works and Government Services Canada, "Update to the Integrity Regime", Policy Notification 107R2 (4 April 2016), online: <https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107R2>.

[167] The most recent version of the *Code of Conduct for Procurement* can be found online at <https://www.tpsgc-pwgsc.gc.ca/app-acq/cndt-cndct/contexte-context-eng.html>.

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In October 2010, PWGSC added the following categories of offences that would render suppliers ineligible to bid on procurement contracts:

- corruption;
- collusion;
- bid-rigging; and
- any other anti-competitive activity.

In July 2012, PWGSC established a formal "Integrity Framework." The Integrity Framework set out a rules-based system that left no room for the exercise of discretion with respect to debarment. The Integrity Framework provided for automatic disqualification from bidding on public contracts if the company or any of its affiliates was convicted of a list of Canadian offences. Initially, conviction under a foreign offence did not result in automatic ineligibility. In addition to the list of offences set out in its previous debarment policies, PWGSC added the following new categories of offences that would render suppliers ineligible to bid on procurement contracts:

- money laundering;
- participation in activities of criminal organizations;
- income and excise tax evasion;
- bribing a foreign public official (e.g., contrary to Canada's *Corruption of Foreign Public Officials Act*); and
- offences in relation to drugs.

In March 2014, PWGSC introduced several fundamental changes to the Integrity Framework. PWGSC added the following new categories of offences that would render suppliers ineligible to bid on procurement contracts:

- extortion;
- bribery of judicial officers;
- bribery of officers;
- secret commissions;
- criminal breach of contract;
- fraudulent manipulation of stock exchange transactions;
- prohibited insider trading;
- forgery and other offences resembling forgery; and
- falsification of books and documents.

PWGSC also amended the Integrity Framework such that convictions under offences in foreign jurisdictions that are "similar" to the listed Canadian offences would result in ineligibility. Germany-based Siemens was the first major government supplier to receive confirmation of its debarment under the "similar offences" provision of the Integrity

Framework.[168] Siemens paid a US$1.6-billion fine after pleading guilty in 2008 to corruption-related offences in the US and Germany.[169]

PWGSC also added a new automatic ineligibility time period: all suppliers convicted of a relevant offence became automatically debarred for ten years. Once the ten-year debarment period has passed, bidders have to certify that adequate measures have been put in place to avoid recurrence. Prime contractors were also required to apply the provisions of the Integrity Framework to their subcontractors.

The March 2014 expansion proved highly controversial. Businesses, NGOs, and bar associations argued that Canada's Integrity Framework had become so inflexible, punitive and far-reaching that it had become counterproductive to its primary objective—namely, preserving the integrity of the public procurement process. Key criticisms included the following:

- The strictness of the Integrity Framework could deprive the government, and the taxpaying public, of certain specialized expertise and high-quality goods and services.
- The policy's harshness and inflexibility discouraged companies from acknowledging and remediating wrongdoing. Companies were offered no strong incentives to cooperate with authorities or to seek to bring about wide-ranging cultural reforms within the corporation.
- The mandatory ten-year ineligibility period failed to provide any scope for reduction or leniency in light of the gravity of the offence or the supplier's remediation efforts. This rigid stance stood in contrast with the more flexible, forgiving position taken in the US, the EU, and other jurisdictions whose procurement regimes grant credit for mitigating circumstances and remediation efforts. Notably, Transparency International criticized the finality and rigidity of the ten-year debarment policy, pointing out that the World Bank's debarment policy "provides for regular third-party reviews of a company's compliance measures which provide an opportunity for the World Bank to determine if the company's debarment should be lifted."[170]
- Debarment based on the commission of "similar" foreign offences, with PWGSC being the arbiter of what constitutes a "similar" foreign offence, was seen as being too subjective. In many cases, it could not be said with any certainty whether a particular foreign offence would be sufficiently "similar" to be captured under the

[168] Barrie McKenna, "Ottawa Could Face Lawsuits for Strict Corruption Rules: Report", *The Globe and Mail* (24 November 2014), online: <http://www.theglobeandmail.com/report-on-business/international-business/ottawa-could-face-lawsuits-for-strict-trade-corruption-rules-report/article21739211/>.

[169] *Ibid*.

[170] Letter from Transparency International to the Honourable Diane Finley, Minister of Public Works and Government Services (17 February 2015) at 5.

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Integrity Framework. Furthermore, concerns were raised about the unfairness of the severe consequences that would follow if a company were to be convicted in a foreign jurisdiction under circumstances that, in Canada, would be seen as unfair or unjust. Such a conviction would result in the company's being debarred in Canada without having a meaningful opportunity to contest the unfair conviction.

- The foreign affiliates policy meant that law-abiding Canadian companies could be held responsible for a distant affiliate's criminal conduct occurring abroad in circumstances where the Canadian company had no participation or involvement. This policy came under considerable scrutiny after PWGSC announced that it was investigating whether Hewlett Packard, the Government of Canada's largest computer hardware supplier, might be at risk of debarment due to the actions of an overseas affiliate.[171] In 2014, a Russian subsidiary of Hewlett Packard entered a guilty plea in the US for violating anti-bribery provisions contained in the US FCPA.[172] Executives of the Russian subsidiary had bribed Russian government officials for the purpose of securing government contracts. It soon became apparent that, in light of the Integrity Framework's provisions regarding "similar foreign offences" and affiliate responsibility, Hewlett Packard might be debarred in Canada.[173] Although fears over Hewlett Packard's potential debarment were never realized, the notion that an important and well-respected government supplier might be debarred for ten years, with existing contracts being either terminated or continued under strict monitoring, raised eyebrows.

In November 2014, *The Globe and Mail* reported that the federal government might face a challenge from the World Trade Organization and NAFTA investor lawsuits due to the strictness of Canada's debarment rules.[174] Further concerns were expressed over the implications for trade. The severity of Canada's debarment policy gave rise to the possibility that Canadian companies could face "tit-for-tat retaliation" by countries in which major companies that have been debarred are headquartered.[175]

In response to these and other criticisms, PWGSC replaced the "Integrity Framework" with a new "Integrity Regime" on July 3, 2015.[176] The new Integrity Regime emphasizes the

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[171] Andy Blatchford, "Anti-Corruption Rules on Suppliers a Threat to Canadian Economy: Study", *Ottawa Citizen* (23 November 2014), online: <http://ottawacitizen.com/news/national/anti-corruption-rules-on-suppliers-a-threat-to-canadian-economy-study>.

[172] *Ibid*. Hewlett Packard's Russian subsidiary was fined $58.7 million USD for the FCPA violation.

[173] Robert A Glasgow, Brenda C Swick & Tyler Wentzell, "The First Test of the Supplier Integrity Rules", McCarthy Tétrault LLP (29 September 2014), online: <http://www.mccarthy.ca/article_detail.aspx?id=6895>.

[174] McKenna (24 November 2014).

[175] *Ibid*.

[176] See Public Works and Government Services Canada, "Government of Canada's Integrity Regime" (14 July 2016), online: <http://www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html>. See also John W Boscariol & Robert A Glasgow, "Canada Implements New Integrity Regime for Public Procurement", McCarthy Tétrault LLP (6 July 2015), online: <http://www.mccarthy.ca/article_detail.aspx?id=7126>.

importance of fostering ethical business practices and reducing the risk of Canada entering into contracts with suppliers convicted of an offence linked to unethical business conduct. Some commentators have applauded the Integrity Regime for moving away from the notion of punishment and retribution and moving toward the goal of preserving the integrity of public procurement processes. However, many have observed that the new Integrity Regime is still strict in comparison to US, UK, and World Bank debarment regimes.

The debarment policy contained in the 2015 Integrity Regime is more lenient than that contained in the previous Integrity Framework in several ways. For the purposes of this section, three policy changes are particularly noteworthy.

- First, the new Integrity Regime eliminates automatic debarment of companies for an affiliate's conduct. Only where a supplier is found to have participated or been involved in the impugned conduct will the supplier be debarred. This can be seen as a significant improvement, enhancing both the fairness and logic of PWGSC's debarment policy.
- Second, the ten-year debarment period is no longer set in stone. Where a supplier can demonstrate that it has (1) cooperated with law enforcement and/or (2) undertaken remedial actions, the debarment period can be reduced by up to five years, though this will require that an administrative agreement be put in place whereby enforcement authorities can monitor the corporation's ongoing behaviour. (Note, however, that a conviction on a charge of fraud against the government [or section 120] under the *Criminal Code* or *Financial Administration Act* [see section 750(3) of the *Criminal Code*] results in *permanent* debarment unless a record suspension [or exemption by the Governor in Council] is obtained.) The possibility of receiving a shortened debarment period gives companies a compelling incentive to cooperate with authorities and to remedy the misconduct. This new policy is more forward-looking in orientation, rather than retributive, as compared to the previous Integrity Framework.
- Third, Barutciski and Kronby point out that the new regime increases transparency in the process of determining ineligibility through the addition of the "due process" provisions.[177] Burkett and Saunders, both practitioners specializing in white-collar crime at Baker McKenzie LLP in Toronto, summarize the due process provisions in the following terms:

> Suppliers are notified of their ineligibility/suspension and provided information of the process(es) available to them. A supplier is able

[177] Milos Barutciski & Matthew Kronby, "The New Integrity Regime Still Tilts Toward Punishment", *The Globe and Mail* (13 July 2015), online: <http://www.theglobeandmail.com/report-on-business/rob-commentary/new-integrity-regime-of-procurement-rules-still-tilts-toward-punishment/article25475524/>. See also Sean Silcoff, "Industry Players Say Ottawa's Revised Integrity Rules Still Too Harsh", *The Globe and Mail* (7 July 2015), online: <http://www.theglobeandmail.com/report-on-business/industry-players-say-ottawas-integrity-regime-still-unfair/article25334479/>.

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> to come forward at any time and ask for an advanced determination. Upon a determination of ineligibility, the supplier would see their ineligibility period begin immediately. This will incent suppliers to come forward and proactively disclose wrongdoing. An administrative review process of the assessment of affiliates would be available to the supplier.
>
> This process is a step in the right direction, as it provides for proactive advance determinations and a review process for the assessment of affiliates, which will oversee the factually complex issue of control, participation or involvement. The due process provision does not appear to cover the decision as to whether the period should be reduced from 10 to five years, however.[178]

Under the new Integrity Regime, debarment remains, for the most part, automatic, not discretionary. The Integrity Regime provides for automatic debarment if the company or any members of its board of directors have, in the past three years, been found guilty of or have been discharged (absolutely or conditionally) from a list of offences under Canadian law or a similar foreign offence. All prospective suppliers must certify upon bidding that the company, its directors, and its affiliates have not been charged, convicted, or absolutely or conditionally discharged of the listed offences or similar foreign offences in the past three years. Providing a false or misleading certification is itself cause for debarment. A supplier already doing business with the Government of Canada may be suspended for up to 18 months if the supplier admits guilt to an offence listed in the Integrity Regime or is charged with such an offence. This provision is discretionary, rather than automatic.

Despite the changes to PWGSC's debarment policy, many commentators continue to criticize Canada's debarment regime for being too strict. Barutciski and Kronby argue that the new regime still "tilts too heavily toward punishment and retribution at the expense of promoting a fair and competitive public procurement market and value for the taxpayer."[179] The authors note that a five-year debarment "can still be a death penalty for some companies" and criticize the lack of flexibility and relief for companies that cooperate and implement remedial measures.[180] Barutciski and Kronby conclude that "[t]he new integrity regime fails to strike the right balance between punishment and deterrence of misconduct (principally

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[178] Christopher Burkett & Matt Saunders, "The New Integrity Regime in Canada: Revised Debarment Rules Still Too Strict?", Baker McKenzie LLP (16 July 2015), online: <http://www.canadianfraudlaw.com/2015/07/the-new-integrity-regime-in-canada-revised-debarment-rules-still-too-strict/>.

[179] Barutciski & Kronby, (13 July 2015). See also "The 'Integrity Framework' Is Still Too Tough", Editorial, *The Globe and Mail* (8 July 2015), online: <http://www.theglobeandmail.com/opinion/editorials/the-integrity-framework-is-still-too-tough/article25373384/>.

[180] Barutciski & Kronby, *ibid*.

the domain of criminal law) and protecting the integrity of federal procurement and taxpayer dollars (the domain of procurement rules)."[181]

John Manley, President and CEO of the Business Council of Canada and former deputy prime minister, points out that corporations in Canada have a strong disincentive to self-report wrongdoing or cooperate in investigations, since a guilty plea or conviction triggers the harsh debarment regime, and deferred prosecution agreements (DPAs) remain unavailable in Canada.[182] Manley advocates for the introduction of DPAs in Canada to incentivize cooperation and provide prosecutors with an additional tool for fighting corporate crime. On the other hand, Stephen Schneider, professor of sociology and criminology at Saint Mary's University, sees DPAs as a means of allowing corporations that are "too big to fail" to escape criminal liability, which makes corporations "more apt to behave badly."[183] For further discussion of DPAs, as well as the debate around whether such agreements should be made available in Canada, see Chapter 6, Section 3.

Some have expressed concerns that the strictness of Canada's debarment policies may leave the government unable to call upon the specialized expertise and in-depth knowledge of certain goods and services providers who have no close competitors.[184] This, in turn, can result in economic losses to the government, as well as harm to Canadian taxpayers.[185] An added concern is the detrimental impact the Integrity Regime's debarment policy may have on Canadian companies and their employees. Responding to the severity of Canada's debarment policies, a report commissioned by the Canadian Council of Chief Executives emphasizes that "[d]ebarment imposes a direct cost on the debarred firms, but also on innocent parties and society at large."[186] The report suggests that a "typical" major supplier headquartered overseas would lose sales of over CAD$350 million per year and lay off 400 workers as a result of debarment, resulting in a net loss to the Canadian economy of over CAD$1 billion over the ten-year debarment period.[187] The report raises concerns over the following potential collateral effects of Canada's debarment policy:

(1) a reduction in the number of potential suppliers, which could lead to less variety, poorer quality, and higher prices;

(2) supply-chain impacts, such as small- and medium-sized firms losing contracts due to suspensions of larger companies;

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[181] *Ibid*.

[182] Manley (29 May 2015).

[183] Stephen Schneider, "Deferred Prosecution Won't Put a Dent in Corporate Crime", *The Globe and Mail* (2 June 2015), online: <http://www.theglobeandmail.com/report-on-business/rob-commentary/deferred-prosecution-wont-put-a-dent-in-corporate-crime/article24758293/>.

[184] "The 'Integrity Framework' Is Still Too Tough", Editorial, *The Globe and Mail* (8 July 2015), online: <http://www.theglobeandmail.com/opinion/editorials/the-integrity-framework-is-still-too-tough/article25373384/>.

[185] Blatchford (23 November 2014).

[186] *Ibid*.

[187] *Ibid*.

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(3) a "chilling effect" on foreign investment in Canada by firms concerned about the stigma of being debarred in a G7 country; and

(4) the Canadian government's procurement rules being out of step with, and harsher than, those in many other countries.[188]

A further basis for criticism is that Canada's approach to debarment remains uncodified. The US, by contrast, has legally codified its debarment provisions under the *Federal Acquisition Regulation*. Canada's lack of codified debarment policies may leave contractors with a lack of certainty and predictability. Moreover, an uncodified debarment framework is not subject to the sort of legislative review and scrutiny it would otherwise receive if it were codified.

Commentators have argued that the harshness of the Integrity Regime provides a disincentive for companies to participate in the Canadian Competition Bureau's immunity and leniency programs.[189] Under the Integrity Regime, companies are automatically debarred if they are convicted of cartel offences (e.g., conspiracies and bid-rigging), and no exception or allowance is made in this regard for parties who participate in the Competition Bureau's immunity and leniency program. Since the success of the immunity and leniency program depends upon cartel participants being incentivized to come forward and cooperate in return for either full immunity from prosecution or a reduction in penalties, and since the Integrity Regime works against such incentives, companies may feel reluctant to cooperate with either the Competition Bureau or PWGSC.

In April 2016, PWGSC added a new requirement that all bidders, offerors, or suppliers provide a complete list of all foreign criminal charges and convictions pertaining to themselves, their affiliates and their proposed first-tier subcontractors that, to the best of the entity's knowledge and belief, may be similar to one of the listed offences.[190] In submitting a bid, the bidder, offeror, or supplier must certify that it has provided a complete list. If, in the opinion of PWGSC, a supplier has provided a false or misleading certification or declaration, the supplier is rendered automatically ineligible for ten years. Barutciski et al. criticize the new reporting requirement in the following terms:

> … the certification requirement with respect to affiliate charges and convictions, in conjunction with the severe penalty for false reporting, seems destined to create compliance nightmares for large multinational companies. Given the broad range of offences – both in Canada and abroad

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[188] *Ibid*.

[189] See Mark Katz, "Canada's Integrity Regime and Cartel Enforcement", Davies Ward Phillips & Vineberg LLP (5 July 2016), online: <http://kluwercompetitionlawblog.com/2016/07/05/canadas-integrity-regimeunintended-consequences-for-canadian-cartel-enforcement/>.

[190] See Milos Barutciski et al, "Changes to Canada's Integrity Regime for Public Procurement Create Onerous New Reporting Requirement", Bennett Jones LLP (8 April 2016), online: <https://www.bennettjones.com/Publications/Updates/Changes_to_Canada_s_Integrity_Regime_for_Public_Procurement_Create_Onerous_New_Reporting_Requirement>.

> – that might be captured by the new provisions, and the obligation to include charges as well as convictions, this requirement will inject yet further compliance cost and uncertainty into the process for uncertain benefits from the standpoint of preserving integrity in government procurement as opposed to punishment.[191]

Currently, the government and private industry are at odds about certain aspects of debarment practice. SNC-Lavalin, Canada's largest engineering firm, is currently debarred by the World Bank for corruption relating to the Padma Bridge project (see Chapter 1). After SNC-Lavalin agreed with the World Bank to a ten-year ban, the RCMP laid corruption and fraud charges against SNC-Lavalin and two subsidiaries over alleged bribery in Libya. While the company disputes the charges, it argues that the strict Canadian debarment rules could destroy the company.[192] In December, 2015, SNC-Lavalin became the first corporation to sign an administrative agreement under the new Integrity Regime, which confirmed the company's eligibility as a supplier to the Canadian government while the foreign bribery charges are pending.[193]

In September 2017, the government of Canada instituted a public consultation, which they referred to as "expanding Canada's toolkit to address corporate wrongdoing."[194] A major focus of the consultation was on whether Canada should enhance its Integrity Regime by making its current suspension and debarment policies more flexible. The consultation included a discussion paper on possible enhancements to the Integrity Regime, setting out 10 issues or considerations that should be taken into account in deciding whether and how to alter the current suspension and debarment policies.[195] The consultation process, the consultation document and the discussion paper leave me with the impression that the government is on a slow and cautious path toward creating a more flexible (and often times more lenient) scheme for suspensions and debarments. In February 2018, the Canadian government published a report on its consultations.[196] The report indicates that the government received 45 online submissions on the possible adoption of a DPA scheme with

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[191] *Ibid*.

[192] Barrie McKenna, "SNC Case Shows Downside of Ottawa's Strict Anti-Corruption Regime", *The Globe and Mail* (19 February 2014), online: <http://www.theglobeandmail.com/report-on-business/snc-case-shows-downside-of-ottawas-strict-anti-corruption-regime/article23087586/>.

[193] SNC-Lavalin, Press Release, "SNC-Lavalin Signs an Administrative Agreement under the Government of Canada's New Integrity Regime" (10 December 2015), online: <http://www.snclavalin.com/en/administrative-agreement-under-canada-new-integrity-regime>.

[194] See the Government of Canada's website devoted to the consultation: <https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/index-eng.html>.

[195] Government of Canada, "Expanding Canada's Toolkit to Address Corporate Wrongdoing: The Integrity Regime Discussion Guide", online: <https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/examiner-review-eng.html>.

[196] Government of Canada, "Expanding Canada's Toolkit to Address Corporate Wrongdoing: What We Heard" (22 February 2018), online: < https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/rapport-report-eng.html>.

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43% from business, 30% from individuals, 20% from law enforcement and other justice sectors, and 7% from NGOs.[197] Government officials also held 40 meetings with 370 participants to hear their views (some on DPAs, others on suspensions, debarments and the Integrity Regime). On the key question related to whether more discretion in fixing periods of debarment is desirable, the report indicated that this question "garnered the most comments and strongest views."[198] On this issue, the report states:

> *Time period*
>
> The majority of participants suggested that the time periods associated with ineligibility be reduced from the current 10 years (reducible to five), which was seen as too long. The principal view was to favour full discretion in the determination of a period of ineligibility, including the ability to reduce the period to zero.
>
> Other views were for:
>
> - an ineligibility period aligned with those of Canada's major trading partners
> - a maximum period of between three and five years
>
> *Factors to determine time period*
>
> Many provided a list of factors to be taken into account when determining an appropriate ineligibility period with some noting that these should be published as part of the policy; others suggested that such factors be used as guidelines rather than be an exhaustive list. Most proposals for factors for consideration included:
>
> - the severity of the offence committed
> - self-reporting and cooperation with law enforcement
> - taking corrective action
> - establishing compliance programs
> - efforts at restitution
> - repeat offences
>
> Other factors raised were:
>
> - the consideration of the impacts on employees, the economy and government
> - the inclusion of exemptions from debarment for participants in pre-existing cooperation programs, such as the Competition Bureau's Leniency program

[197] *Ibid* at 7.

[198] *Ibid* at 9.

> There was a recognition that introducing a considerable amount of discretion into the Integrity Regime could pose risks of inconsistent decision making and reduced predictability in determination processes. Therefore, the importance of transparency and due process in the determination process was stressed, including:
>
> - an opportunity for suppliers to present their side / facts and submissions
> - the publication of guidelines governing the exercise of discretion
> - procedures to appeal and to reduce debarment periods
>
> The need to integrate a safe-harbour provision that would allow companies to self-disclose adverse information without being punished was identified. The possibility of a reassessment of the debarment decision after a certain amount of time was also raised.[199]

Quebec's *Act Respecting Contracting by Public Bodies*[200] contains a debarment policy similar in nature to PWGSC's current debarment policy. Quebec's legislation provides for automatic debarment from the public sector bidding process where the corporation has been found guilty of prescribed offences—including offences under the *CFPOA*—in the preceding five years.

For further commentary on Canada's Integrity Framework and the role of debarment within that framework, see Chapter 11, Section 6.4.4.

8.7 Applicability of Integrity Provisions to Other Government Departments

Other government departments and agencies can apply PWGSC's integrity provisions to their solicitations and contracts. In order to assist these departments and agencies in applying the integrity provisions, PWGSC conducts supplier checks under memoranda of understanding (MOUs). PWGSC has entered into an MOU with:

- Aboriginal Affairs and Northern Development Canada;
- Agriculture and Agri-Food Canada;
- Canada Revenue Agency;
- Defence Construction Canada;
- Employment and Social Development Canada;
- Jacques Cartier and Champlain Bridges Crown Corporation; and
- Shared Services Canada.

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[199] *Ibid* at 9-10.

[200] *Act Respecting Contracting by Public Bodies*, RSQ, c-65.

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9. DISQUALIFICATION AS COMPANY DIRECTOR

9.1 Introduction

Convictions for serious criminal offences such as bribery have various collateral consequences, some mandatory and others discretionary. For example, a conviction for a serious offence can result in disqualification to hold a public office or ineligibility to travel to a foreign country. In this section, the possibility of disqualification from being a director or officer of a company is discussed.

9.2 US Law

Pursuant to the US *Securities Exchange Act*,[201] the SEC can apply to a federal court for permanent or temporary injunctive relief.[202] A court can prohibit conditionally, unconditionally or permanently any person who has violated securities laws and who demonstrates unfitness from serving as an officer or director.[203] The standard for a bar was substantially broadened with the passing of the *Sarbanes Oxley Act*,[204] which changed the standard from "substantial unfitness" to "unfitness."[205]

The SEC itself cannot impose the remedy via an administrative proceeding; it must be done by a court, although a "voluntary" director disqualification may be negotiated by the SEC as part of a settlement agreement or a DPA.[206] The courts have broad discretion to impose an appropriate remedy.[207] When determining the previous standard of substantial unfitness, courts looked at the non-exhaustive "*Patel* factors": "(1) the 'egregiousness' of the underlying securities law violation; (2) the defendant's 'repeat offender' status; (3) the defendant's 'role' or position when he engaged in the fraud; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood that misconduct will recur."[208] These factors remain relevant under the new lower standard.

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[201] *Securities Exchange Act*, 15 USC, § 78(d)(2) (1934).
[202] *Ibid*, § 21(d)(1); see also *Securities Act of 1933*, c 38, 48 Stat 74, in which a similar provision has been enacted in § 20(b).
[203] *Securities Exchange Act*, *ibid*, § 21(d)(2); See also *Securities Act*, *ibid*, § 20 (e) for a similar provision.
[204] *Sarbanes Oxley Act of 2002*, Pub L No 107-204, 116 STAT 745.
[205] *Ibid*, § 305(1).
[206] Michael Dailey, "Comment: Officer and Director Bars: Who is substantially unfit to serve after *Sarbanes-Oxley*?" (2003) 40 Hous L Rev 837 at 850.
[207] *SEC v Patel*, 61 F (3d) 137 at 141; *SEC v Posner*, 16 F (3d) 520.
[208] *Patel*, *ibid*; see also *SEC v Boey*, 2013 US LEXIS 102102 at 6-7 and *SEC v Dibella*, 2008 US LEXIS 109378 at 40, 2008 WL 6965807 for further discussion. See also *SEC v Selden*, 632 F Supp (2d) 91, 2009 US LEXIS 59214, in which the US District Court of Massachusetts expressly endorses the *Patel* factors.

Since a permanent bar may result in a "loss of livelihood and stigma," courts require more than what would be required for a non-permanent bar.[209] In fact, Congress intended that the permanent bar remedy be used with caution.[210] A court is required to first consider a conditional bar.[211] The following four cases are examples of the courts' approach to these officer or director bars.

In *SEC v Posner*,[212] the US Second Circuit Court of Appeals upheld a permanent bar imposed by a US District Court.[213] The Court focused on the high degree of scienter in violating the securities laws, several past violations (including conspiracy, tax evasion and filing false tax returns), the high likelihood of future violations, and the fact that the defendants had refused to testify (the Court inferred that the defendants' testimony would have negatively impacted their case). The Court stated that such a punishment would serve as a "sharp warning" to other violators.[214]

In *SEC v Boey*, the US District Court of New Hampshire refused to issue a permanent bar because the Defendant had no prior history of violations and there was no plausible risk that he would reoffend.[215] Over a decade had passed since his violation. As such, a five-year bar was held to be sufficient. The Court also refused to issue a permanent injunction because adequate punishment had already been imposed (e.g., the five-year officer and director bar, a civil penalty and disgorgement).

In *SEC v Selden*, the US District Court of Massachusetts imposed a two-year officer and director bar along with other monetary penalties.[216] The Court noted that the offences were particularly serious because the defendant was a director and CEO, made misleading statements over several years and acted with a high degree of scienter. Although it was his first and only violation, there was a strong probability of reoccurrence. The Court also pointed out that the defendant had a minimal economic stake in the violation and that he cooperated with the investigation, although his acknowledgement of responsibility was "less than stellar."

In *SEC v Dibella*, the US District Court of Connecticut refused both an officer and director bar and a permanent injunction.[217] The Court focused on the fact that the defendant was not

[209] *Patel*, *ibid*.
[210] Dailey, (2003) at 851.
[211] *SEC v Patel*, 61 F (3d) 137 at 142.
[212] *SEC v Posner*, 16 F (3d) 520.
[213] See *SEC v Drexel Burnham Lambert Inc*, 837 F Supp 587, 1993 US LEXIS 17027 for the lower court's reasons.
[214] *SEC v Posner*, 16 F (3d) 520 at 522.
[215] *SEC v Boey*, 2013 US LEXIS 102102 at 6-7.
[216] *SEC v Selden*, 632 F Supp (2d) 91.
[217] *SEC v Dibella*, 2008 US LEXIS 109378 at 40.

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serving on any boards of publicly traded companies, had never served as an officer, had no prior history of violations and would be unlikely to commit an offence in the future.

9.3 UK Law

Individuals convicted of indictable offences in the management of a company face disqualification from being a director or officer of a company under the *Company Directors Disqualification Act 1986*. The disqualifications are mandatory in some circumstances and discretionary in other circumstances. The Act sets out the following provisions:

1 Disqualification orders: general.

(1) In the circumstances specified below in this Act a court may, and under sections 6 and 9A shall, make against a person a disqualification order, that is to say an order that for a period specified in the order—

a) he shall not be a director of a company, act as receiver of a company's property or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company unless (in each case) he has the leave of the court, and

b) he shall not act as an insolvency practitioner.

(2) In each section of this Act which gives to a court power or, as the case may be, imposes on it the duty to make a disqualification order there is specified the maximum (and, in section 6, the minimum) period of disqualification which may or (as the case may be) must be imposed by means of the order and, unless the court otherwise orders, the period of disqualification so imposed shall begin at the end of the period of 21 days beginning with the date of the order.

(3) Where a disqualification order is made against a person who is already subject to such an order or to a disqualification undertaking, the periods specified in those orders or, as the case may be, in the order and the undertaking shall run concurrently.

(4) A disqualification order may be made on grounds which are or include matters other than criminal convictions, notwithstanding that the person in respect of whom it is to be made may be criminally liable in respect of those matters.

1A Disqualification undertakings: general.

(1) In the circumstances specified in sections 7 and 8 the Secretary of State may accept a disqualification undertaking, that is to say an undertaking by any person that, for a period specified in the undertaking, the person—

a) will not be a director of a company, act as receiver of a company's property or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company unless (in each case) he has the leave of a court, and

b) will not act as an insolvency practitioner.

(2) The maximum period which may be specified in a disqualification undertaking is 15 years; and the minimum period which may be specified in a disqualification undertaking under section 7 is two years.

(3) Where a disqualification undertaking by a person who is already subject to such an undertaking or to a disqualification order is accepted, the periods specified in those undertakings or (as the case may be) the undertaking and the order shall run concurrently.

(4) In determining whether to accept a disqualification undertaking by any person, the Secretary of State may take account of matters other than criminal convictions, notwithstanding that the person may be criminally liable in respect of those matters.[218]

Disqualification can also occur by voluntary arrangement. In *R v Hibberd and another,* two company directors defrauded a bank and loan company of over £1.5 million.[219] The Court declined to make a disqualification order because such an order had already been made under a voluntary arrangement with the Department of Trade and Industry.[220]

The leading case on disqualification is the 1998 case of *R v Edwards*. In *Edwards,* the court stated:

> The rationale behind the power to disqualify is the protection of the public from the activities of persons who, whether for reasons of dishonesty, or of naivety or incompetence in conjunction with the dishonesty of others, may use or abuse their role and status as a director of a limited company to the detriment of the public. Frauds of the kind in this case archetypally give rise to a situation in which the exercise of the court's power is appropriate.[221]

The Court in *Edwards* drew on guidance from the case of *R v Millard*, where disqualification was divided into three brackets:

(i) the top bracket of disqualification for periods over ten years should be reserved for particularly serious cases. These may

[218] *Company Directors Disqualification Act 1986* (UK), c 46.
[219] *R v Hibberd and another*, [2009] EWCA Crim 652.
[220] *Ibid* at para 3.
[221] *R v Edwards,* [1998] 2 Crim App R (S) 213 (sentencing reasons of Potter LJ.).

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include cases where a director who has already had one period of disqualification imposed on him falls to be disqualified yet again.

(ii) The minimum bracket of two to five years' disqualification should be applied where, though disqualification is mandatory, the case is relatively not very serious.

(iii) The middle bracket of disqualification from six to ten years should apply for serious cases which do not merit the top bracket.[222]

In *Edwards,* the offender was unemployed and persuaded to participate in a fraudulent enterprise as a director, a role for which he was inexperienced and unsuited. The Court found that a ten-year disqualification order was too harsh and substituted a three-year order.

In *R v Cadman,*[223] the Court of Appeal Criminal Division reviewed a number of decisions regarding disqualification orders:

> *Sevenoaks Stationers (Retail) Limited* [1991] CH 164, Court of Appeal Civil Division, dealt with an accountant who over five years with five separate companies which had all become insolvent had accrued total indebtedness of approximately £560,000. There were no audited accounts and he had traded whilst insolvent in relation to at least one company. This amounted to incompetence or negligence in a very marked degree falling short of dishonesty. His disqualification period was reduced to five years. This case is memorable for the trio of brackets it established, later to be adopted with approval in Millard. (1) The top bracket, periods over ten years, should be reserved for particularly serious cases. These may include cases where a doctor who has already one period of disqualification imposed upon him falls to be disqualified yet again. (2) The minimum bracket of two to five years' disqualification should be applied where, though disqualification is mandatory, the case is, relatively, not very serious. (3) The middle bracket of disqualification, from six to ten years, should apply to serious cases which do not merit the top bracket.
>
> 25. In *Millard* [1994] 15 Cr App R(S) 445 that approach was not only approved but applied so as to substitute for a 15-year disqualification one of eight years. An appellant had fraudulently traded using six company vehicles, creating a deficiency of £728,000-odd. He had been convicted and the fraudulent trading spanned nearly four years. He had three previous convictions for dishonesty. Miss Small readily accepts that what assistance that case can offer is tempered by its age.
>
> 26. *Robertson* [2006] EWCA Crim 1289 was an appellant of 49 and of good character. He was convicted of fraudulent trading during some six

[222] *R v Millard* [1994] 15 Crim App R 445.

[223] *R v Cadman*, [2012] EWCA Crim 611.

months. His business defrauded the DFES in respect of an ILA. The department paid his company £1.4 million. His disqualification period, which was not challenged in the Court of Appeal, was five years.

27. *Sukhdabe Singh More* [2007] EWCA Crim 2832 was an appellant pleading guilty to one money laundering offence. Over some two months he had allowed his business account to be used to launder £136,000. He had two previous convictions for dishonesty. The Court of Appeal reduced his disqualification to three years.

28. *Jules Paul Simpson* [2007] EWCA Crim 1919 was an appellant who had pleaded guilty to conspiracy to defraud. For the last months of his legitimate business he carried on knowing it to be insolvent. The loss to creditors was £200,000. He was disqualified for six years.

29. *Nigel Corbin* (1984) 6 Cr App R(S) 17 is even older than Robertson but Miss Small prays it in aid since it featured an appellant involved with three originally legitimate businesses. Over 18 months he admitted nine counts of deception. A criminal bankruptcy order was made in the sum of £35,000. The Court of Appeal left untouched his disqualification period of five years.

30. In *Anthony Edwards* [1998] 2 Cr App R(S) 213 the assistance to this court lies in a comment:

    "The rationale behind the power to disqualify is the protection of the public from ... persons who, whether for reasons of dishonesty, or of naivety or incompetence in conjunction with the dishonesty of others, may use or abuse their role and status as a director of a limited company to the detriment of the public."

31. In *Attorney General's Reference No 88 of 2006* [2006] EWCA Crim 3254 the disqualification periods were in excess of six years, more often seen in cases involving carousel frauds. Those tended to involve greater sums and greater sophistication, making the perpetrators a great risk to the public if permitted to act in the management of companies in the future. The first three appellants had caused a £20 million loss over 16 months. To the clear astonishment of the Court of Appeal no disqualification period had been imposed in the court below. On the first three appellants the court imposed an eight year disqualification. The final appellant secured a benefit of £1.5 million during one month and was disqualified for four years.

32. In *Sheikh and Sheikh* [2011] 1 Cr App R(S) 12 the court upheld a ten year period of disqualification. The case featured illegal production of pirated DVDs. The appellants were 29 and 27. They had been convicted after a lengthy trial and there was no evidence of remorse. The turnover was in excess of £6 million. The offending lasted a number of years and

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was very sophisticated, crossing international boundaries and exploiting vulnerable immigrants.

33. In *Brealy* [2010] EWCA Crim 1860 disqualification of a director convicted of corruption showed that for six years he had allowed a local counsellor to live rent free whilst being a director of a property business which required a number of building consents. The value of the non-payment of rent was some £34,000. The disqualified appellant was of good character, but the court said that his offending struck at the very heart of a democratic government. It was an aggravating feature that the offending continued for some six years. Five years' disqualification was upheld.

9.4 Canadian Law

Some provincial corporate statutes, including those in British Columbia and New Brunswick, have a "director disqualification" rule for persons convicted of certain offences. For example, a person is not qualified to become or to continue as a director of a British Columbia company for five years after the completion of a sentence for an offence in connection with the management of a business or an offence involving fraud.[224] However, the *Canada Business Corporations Act*,[225] the *Ontario Business Corporations Act*[226] and most other provincial corporate statutes have no such disqualification provision.

However, disqualification can arise under provincial securities legislation. The powers of disqualification can be quite broad. For example, under section 127(1)(8) of the *Ontario Securities Act*, the Securities Commission may "in the public interest" make an order that "a person is prohibited from becoming or acting as a director or officer of any issuer [i.e., a company issuing securities under the *Ontario Securities Act*]." [227] The "public interest" is a very broad term and includes prior acts of fraud and corruption. Other provincial securities legislation confer similar disqualification powers.

10. MONITORSHIP ORDERS

10.1 UNCAC and OECD

There is no specific mention in either Convention of imposing an independent monitor on a corporation that has been convicted of a corruption offence.

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[224] *British Columbia Business Corporations Act*, SBC 2002, c 57.
[225] *Canada Business Corporations Act*, 1985 RSC 1985, c C-144.
[226] *Ontario Business Corporations Act*, RSO 1990, c B.16.
[227] *Ibid.*

10.2 US Law

According to Tarun, the imposition of an independent monitor on an offending corporation is a frequent condition of a DOJ or SEC settlement.[228] Typically, the monitorship lasts for three years with the monitor filing two or three reports yearly with DOJ or SEC. The criteria for appointing monitors and the scope of their duties are set out in a DOJ policy memorandum known as the Morford Memorandum.[229] Tarun notes that there is a trend "away from imposing three-year monitorships to lesser sanctions such as periodic reporting to the DOJ or SEC or the requirement of a corporate compliance consultant."[230]

10.3 UK Law

There does not seem to be any specific legislative power authorizing the imposition of a monitorship order after a company is convicted of an offence of corruption or fraud. Nonetheless, Nicholls et al. describe at least three ways in which corporate behaviour can be monitored to prevent future criminal conduct.[231] First, a Serious Crime Prevention Order (SCPO) for up to five years can be made against a company convicted of a serious offence (which includes bribery and corruption) where there are reasonable grounds to believe such an order would prevent, restrict or disrupt involvement in future serious crime. The SCPO is a civil remedy imposed by courts and can involve a wide range of restrictions and notification conditions on the company's conduct.[232]

Second, a court may impose, in addition to any other sentence, a Financial Reporting Order (FRO) on an individual or a company who has been convicted of an offence under sections 1, 2 or 6 of the *Bribery Act* if the Court "is satisfied that the risk of that person committing another listed offence is sufficiently high to justify the making of the order."[233] As noted by Nicholls et al., the FRO specifies the frequency with which financial reports must be filed and the financial details and supporting documents that must be in the financial reports.[234] A FRO can be imposed for a maximum of 15 years.

Third, as Nicholls et al. report, the SFO has in recent years been moving to a US-style policy of resolving bribery allegations through plea agreements rather than trials.[235] The SFO has a

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[228] Tarun (2013) at 288-89.
[229] "Selection and Use of Monitors in Deferred Prosecution Agreements with Corporations" (7 March 2008), online: <https://www.justice.gov/sites/default/files/dag/legacy/2008/04/15/dag-030708.pdf>. The memo is reproduced in Tarun, *ibid*, as Appendix 9.
[230] Tarun, *ibid* at 288.
[231] Nicholls et al (2011) at 212-14.
[232] *Ibid* at 212-13. The SCPO is authorized by the *Serious Crime Act 2007* (UK), c 27, ss 1-41 and Schedules 1 and 2.
[233] *Serious Organized Crime and Police Act* (*SOCPA*) *2005* (UK), c 15, s 76 as amended by the *Bribery Act 2010* (UK), c 23, Schedule 1, s 9.
[234] Nicholls et al (2011) at 213.
[235] *Ibid* at 213-14.

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policy of encouraging corporate self-reporting of bribery in exchange for more lenient civil sanctions or criminal or administrative offences other than bribery, which do not involve debarment under the EU Public Procurement Directive.[236] Nicholls et al. note that in addition to fines, the terms of a plea agreement could include monitoring and other matters such as the following:

- Civil recovery, to include the amount of the unlawful property, plus interest and costs;
- Independent monitoring (with an agreed and proportionate scope) by an appropriately qualified individual nominated by the corporation and agreed by the SFO;
- An agreed programme of culture change and training within the corporation;
- Dealing with individuals involved in the wrongdoing;
- Possible assistance from the SFO in settling with authorities in other relevant jurisdictions.[237]

Nicholls et al. also discuss a number of more recent SFO cases that reflect the SFO's tendency to not proceed with bribery charges (which entail debarment consequences) and allow companies to plead guilty instead to the offence of failing to maintain accurate business records under section 221 of the *Companies Act 1985*: see, e.g. *Balfour Beatty* case, *AMEC* case and the *BAE* case.[238]

10.4 Canadian Law

The *Canada Business Corporations Act*, along with those provincial corporate statutes modeled after the federal Act, does not contain a power to specifically impose a monitorship order on a corporation convicted of a serious crime of fraud or corruption.[239] However, the provincial securities acts generally do have a power somewhat analogous to monitorship. For example, section 127(1)(4) of the *Ontario Securities Act* authorizes the Ontario Securities Commission to make an order in the public interest "that a market participant submit to a review of his, her or its practices and procedures and institute such changes as may be ordered by the Securities Commission."[240]

Under the 2015 Integrity Regime, quoted in Section 8.6 above, a third-party monitor may be imposed on a company through an administrative agreement if the company's ten-year debarment period is reduced, if a public interest exception to debarment is made, or if the company is suspended.

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[236] SFO Guidelines (2009) cited by Nicholls et al, *ibid* at 213-14.
[237] *Ibid* at 214.
[238] See *ibid* at 218-21 for a description of these cases.
[239] *Canada Business Corporations Act*, RSC 1985, c C-44.
[240] *Ontario Securities Act*, RSO 1990, c S.5.

Another route for monitoring a corporation is the use of a probation order. Organizations that are convicted of a *Criminal Code* offence, including fraud, bribery and corruption, can be placed on probation for a maximum of three years and the judge can impose, as conditions of that probation order, one or more of the following:

> (a) make restitution to a person for any loss or damage that they suffered as a result of the offence;
>
> (b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
>
> (c) communicate those policies, standards and procedures to its representatives;
>
> (d) report to the court on the implementation of those policies, standards and procedures;
>
> (e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;
>
> (f) provide, in the manner specified by the court, the following information to the public, namely,
>
> (i) the offence of which the organization was convicted,
>
> (ii) the sentence imposed by the court, and
>
> (iii) any measures that the organization is taking – including any policies, standards and procedures established under paragraph (b) – to reduce the likelihood of it committing a subsequent offence; and
>
> (g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.[241]

Section 732.1(3.2) of the *Criminal Code* provides that before imposing the conditions in (b) above, the court "shall consider whether it would be more appropriate for another regulatory body to supervise the development or implementation of the policies, standards and procedures referred to in that paragraph."

[241] *Criminal Code*, RSC 1985, c C-46, s 732.1 (3.1).

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PART B: CIVIL AND ADMINISTRATIVE ACTIONS AND REMEDIES

11. NON-CONVICTION BASED FORFEITURE

Non-conviction based (NCB) forfeiture is introduced in Section 2.4.2 of Chapter 5 (Asset Recovery). The law and procedures for NCB forfeiture under UNCAC, the OECD Convention and US, UK and Canadian law are discussed in Chapter 5 in Sections 3.1, 3.2, 4.1, 4.2 and 4.3 respectively.

12. CIVIL ACTIONS AND REMEDIES

Civil actions provide a means of deterring corruption and compensating victims. Victims of corruption can bring personal claims against corrupt actors for damages, for example in tort or contract. Punitive damages may also be awarded. Victims may also make proprietary claims to assets acquired through corruption, forcing the corrupt actor to return assets to their true owner. Disgorgement of profits is another tool used to punish wrongdoers and is frequently employed by the US SEC. Civil actions and remedies are dealt with more thoroughly in Sections 2.4.5 to 2.4.7 of Chapter 5 (Asset Recovery).

13. INTERNATIONAL INVESTMENT ARBITRATION

by Dmytro Galagan

[Section 13 was specifically written for this book by Dmytro Galagan, LL.M. candidate, Law Faculty, University of Victoria]

13.1 Introduction

Administrative, civil, and criminal actions and remedies against corrupt public officials, entities, and private individuals are instruments to directly combat corruption. In contrast, arbitration is a private and consensual dispute resolution mechanism where the disputants agree to submit their disputes to an independent decision maker whose judgment (an arbitral award) will be final and binding on the parties.[242] This system of dispute settlement has a long history, which may be traced back to medieval merchant guilds and even ancient

[242] Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, 6th ed (Oxford University Press, 2015), paras 1.04-1.05.

Greek mythology, and, at least at first sight, does not have much in common with the global fight against corruption.[243]

However, increasing involvement of States and State-owned enterprises in the globalized economy, as well as rising sophistication of regulatory and reporting schemes in various countries, inevitably leads to complex disputes arising out of international trade and investment transactions. For instance, the International Chamber of Commerce reported that in 13.1% of arbitration cases initiated in 2015, at least one of the parties was a State or parastatal entity.[244] The following sections will demonstrate that in international arbitration, private investors and sovereign states may make allegations of corruption and use them either as a "sword" to seek compensation for the losses caused by corrupt public officials, or as a "shield" to escape liability in cases arising out of contracts or investments tainted by corruption.[245] Therefore, the manner in which allegations of corruption are and should be

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[243] Gary Born, *International Commercial Arbitration*, 2nd ed (Kluwer Law International, 2014) at 6-70.
[244] International Chamber of Commerce (ICC), "Statistics", online: <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/>.
[245] For the most recent commentary on global corruption and international arbitration, see Domitille Baizeau & Richard Kreindler, eds, *Addressing Issues of Corruption in Commercial and Investment Arbitration* (Kluwer Law International, 2015); Utku Cosar, "Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences and Sanctions" in Albert Jan van den Berg, ed, *Legitimacy: Myths, Realities, Challenges*, 18 ICCA Congress Series (Kluwer Law International, 2015) at 531; Zachary Douglas, "The Plea of Illegality in Investment Treaty Arbitration" (2014) 29:1 ICSID Rev 155; Yves Fortier, "Arbitrators, Corruption, and the Poetic Experience: 'When Power Corrupts, Poetry Cleanses'" (2015) 31:3 Arb Intl 367; Jarrod Hepburn, "In Accordance with *Which* Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration" (2014) 5:3 J Intl Disp Settlement 531; Bruce Klaw, "State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles, and Opportunities" (2015) 33:1 BJIL 60; Carolyn Lamm, Brody Greenwald & Kristen Young, "From *World Duty Free* to *Metal-Tech*: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption" (2014) 29:2 ICSID Rev 328; Carolyn Lamm & Andrea Menaker, "The Consequences of Corruption in Investor-State Arbitration" in Meg Kinnear et al, *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2015) at 433-46; Aloysius Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press, 2014); Aloysius Llamzon & Anthony Sinclair, "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct" in Albert Jan van den Berg, ed, *Legitimacy: Myths, Realities, Challenges*, 18 ICCA Congress Series (Kluwer Law International, 2015) at 451-530; Michael Losco, "Charting a New Course: *Metal-Tech v. Uzbekistan* and the Treatment of Corruption in Investment Arbitration" (2014) 64 Duke LJ 37; Michael Losco, "Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction" (2014) 63 Duke LJ 1201; Michael Nueber, "Corruption in International Commercial Arbitration – Selected Issues" in Christian Klausegger et al, eds, *Austrian Yearbook on International Arbitration* (Manz, 2015) at 3-13; Cecily Rose, "Circumstantial Evidence, Adverse Influences, and Findings of Corruption: *Metal-Tech Ltd. v. The Republic of Uzbekistan*" (2014) 15:3-4 J World Investment & Trade 747; Cecily Rose, "Questioning the Role of International Arbitration in the Fight against Corruption" (2014) 31:2 J Intl Arb 183; Dai Tamada, "Host States as Claimants: Corruption Allegations" in Shaheeza Lalani & Rodrigo Polanco, eds, *The Role of the State in Investor-State Arbitration* (Brill, 2015) at 103-22; Joe Tirado, Matthew Page & Daniel Meagher, "Corruption

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dealt with in the international arbitration process, and the remedies arising therefrom, are important components in the fight against global corruption.

This section starts with a brief overview of the system of international arbitration to provide students and practitioners of anti-corruption law with a necessary background in this method of dispute resolution. It then outlines the reasons why parties may agree to arbitrate their disputes, including neutrality and flexibility of the procedure, enforceability of arbitration agreements, and the final and binding character of arbitral awards. This section also discusses cases where allegations of corruption were made by foreign investors and States, and concludes by formulating several principles on the treatment of corruption and bribery in international investment arbitration practice.

13.2 International Arbitration Explained

Arbitration, as stated above, is a dispute settlement mechanism where two or more parties (corporations, individuals or States) agree to refer their existing or future disputes to an individual, who is called a "single arbitrator," or a group of persons collectively referred to as an "arbitral tribunal." This subsection explains the differences between institutional and *ad hoc* arbitration, as well as between commercial and investment arbitration.

13.2.1 Institutional and *ad hoc* Arbitration

International arbitration exists in different forms and shapes. To begin with, arbitration can be either "institutional" or "*ad hoc*."[246] Institutional arbitrations are overseen by international organizations that may appoint members of arbitral tribunals, resolve challenges to arbitrators, designate the place of arbitration, fix the sum of the arbitrators' fees or review drafts of arbitral awards to ensure their compliance with formal requirements. Arbitral institutions do not issue judgments on the merits of the parties' dispute—that is the responsibility of the individuals selected by the parties or appointed by the institution—but ensure, within the limits of their authority, the smooth, speedy and cost-efficient conduct of the proceedings. Among the best-known arbitral institutions are the International Court of Arbitration of the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR), which was established by the American Arbitration Association (AAA), JAMS International, the Kuala Lumpur Regional Centre for Arbitration (KLRCA), the London Court of International Arbitration (LCIA), the Permanent Court of Arbitration (PCA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the Singapore International Arbitration Center (SIAC), the Hong Kong International Arbitration Centre (HKIAC), and the Vienna International Arbitration Centre (VIAC). Where the parties

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Investigations by Governmental Authorities and Investment Arbitration: An Uneasy Relationship" (2014) 29:2 ICSID Rev 493; Sergey Usoskin, "Illegal Investments and Actions Attributable to a State under International Law" in Shaheeza Lalani & Rodrigo Polanco, eds, *The Role of the State in Investor-State Arbitration* (Brill, 2015) at 334-49.

[246] Born (2014) at 168–71.

agree to arbitrate their dispute at a particular arbitral institution, a set of procedural rules promulgated by such an institution applies to the proceedings.

In contrast, *ad hoc* arbitrations are not conducted under the auspices of a particular institution. Instead, the parties merely agree to arbitrate their disputes, rather than to litigate them in state courts, and may choose an appointing authority that will select the arbitrators if the parties cannot reach an agreement on this issue. The United Nations Commission on International Trade Law (UNCITRAL) has prepared a set of procedural rules that the parties may use to organize their arbitration proceedings.[247]

13.2.2 Commercial and Investment Arbitration

International arbitration is usually divided into "investment" arbitration, which may be either contract-based or treaty-based, and "commercial" arbitration. The boundary between these two categories sometimes gets blurry and largely depends on the definition of what constitutes an "investment." In general, arbitration is deemed "commercial" if it concerns a dispute arising out of a purely commercial transaction, such as a contract for the sale of goods, and where the parties' consent to arbitration is expressed in an arbitration clause contained in their contract. On the other hand, the subject matter of the dispute in international investment arbitration is an "expenditure to acquire property or assets to produce revenue; a capital outlay."[248] Consent to arbitrate the disputes with foreign investors may be found in an international treaty concluded between the investor's "home state" and the "host state" where the investment was made (hence "treaty-based international investment arbitration), in the host state's domestic law on foreign investment, or in an investment contract between the foreign investor and the host state or its instrumentality, such as a ministry or a state-owned enterprise (hence "contract-based international investment arbitration").

The backbone of the international investment treaty-based arbitration system is a web of more than 3,300 international investment agreements (IIAs), including 2,946 bilateral investment treaties (BITs) and 358 treaties with investment provisions (TIPs), such as the North American Free Trade Agreement (NAFTA) or the Energy Charter Treaty (ECT).[249] Another important element of the investment protection regime is the ICSID Convention, which established the International Centre for Settlement of Investment Disputes (ICSID), a specialized arbitral institution that is part of the World Bank Group, together with the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), and the

[247] UNCITRAL Arbitration Rules, available online at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html>.
[248] Bryan A Garner, ed, *Black's Law Dictionary*, 10th ed (2014), "investment".
[249] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2016* (United Nations, 2016) at 101.

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Multilateral Investment Guarantee Agency (MIGA).[250] The US, UK, and Canada are all parties to the ICSID Convention, which entered into force for those countries on 14 October, 1966, 18 January, 1967 and 1 December, 2013, respectively.[251] The US is a party to 46 BITs and 67 TIPs, the UK is party to 106 BITs and 64 TIPs, and Canada is party to 38 BITs and 19 TIPs.[252]

International commercial and contract-based investment arbitration, and international treaty-based investment arbitration, both have a lot in common when one views how proceedings are conducted, how the evidence is admitted and how the tribunals issue procedural orders and awards.[253] Furthermore, the same experienced commercial lawyers may act either as the arbitrators or the parties' counsel in different arbitration cases, and arbitration proceedings are governed by the same rules promulgated by the UNCITRAL or various arbitral institutions.

However, while the procedure and the personalities involved may be the same, contract-based and treaty-based arbitration are different in several significant ways. To begin with, parties to commercial transactions typically insert a clause into their contract agreeing to refer to arbitration any dispute arising out of or in connection with the contract. By contrast, the host state's consent to arbitration in an IIA is usually expressed as an open offer to arbitrate any future dispute with any investor-national of the counterparty state to the IIA, and such an offer is deemed to be accepted and becomes a binding arbitration agreement when the investor commences arbitration against the host state.[254] For instance, the 2012 US Model BIT and the 2004 Canadian Model FIPA provide that a foreign investor may submit to arbitration a claim that the host state has breached an obligation under the treaty and the investor has thus incurred loss or damage,[255] and the claimant may choose between submitting the claim for resolution under (i) the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings (if both the host state and the investor's home state are parties to the ICSID Convention), (ii) the ICSID Additional Facility Rules (if either the home state or the host state is a party to the ICSID Convention), (iii) the UNCITRAL Arbitration Rules, or (iv) any other arbitration rules agreed on between the investor and the host state.[256]

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[250] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 UNTS 159.

[251] ICSID, Database of Member States, online: <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.bak.aspx?ViewMembership=All>.

[252] UNCTAD Investment Policy Hub, *International Investment Agreements Navigator*, online: <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry>.

[253] Aloysius Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press, 2014) at paras 5.06-5.07.

[254] *Ibid* at para 5.11.

[255] 2004 Canadian Model Foreign Investment Promotion and Protection Agreement (FIPA), arts 22-23, online: <http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf>; 2012 United States Model Bilateral Investment Treaty, art 24(1), online: <http://www.state.gov/documents/organization/188371.pdf>.

[256] Canadian Model FIPA, *ibid,* art 27; US Model BIT, *ibid,* art 24(3).

This distinction has important implications as to the rules of law applicable to the merits of the dispute. In a purely commercial setting, the arbitral tribunal will resolve the parties' dispute in accordance with the national law applicable to the contract concluded by the parties. The parties may either agree on the applicable law themselves or, in the absence of such agreement, the arbitral tribunal will apply the law determined by the conflict-of-laws rules that the tribunal considers applicable.[257] In contrast, in a treaty-based arbitration, a tribunal applies the relevant BIT or TIP and relevant rules and principles of public international law. A typical BIT requires each state party to accord to investors of the other state party treatment no less favorable than the treatment it accords, in like circumstances, to its own investors ("national treatment") and to investors of other state parties ("most-favored-nation treatment"), as well as to treat foreign investments fairly and equitably and accord them full protection and security.[258] Furthermore, BITs prohibit either state party from nationalizing or expropriating an investment, either directly or indirectly through measures equivalent to expropriation or nationalization, unless the expropriation or nationalization is effected for a public purpose, in accordance with due process of law, in a non-discriminatory manner and with prompt, adequate and effective compensation.[259]

13.3 Why Parties Agree to Arbitrate

There are several reasons why arbitration has become the primary means for the settlement of international commercial and investment disputes.[260] In general, this is because arbitration is often perceived as a "neutral, speedy and expert dispute resolution process, largely subject to the parties' control, in a single, centralized forum, with internationally-enforceable dispute resolution agreements and decisions."[261] This subsection concentrates on three distinct characteristics of international arbitration: (i) neutrality and flexibility, (ii) enforceability of arbitration agreements, and (iii) the final and binding nature of arbitral awards.

13.3.1 Neutrality and Flexibility

To begin with, international arbitration is neutral and flexible. Naturally, a party to a transaction may be hesitant to agree to litigate its disputes in the domestic courts of a State where the other party resides or has its place of business, as the party will face litigation in foreign courts, before foreign judges, in a foreign language and with the assistance of foreign

[257] UNCITRAL Model Law on International Commercial Arbitration, art 28.
[258] 2004 Canadian Model Foreign Investment Promotion and Protection Agreement (FIPA), arts 3-5, online: <http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf>; 2012 United States Model Bilateral Investment Treaty, arts 3-5, online: <http://www.state.gov/documents/organization/188371.pdf>.
[259] Canadian Model FIPA, *ibid*, art 13; US Model BIT, *ibid*, art 6.
[260] Blackaby et al, (2015), paras 1.94-1.107; Born, (2014) at 73–93.
[261] Born, *ibid* at 73.

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legal counsel. This is particularly true in cases where one of the parties is located in a country with high corruption risk or is itself a sovereign state or state entity.

In international arbitration, the parties are free to agree on a neutral place and language of proceedings. For instance, a corporation from Germany and a state-owned enterprise from Indonesia may agree to arbitrate their disputes pursuant to the ICC Arbitration Rules with the proceedings being held in a major business center (such as Geneva, Hong Kong, London, New York, Paris or Singapore) in English. Furthermore, the parties are generally given an opportunity to participate in the selection of the tribunal (usually, both parties jointly choose a sole arbitrator or, if the arbitral tribunal is to consist of three arbitrators, each party may nominate one and the presiding arbitrator will be either agreed on by the two party-appointed arbitrators or chosen by the appointing authority), but each arbitrator is required to be and remain independent and impartial.

In other words, the parties are free to tailor their arbitration agreement to their wishes and the specifics of a particular transaction. For instance, if their venture concerns construction, exploration activities, insurance or the telecommunications business, the parties may provide for specialized procedures for presenting expert evidence or agree that prospective arbitrators have to possess certain technical expertise or be members of a particular professional association.

13.3.2 Enforceability of Arbitration Agreements

Another important characteristic of international arbitration is the enforceability of arbitration agreements. Article II(3) of the New York Convention, which is in force in some 156 states,[262] requires the courts to refer the parties to arbitration if one of them commences litigation in respect of a matter subject to an arbitration agreement.[263] In the same manner, the US *Federal Arbitration Act*[264] stipulates that court proceedings must be stayed where the matter in dispute is referable to arbitration. Similarly, the *Arbitration Act* in the UK provides for a stay of proceedings.[265]

In Canada, arbitration legislation adopted at federal, provincial and territorial levels is based on the UNCITRAL Model Law on International Commercial Arbitration,[266] which states that:

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[262] UNCITRAL, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Status* [UNCITRAL Status], online: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.

[263] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 4739.

[264] 9 USC 1, § 3.

[265] *Arbitration Act 1996* (UK), c 23, s 9.

[266] See Canada *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp); British Columbia *Arbitration Act*, RSBC 1996, c 55; Ontario *Arbitration Act, 1991*, SO 1991, c 17; Alberta *Arbitration Act*, RSA 2000, c A-43; UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration* [UNCITRAL Model Law] *(1985), with amendments as adopted in 2006,* UNCITRAL Status (1958).

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.[267]

In conclusion, if a claim which is subject to an arbitration agreement is brought before the court in the US, UK or Canada, the court will stay the proceedings and refer the parties to arbitration, as long as the arbitration agreement is not null and void, inoperative or incapable of being performed. Furthermore, it is a well-established principle that an arbitration clause is deemed to be separate from the contract of which it forms a part and, as such, it survives the termination or invalidation of that contract.[268]

In the UK, the principle of the separability of an arbitration agreement is embodied is section 7 of the *Arbitration Act 1996*:

> Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.

The UNCITRAL Model Law has a similar provision:

> The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.[269]

The principle of separability prevents parties from frustrating an arbitration agreement by attempting to terminate or invalidate the contract in which the arbitration clause appears. For instance, if a high-ranking public official solicits a bribe by threatening to terminate a procurement contract and the party refuses to comply, the arbitration clause in the contract remains valid and the dispute will be settled by independent and impartial arbitrators rather than courts in the public official's state. However, if the arbitration agreement itself was procured by corruption, the state courts would recognize it as null and void, and thus refuse to refer the matter to arbitration.

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[267] UNCITRAL Model Law (1985), art 8(1).
[268] Blackaby et al (2015), at para 2.101.
[269] UNCITRAL Model Law (1985), art 16(1).

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13.3.3 Arbitral Awards Are Final and Binding

Not only are arbitration agreements enforceable, but the tribunal's awards are final and binding on the parties and may be enforced around the globe. In general, there is no possibility to appeal an arbitral award to a superior tribunal or national court, but a party may file an application with a competent state court to set the award aside on limited (mostly procedural) grounds. Also, under certain circumstances state courts may deny a request to enforce an arbitral award. This subsection gives an overview of setting aside and recognition and enforcement proceedings under the New York Convention, ICSID Convention, and national laws of the US, UK and Canada. It explains that state courts may set aside (or refuse to enforce) arbitral awards procured by corruption or based on an investment or commercial agreement tainted by corruption.

13.3.3.1 New York Convention

The New York Convention requires Contracting States to "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon." [270] Article V(1) of the New York Convention provides that recognition and enforcement of the award may be refused at the request of the party against whom it is invoked if that party furnishes proof that (a) the parties to the arbitration agreement were under some incapacity or the arbitration agreement is not valid; (b) the party against whom the award is invoked was not given proper notice or was otherwise unable to present his case; (c) the award contains decisions on matters beyond the scope of the submission to arbitration; (d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority.

Furthermore, recognition and enforcement of an arbitral award may also be refused pursuant to Article V(2) of the New York Convention if the competent court in the country where recognition and enforcement is sought finds that (a) the subject matter of the dispute is not capable of settlement by arbitration under the law of that country, or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

If an award is based on a contract tainted by bribery or corruption, the courts may deny its enforcement on public policy grounds.[271] For instance, in an English case, the High Court of England and Wales refused to enforce an arbitral award ordering the respondent to pay commission to a public official because the court found that the commission was effectively

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[270] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 4739, art III.

[271] Born (2014) at 3673-74; Dirk Otto & Omaia Elwan, "Article V(2)" in Herbert Kronke et al, eds, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010) at 372-73.

a bribe to be paid in exchange for the official procuring a contract between the respondent and a government entity.[272] Similarly, the Paris Court of Appeal denied enforcement of an award where the defendant used part of the commission fee to bribe Iranian officials.[273] The Court noted that a "contract having as its aim and object a traffic in influence through the payment of bribes is, consequently, contrary to French international public policy as well as to the ethics of international commerce as understood by the large majority of States in the international community."[274]

13.3.3.2 ICSID Convention

The ICSID Convention requires each contracting state to "recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."[275] Execution of an award rendered by an ICSID tribunal will be governed by the laws concerning the execution of judgments in the State where execution is sought.[276]

ICSID awards are binding on the parties and may not be subject to any appeal.[277] The ICSID Convention also does not provide for the possibility of arbitral awards to be set aside by national courts, but instead creates a self-contained annulment mechanism. Within 120 days after the date on which the award was rendered, a party may submit an application to the ICSID Secretary-General requesting annulment of the award.[278] An *ad hoc* committee of three persons will be formed,[279] which may annul an award only on the basis of the following grounds: (a) that the tribunal was not properly constituted; (b) that the tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.[280]

13.3.3.3 US

In the US, the *Federal Arbitration Act* provides that a court in the district where the award was made may, upon application of a party to the arbitration, make an order vacating the award if:

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[272] *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd*, [1988] 1 QB 448 (HC).
[273] *European Gas Turbines SA v Westman International Ltd*, Court of Appeal, Paris, 30 September 1993 in XX Yearbook Commercial Arbitration 198 (1995).
[274] *Ibid* at 202, para 6.
[275] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 UNTS 159, art 54(1).
[276] *Ibid*, art 54(3).
[277] *Ibid*, art 53(1).
[278] *Ibid*, art 51(1) & (2).
[279] *Ibid*, art 52(3).
[280] *Ibid*, art 52(1).

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(1) the award was procured by corruption, fraud, or undue means;

(2) there was evident partiality or corruption in the arbitrators, or either of them;

(3) the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced; or

(4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[281]

Within three years after an arbitral award under the New York Convention is made, a party to the arbitration may apply for an order confirming the award as against any other party to the arbitration.[282] Federal district courts have original jurisdiction in proceedings for recognition and enforcement of foreign arbitral awards.[283] The court will confirm the award unless it finds one of the grounds for refusal of recognition or enforcement specified in Article V of the New York Convention,[284] which has been in force in the US since 29 December 1970.[285]

13.3.3.4 UK

In the UK, a party to arbitration proceedings may apply to a court to challenge the award of an arbitral tribunal as to its substantive jurisdiction or on the ground of a serious irregularity affecting the tribunal, the proceedings or the award.[286] In this context, "serious irregularity" means any of the following, if the court considers that such an irregularity has caused or will cause substantial injustice to the applicant:

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

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[281] 9 USC 1, § 10(a).
[282] 9 USC 2, § 207.
[283] 9 USC 2, § 203.
[284] 9 USC 2, § 207.
[285] UNCITRAL Status (1958).
[286] *Arbitration Act 1996* (UK), c 23, ss 67(1) and 68(1).

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.[287]

Also, unlike many other jurisdictions, the *Arbitration Act 1996* provides a party to arbitration proceedings with an opportunity to appeal to the court on a question of law arising out of an award made in the proceedings.[288] An appeal may be brought only (a) with the agreement of all the other parties to the proceedings or (b) with the leave of the court.[289] Leave to appeal will be given only if the court is satisfied that:

(a) the determination of the question will substantially affect the rights of one or more of the parties,

(b) the question is one which the tribunal was asked to determine,

(c) on the basis of the findings of fact in the award

  (i) the decision of the tribunal on the question is obviously wrong, or

  (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.[290]

Any application or appeal must be brought within 28 days of the date of the award and may not be brought unless the applicant or appellant has already exhausted any available arbitral process of appeal or review.[291]

The *Arbitration Act 1996* provides that a New York Convention award (i.e., an arbitral award made in the territory of a State which is a party to the New York Convention) is binding on the persons as between whom it was made and may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.[292] Recognition or enforcement of an award may be refused only on the grounds enumerated in Article V of the New York Convention,[293] which has been in force in the UK since 23 December 1975.[294]

[287] *Ibid*, s 68(2).
[288] *Ibid*, s 69(1).
[289] *Ibid*, s 69(2).
[290] *Ibid*, s 69(3).
[291] *Ibid*, ss 70(3) and 70(2)(a).
[292] *Ibid*, ss 100(1) and 101(1)-(2).
[293] *Ibid*, ss 103(1)-(4).
[294] UNCITRAL Status (1958).

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13.3.3.5 Canada

Under the UNCITRAL Model Law, which in Canada has been adopted at federal, provincial and territorial levels, recourse to a court to challenge an arbitral award is only available through an application for setting aside.[295] The grounds for the setting aside of an arbitral award, enumerated in Article 34(2) of the UNCITRAL Model Law, mirror the grounds for refusal of recognition or enforcement of arbitral awards in Article V of the New York Convention.[296] An application for setting aside must be made within three months after the date on which the party making the application received the award.[297]

An arbitral award, irrespective of the country in which it was made, must be recognized as binding and will be enforced upon application in writing to the competent court.[298] The grounds for refusal of recognition or enforcement of arbitral awards, enumerated in Article 35(1) of the UNCITRAL Model Law, mirror those listed in Article V of the New York Convention, which has been in force in Canada since 10 August, 1986.[299]

13.4 Treatment of Allegations of Corruption in International Investment Arbitration

This subsection gives an overview of contract- and treaty-based international investment arbitration cases where parties made allegations of corruption. It shows that corruption has been invoked by private investors as claimants to seek compensation for the losses caused by the actions of corrupt public officials, and by States as respondents to escape liability in cases arising out of investments tainted by corruption.

13.4.1 Cases where Claimants Made Allegations of Corruption

Four cases described below show where the question of corruption was raised by the investors who alleged that public officials in the host state solicited bribes from them (*EDF*

[295] *Ibid,* art 34(1).
[296] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 4739, arts V(1)(a)-(d) & V(2).
[297] UNCITRAL Model Law (1985), art 34(3).
[298] *Ibid*, art 35(1).
[299] UNCITRAL Status (1958).

v. Romania[300]) or were corruptly influenced by the investors' competitors (*Methanex v. United States*,[301] *Oostergetel v. Slovakia*,[302] and *ECE and PANTA v. Czech Republic*[303]).

13.4.1.1 *Methanex v United States*

In *Methanex v United States*, the claimant initiated arbitration proceedings under Chapter 11 of NAFTA seeking compensation from the US in the amount of US$970 million for losses caused by the State of California's ban on the sale and use of the gasoline additive MTBE, a key ingredient of which is methanol.[304] Methanex, a Canadian producer of methanol, alleged that the then-California Governor Gray Davis' decision to issue the ban on MTBE was motivated by corruption, as the Governor received more than US$200,000 in political campaign contributions from ADM, the principal US producer of ethanol.[305]

Although the tribunal ultimately found that it did not have jurisdiction over some of the claimant's claims and dismissed all other claims on their merits,[306] the importance of this case is its approach to evaluating the evidence of corruption.[307] Methanex invited the tribunal to base the finding of corruption on the totality of factual inferences and interpretations:

> Counsel for Methanex's description of this methodology can be summarised, colloquially, as one of inviting the Tribunal to "connect the dots," i.e., while individual pieces of evidence when viewed in isolation may appear to have no significance, when seen together, they provide the most compelling of possible explanations of events, which will support Methanex's claims.[308]

The tribunal agreed with the methodology proposed by the claimant, but the dots did not connect for Methanex:

> Connecting the dots is hardly a unique methodology; but when it is applied, it is critical, first, that all the relevant dots be assembled; and, second, that each be examined, in its own context, for its own significance, before a possible pattern is essayed. Plainly, a self-serving selection of events and a

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[300] *EDF (Services) Ltd v Romania*, ICSID Case No ARB/05/13, Award (8 October 2009).
[301] *Methanex Corporation v United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005).
[302] *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, UNCITRAL, Final Award (23 April 2012).
[303] *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v Czech Republic*, PCA Case No. 2010-5, Award (19 September 2013).
[304] *Methanex Corporation v United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005), Part I at para 1.
[305] *Ibid*, Part I at para 5.
[306] *Ibid*, Part VI at para 1.
[307] Llamzon, (2014) at para 6.106.
[308] *Methanex Corporation v United States of America*, (3 August 2005), Part III, Chapter B at para 2.

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> self-serving interpretation of each of those selected, may produce an account approximating verisimilitude, but it will not reflect what actually happened. Accordingly, the Tribunal will consider the various "dots" which Methanex has adduced - one-by-one and then together with certain key events (essentially additional, noteworthy dots) which Methanex does not adduce - in order to reach a conclusion about the factual assertions which Methanex has made. Some of Methanex's proposed dots emerge as significant; others, as will be seen, do not qualify as such. In the end, the Tribunal finds it impossible plausibly to connect these dots in such a way as to support the claims set forth by Methanex.[309]

In particular, the tribunal observed that in the US, political campaigns at the federal and state level may accept private financial contributions, and "no rule of international law was suggested as evidence that the USA and other nations which allow private financial contributions in electoral campaigns are thereby in violation of international law."[310] The tribunal also rejected Methanex's suggestion that the fact that ADM hosted a "secret" dinner for Mr. Davis confirms an intent to favor ethanol and thus injure methanol producers (including Methanex).[311] While the contribution of campaign funds, if made under circumstances that suggest a deal or a *quid pro quo*, could be unlawful and amount to a breach of NAFTA's provisions on national treatment, minimum standard of treatment, and expropriation, Methanex itself acknowledged that it was unable to prove any *quid pro quo* or handshake deal.[312]

13.4.1.2 *EDF v Romania*

In *EDF v Romania*, a UK company that formed two joint ventures with Romanian state-owned entities claimed that Romania failed to accord fair and equitable treatment to EDF's investment. EDF claimed that the revocation of its duty-free store licenses and non-renewal of its lease agreements resulted from EDF's refusal to pay US$2.5 million in bribes allegedly solicited by the Prime Minister of Romania and other senior public officials.[313] The respondent denied the allegations of corruption and noted that the claimant did not provide "reliable evidence" that the numerous decision-makers involved in the process of deciding whether to extend the contract or to approve the act governing duty-free licenses "were even aware of, let alone influenced by, alleged bribes solicited by the Prime Minister's staff members."[314] The claimant did not report the alleged bribe solicitations when they occurred in August and October of 2001, but published them in a German newspaper in November, 2002, following which an investigation was opened by the Romanian Anti-Corruption

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[309] *Ibid*, Part III, Chapter B at para 3.
[310] *Ibid*, Part III, Chapter B at para 17.
[311] *Ibid*, Part III, Chapter B at paras 34-46.
[312] *Ibid*, Part III, Chapter B at paras 37-38.
[313] *EDF (Services) Ltd v Romania*, ICSID Case No ARB/05/13, Award (8 October 2009) at paras 1, 46, 101-106, 221-222.
[314] *Ibid* at para 144.

Authority (DNA).[315] The DNA has twice investigated the claimant's allegations of bribery solicitation and twice (in 2003 and 2006) rejected them, and the criminal courts in Romania have twice reviewed and affirmed the DNA's findings that the claimant's allegations are groundless.[316]

The tribunal agreed that solicitation of bribes by the host state's officials would amount to a violation of the BIT, but ruled that the claimant failed to furnish "clear and convincing" evidence of the respondent's corruption:

> The Tribunal shares the Claimant's view that a request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well as a violation of international public policy, and that "exercising a State's discretion on the basis of corruption is a […] fundamental breach of transparency and legitimate expectations." … Respondent flatly denies that such a request for a corrupt payment was made. In any case, however, corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence. The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption. The evidence before the Tribunal in the instant case concerning the alleged solicitation of a bribe is far from being clear and convincing.[317]

Furthermore, the tribunal seemed to imply that, in order to attribute bribe solicitation by a public official to the official's state, the investor would need to prove, by clear and convincing evidence, that such a public official was soliciting the bribe "on behalf and for the account of the Government."

> The burden of proof lies with the Claimant as the party alleging solicitation of a bribe. Clear and convincing evidence should have been produced by the Claimant showing not only that a bribe had been requested from Mr. Weil [the CEO of EDF], but also that such request had been made not in the personal interest of the person soliciting the bribe, but on behalf and for the account of the Government authorities in Romania, so as to make the State liable in that respect. In the absence of such evidence, the Tribunal is compelled to draw the conclusion that Claimant did not sustain its burden of proof. [318]

[315] *Ibid* at para 222.
[316] *Ibid* at para 228.
[317] *Ibid* at para 221 (internal quotations omitted).
[318] *Ibid* at para 232.

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13.4.1.3 *Oostergetel v Slovakia*

In *Oostergetel v Slovakia*, the claimants contended that the bankruptcy proceedings of BCT, their investment vehicle, were conducted in an illegitimate manner.[319] They alleged that, possibly due to corruption, the state officials involved in the bankruptcy proceedings (tax authorities, ministers, judges and trustees) supported the so-called "Slovak financial mafia" in depriving the claimants of their real estate.[320]

With regard to the claimants' allegation that they were denied justice in the Slovak courts, the tribunal observed that despite the seriousness of the allegations of corruption and conspiracy to ruin the claimants' investment, the investors "made no serious attempt to establish that the adjudication of the bankruptcy of BCT by the Slovak Courts was so bereft of a basis in law that the judgment was in effect arbitrary or malicious."[321] The claimants appealed the adjudication of bankruptcy only on procedural grounds (and did not contest the substantive reasons for the bankruptcy), and the claimants' own legal expert largely supported the correctness of the proceedings.[322] Accordingly, the tribunal rejected the claimants' allegations of a denial of justice:

> 296. In light of these statements, it is clear that a claim for denial of justice must fail. The Claimants failed to provide sufficient proof of the alleged missteps of the bankruptcy proceedings. As regards a claim for a substantial denial of justice, mere suggestions of illegitimate conduct, general allegations of corruption and shortcomings of a judicial system do not constitute evidence of a treaty breach or a violation of international law. Neither did the Claimants explain the causal link between the alleged conduct by the relevant actors and the alleged damage. The burden of proof cannot be simply shifted by attempting to create a general presumption of corruption in a given State.
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> 297. Even accepting that irregularities did occur in the course of the proceedings, the record shows that the bankruptcy of BCT was the lawful consequence of the Claimants' persistent default on their tax debts, and no proof was found that the State organs conspired with the so-called "financial" or "bankruptcy mafia" against the investors or their investment in the Slovak Republic.[323]

The tribunal was also not convinced by the claimants' suggestion that bribery was a possible explanation for the alleged conduct of the relevant public officials. The claimants relied on

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[319] *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, UNCITRAL, Final Award (23 April 2012) at para 88.
[320] *Ibid* at paras 92-93, 178.
[321] *Ibid* at para 292.
[322] *Ibid*.
[323] *Ibid* at paras 296-97.

general reports about corruption in Slovak courts, local news clippings concerning irregularities in bankruptcy proceedings handled by the Regional Court of Bratislava, and reports by the European Union and US which mentioned that bribery is widespread in Slovak courts:

> While such general reports are to be taken very seriously as a matter of policy, they cannot substitute for evidence of a treaty breach in a specific instance. For obvious reasons, it is generally difficult to bring positive proof of corruption. Yet, corruption can also be proven by circumstantial evidence. In the present case, both are entirely lacking. Mere insinuations cannot meet the burden of proof which rests on the Claimants.[324]

13.4.1.4 *ECE and PANTA v Czech Republic*

In *ECE and PANTA v Czech Republic*, the dispute arose out of an unsuccessful real estate project attempted by two German investors in the Czech Republic.[325] The claimants alleged that the conduct of the Czech authorities in respect to permits required for the construction of a shopping center resulted in excessive delays and ultimately left the claimants no choice but to abandon their investment.[326] The claimants thus sought compensation for the alleged breaches of their treaty rights to fair and equitable treatment, admission of lawful investments, non-discrimination and protection against arbitrary measures, as well as for expropriation.[327] The investors admitted that they had no direct proof that a competitor bribed officials to halt their permit applications, but presented what they believed to be "numerous serious indices that leave no other option but to conclude that a corruption scheme exists."[328] The claimants cited several NGO reports on systematic corruption in the Czech Republic generally and the city in which the proposed project was located.[329] The claimants also relied on the testimony of a Czech lawyer who was involved in advising ECE on the permit proceedings. She testified that local officials admitted to her that they had been instructed to obstruct the permit proceedings.[330]

The tribunal noted that it "cannot turn a blind eye to corruption and cannot decline to investigate the matter simply because of the difficulties of proof"[331] and accepted that it had

[324] *Ibid* at paras 302-303 (internal quotations omitted).
[325] *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v Czech Republic*, PCA Case No. 2010-5, Award (19 September 2013) at paras 1.1-1.4, 1.9-1.15.
[326] *Ibid* at paras 1.13, 4.1–4.7.
[327] *Ibid* at paras 1.14, 4.8–4.22.
[328] *Ibid* at para 4.394.
[329] *Ibid* at paras 4.846–4.847.
[330] *Ibid* at paras 4.848–4.849.
[331] *Ibid* at para 4.871.

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to "examine with care the facts alleged to prove corruption."[332] However, as in *Methanex v United* States, the "dots" did not connect for the claimants who alleged corruption:

> 4.876 When considering the Claimants' evidence the Tribunal has borne in mind the difficulties of obtaining evidence of corruption. It is well aware that acts of corruption are rarely admitted or documented and that tribunals have discussed the need to "connect the dots". At the same time, the allegations that have been made are very serious indeed. Not only would they (if true) involve criminal liability on the part of a number of named individuals, they also implicate the reputation, commercial and legal interests of various business undertakings which are not party to these proceedings and which are not represented before the Tribunal. Corruption is a charge which an arbitral tribunal must take seriously. At the same time, it is a charge that should not be made lightly, and the Tribunal is bound to express its reservations as to whether it is acceptable for charges of that level of seriousness to be advanced without either some direct evidence or compelling circumstantial evidence. That said, the Tribunal must of course decide the case on the basis of the evidence before it. If the burden of proof is not discharged, the allegation is not made out. The mere existence of suspicions cannot, in the absence of sufficiently firm corroborative evidence, be equated with proof. [333]
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> …
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> 4.879 The Tribunal must begin by stating that it finds to be deeply unattractive an argument to the effect that 'everyone knows that the Czech Republic is corrupt; therefore, there was corruption in this case ...'. The Tribunal acknowledges that some effort was made to adduce specific evidence of corruption, but it did feel that there was a strain of the 'everyone knows' argument in the overall case, for example in the reliance on reports of NGOs as to the general presence of corruption within the Czech Republic. The Tribunal does not close its eyes to the fact that the Czech Republic, like other countries, has had, and reportedly still has, problems with corruption. But the Tribunal remains vigilant against blanket condemnatory allegations which can have the appearance of an attempt to 'poison the well' in the hopes of making up for a lack of direct proof. Reference to other instances of alleged corruption may prove that corruption exists in the State, but it does little to advance the argument that corruption existed in the specific events giving rise to the claim. Nor do allegations of this kind, however seriously advanced, give rise to a burden on the Respondent to 'disprove' the existence of corruption. While the present Tribunal is therefore willing to "connect the dots", if that is appropriate, the dots have to exist and they

[332] *Ibid* at para 4.873.

[333] *Ibid* at para 4.876.

> must be substantiated by relevant and probative evidence relating to the specific allegations made in the case before it.[334]

Therefore, after reviewing the evidence, the tribunal found no substantial evidence of corruption, be it in respect to individual acts or in respect to an alleged "scheme" of corruption.[335]

13.4.2 Cases where Respondents Made Allegations of Corruption

This subsection describes four cases where host states alleged that the claimants' investments had been procured by corruption and the claimants thus were not entitled to any recovery of their losses or damages.

13.4.2.1 *World Duty Free v Kenya*

The importance of the tribunal's decision in *World Duty Free v Kenya*[336] lies in the fact that it was the first contract-based investment arbitration case in which a tribunal made a determinative finding of corruption.[337] In 2000, World Duty Free (WDF) filed a claim at the ICSID pursuant to the arbitration clause in a 1989 contract (governed by English and Kenyan law) for construction and operation of duty free complexes at two international airports.[338] WDF alleged that Kenya, through its executive, judiciary, and agents, improperly used WDF in election campaign finance fraud, illegally expropriated the company, wrongfully placed it in receivership, caused damage through mismanagement in receivership, refused to protect WDF from crime and unlawfully deported its CEO.[339] Subsequently, the owner and CEO of WDF acknowledged that, in order to be able to engage in business in Kenya, WDF was required to make a "personal donation" in the amount of US$2 million to the then-President of Kenya in March 1989.[340] In response, Kenya submitted an application alleging that the 1989 contract was unenforceable because the contract was procured by paying a bribe and requesting dismissal of WDF's claims in their entirety.[341]

The tribunal held that payments made by WDF's owner and CEO were bribes rather than a "personal donation for public purposes," because they were made not only in order to obtain an audience with the President, but "above all to obtain during that audience the agreement of the President on the contemplated investment."[342] The arbitrators noted that "bribery or

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[334] *Ibid* at para 4.879.
[335] *Ibid* at para 4.932.
[336] *World Duty Free Company Limited v Republic of Kenya*, ICSID Case No ARB/00/7, Award (4 October 2006).
[337] Llamzon (2014) at para 6.01.
[338] *World Duty Free Company Limited v Republic of Kenya*, at paras 62, 75.
[339] *Ibid* at paras 68-74.
[340] *Ibid* at para 66.
[341] *Ibid* at para 105.
[342] *Ibid* at para 136.

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influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries,"[343] including Kenya. The tribunal reviewed several international anti-corruption treaties, court decisions and arbitral awards[344] and concluded that even though in some countries or economic sectors bribery is "a common practice without which the award of a contract is difficult – or even impossible," arbitrators "always refused to condone such practices,"[345] and thus contracts based on corruption may not be upheld in arbitration:

> In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.[346]

The tribunal, therefore, found that Kenya was legally entitled to avoid the contract tainted by corruption, and WDF was "not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of *ordre public international* and public policy under the contract's applicable laws."[347]

The tribunal, however, noted that Kenya's failure to either recover the bribe in civil proceedings or to prosecute the former President, who appears to have solicited the bribe, was "highly disturbing":

> It remains nonetheless a highly disturbing feature in this case that the corrupt recipient of the Claimant's bribe was more than an officer of state but its most senior officer, the Kenyan President; and that it is Kenya which is here advancing as a complete defence to the Claimant's claims the illegalities of its own former President. Moreover, on the evidence before this Tribunal, the bribe was apparently solicited by the Kenyan President and not wholly initiated by the Claimant. Although the Kenyan President has now left office and is no longer immune from suit under the Kenyan Constitution, it appears that no attempt has been made by Kenya to prosecute him for corruption or to recover the bribe in civil proceedings.[348]

Nevertheless, the tribunal ruled that "the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other citizens making up one of the poorest

[343] *Ibid* at para 142.
[344] *Ibid* at paras 143-156.
[345] *Ibid* at para 156.
[346] *Ibid* at para 157.
[347] *Ibid* at para 188.
[348] *Ibid* at para 180.

countries in the world," and thus refrained from imposing a duty to prosecute upon the responding state as a precondition to successfully raising the corruption defence.[349]

13.4.2.2 *Metal-Tech v Uzbekistan*

Metal-Tech v Uzbekistan[350] was the first investment *treaty* arbitration case where the tribunal decided that it did not have jurisdiction because the investment was tainted by corruption.[351] Metal-Tech, an Israeli company, commenced ICSID proceedings alleging that Uzbekistan failed to accord fair and equitable treatment and protection and security to the company. Metal-Tech also alleged that Uzbekistan had expropriated Metal-Tech's investment in Uzmetal, a joint venture formed with two Uzbek state-owned companies.[352]

In November, 2011, Uzbekistan informed the tribunal that it had recently become aware of the details of a criminal investigation by the Prosecutor General's Office into questionable payments to Uzbek public officials and individuals affiliated with Metal-Tech and Uzmetal.[353] Uzbekistan alleged that several consulting agreements, which Metal-Tech entered into between 2000 and 2005, were a sham designed to cover illegal payments to Uzbek public officials or their close affiliates.[354] Metal-Tech's CEO admitted that about US$4 million had been paid to consultants who were "primarily engaged in 'lobbying' activities."[355] Therefore, the tribunal concluded that it lacked jurisdiction over the investor's claims because Metal-Tech breached both the Uzbek Criminal Code and the legality requirement under the Israel-Uzbekistan BIT by making payments to a governmental official and a close relative of a high-ranked public official for the purpose of influence peddling.[356]

The arbitrators decided that the investor had lost protection under the BIT, but denied Uzbekistan's request that costs be assessed against the claimant:

> The Tribunal found that the rights of the investor against the host State, including the right of access to arbitration, could not be protected because the investment was tainted by illegal activities, specifically corruption. The law is clear – and rightly so – that in such a situation the investor is deprived of protection and, consequently, the host State avoids any potential liability. That does not mean, however, that the State has not participated in creating the situation that leads to the dismissal of the claims. Because of this

[349] *Ibid* at para 181.
[350] *Metal-Tech Ltd v The Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013).
[351] Llamzon (2014) at para 6.43.
[352] *Metal-Tech Ltd v The Republic of Uzbekistan*, at paras 1, 3, 7, 19, 55.
[353] *Ibid* at para 76.
[354] *Ibid* at paras 28-30.
[355] *Ibid* at para 240.
[356] *Ibid* at paras 325, 327, 337, 351-52, 389.

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> participation, which is implicit in the very nature of corruption, it appears fair that the Parties share in the costs.[357]

Although the claimant's insistence that "there is no evidence that [the claimant's consultant] is being investigated or has been arrested for any crime"[358] and that "no official was charged with unlawful conduct in connection with its project"[359] did not preclude the tribunal from refusing to hear the investor's claims, the arbitrators found it necessary to state:

> While reaching the conclusion that the claims are barred as a result of corruption, the Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.[360]

13.4.2.3 *Niko Resources v Bangladesh*

The "recent and highly significant"[361] case of *Niko Resources v Bangladesh* was a contract-based investment arbitration arising out of the 2003 joint venture agreement (JVA) and the 2006 Gas Purchase and Sales Agreement (GPSA) concluded between Niko Resources and state-owned companies Bapex and Petrobangla.[362] Niko Resources claimed US$35.71 million, alleging it had not been paid for deliveries of gas.[363]

During negotiations for the GPSA, the claimant delivered a car to the Bangladeshi State Minister for Energy and Mineral Resources, while the claimant's Canadian parent company provided the Minister with an all-expenses-paid trip to an exposition in Calgary.[364] Following an investigation in Canada, Niko Canada, on the basis of an agreed statement of facts, was convicted of bribery in 2011 and ordered to pay about CA$9.5 million in fines.[365] The respondents objected to the tribunal's jurisdiction, arguing that the claimant "has

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[357] *Ibid* at para 422.
[358] *Ibid* at para 308.
[359] *Ibid* at para 336.
[360] *Ibid* at para 389.
[361] Llamzon (2014) at para 6.275.
[362] *Niko Resources (Bangladesh) Ltd. v Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No ARB/10/18, Decision on Jurisdiction (19 August 2013)
[363] *Ibid* at paras 1-7, 45, 88.
[364] *Ibid* at para 6.
[365] *Ibid*. See *R v Niko Resources Ltd*, 2011 CarswellAlta 2521 (Alta QB) discussed in Chapter 2 at 2-45 of this book.

violated the principles of good faith and international public policy" and the tribunal was thus "empowered to protect the integrity of the ICSID dispute settlement mechanism by dismissing a claim which represents a violation of fundamental principles of law."[366] The tribunal noted that the question, therefore, was "whether any instance of bribery and corruption in which the Claimant has been or may have been involved deprives the Claimant from having its claims considered and ruled upon by the present Tribunal."[367]

The arbitrators confirmed that bribery is contrary to international public policy,[368] but made a distinction between contracts *of* corruption and contracts *obtained by* corruption:

> There is indeed a fundamental difference between the two types of situations. In contracts of corruption, the object of the contract is the corruption of a civil servant and this object is intended by both parties to the contract. In contracts obtained by corruption, one of the parties normally is aware of the corruption and intends to obtain the contract by these means. But this is not necessarily the case for the other side. As explained in the *World Duty Free* award, bribes normally are covert. In that case the bribe was received not by the Government or another public entity but by an individual, the then President of the country. As the World Duty Free tribunal held, the receipt of the bribe is "*not legally imputed to Kenya itself. If it were otherwise, the payment would not be a bribe.*"[369]

The tribunal observed that contracts of corruption have been found void or unenforceable and denied effect by international arbitrators,[370] whereas in the case of covert bribes, the side innocent of corruption may have a justifiable interest in preserving the contract.[371] In the present case, the contracts giving rise to the investor's claims had a legitimate object (the development of a gas field),[372] there was no causal link between the corruption and conclusion of the agreements (the JVA was concluded before the acts of corruption and the GPSA was concluded 18 months after the Minister resigned),[373] and the respondents did not seek to avoid the agreements or to declare them void *ab initio*.[374]

Instead, the respondents asserted that, because of the act of bribery linked to the investment and for which the investor's parent company was convicted in Canada, ICSID jurisdiction should be denied to the claimant.[375] The respondents invoked three arguments: (i) ICSID

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[366] *Ibid* at paras 374, 376.
[367] *Ibid* at para 380.
[368] *Ibid* at paras 432-433.
[369] *Ibid* at para 443 (italics in the original, internal quotations omitted).
[370] *Ibid* at paras 434-436.
[371] *Ibid* at para 444.
[372] *Ibid* at para 438.
[373] *Ibid* at para 453-455.
[374] *Ibid* at para 456.
[375] *Ibid* at para 465.

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arbitration applies only to investments made in good faith, (ii) accepting jurisdiction would jeopardize the integrity of the ICSID dispute settlement mechanism, and (iii) the doctrine of clean hands.[376] With respect to the first argument, the tribunal ruled that in a contractual dispute, "alleged or established lack of good faith in the investment does not justify the denial of jurisdiction but must be considered as part of the merits of the dispute."[377] Secondly, the integrity of the investment arbitration system is "protected by the resolution of the contentions made (including allegations of violation of public policy) rather than by avoiding them."[378] Finally, in response to the third objection, the arbitrators pointed that Petrobangla and Bapex, with the approval of the Bangladesh Government, entered into the GPSA even after the corruption scandal and resignation of the Minister, so that even if the claimant and Niko Canada had unclean hands, the respondents disregarded this situation and may no longer rely on these events to deny jurisdiction under an arbitration agreement which they then accepted.[379] The tribunal thus held that Niko Canada's corruption conviction in Canada could not be used as grounds to refuse jurisdiction over the merits of a dispute which the parties to the JVA and GPSA had agreed to submit to ICSID arbitration.[380]

Niko Resources v Bangladesh is thus a rare case where corruption was found to exist but did not determine the outcome, as the tribunal rejected the respondents' objection to jurisdiction despite the claimant's admissions of wrongdoing.[381] The dispute, however, continues. In 2014, the tribunal ordered Petrobangla to pay Niko US$25.5 million for gas delivered from November 2004 to April 2010.[382] In March, 2016, the respondents submitted a new request seeking declarations that the JVA and the GPSA have been procured through corruption and the claimant is thus not entitled to use international arbitration to pursue its claims or, alternatively, that the JVA and the GPSA were void.[383] The tribunal affirmed that it is "conscious of the seriousness of corruption offenses" and, being "[m]indful of [the tribunal's] responsibility for upholding international public policy," decided it would examine whether the JVA or the GPSA were procured by corruption.[384] The arbitrators thus invited the parties to produce information and documents in relation to the negotiation and conclusion of the JVA and the GPSA.[385]

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[376] *Ibid* at para 466.
[377] *Ibid* at para 471.
[378] *Ibid* at para 474.
[379] *Ibid* at para 484.
[380] *Ibid* at para 485.
[381] Llamzon (2014) at para 6.289.
[382] *Niko Resources v Bangladesh*, ICSID Case No ARB/10/11 & ARB/10/18, Decision on the Payment Claim (11 September 2014) at para 292(1), online: <http://www.italaw.com/sites/default/files/case-documents/italaw6326.pdf>.
[383] *Niko Resources v Bangladesh*, ICSID Case No ARB/10/11 & ARB/10/18, Procedural Order No 13 Concerning the Further Procedure Regarding the Corruption Issue and Related Issues (26 May 2016) at paras 1-3, online: <http://www.italaw.com/sites/default/files/case-documents/italaw7340.pdf>.
[384] *Ibid* at para 7.
[385] *Ibid* at para 2.

13.4.2.4 *MOL v Croatia*

Another case in which a host state's allegations of corruption may be determinative is currently in the making. In *MOL v Croatia*,[386] the investor alleges that Croatia breached its obligations under the Energy Charter Treaty in connection with MOL's investments in INA, an oil company.[387] In 2003, following the Croatian government's decision to privatize INA, MOL acquired a 25%+1 share in INA while the government remained the majority shareholder. Further negotiations culminated in two agreements which allowed MOL to increase its stake in INA to 49% (the "2009 Agreements"). Whereas Croatia alleges that the 2009 Agreements were procured by MOL's CEO through bribery of then-Prime Minister of Croatia Ivo Sanader, the investor points out that neither MOL nor its CEO has been convicted of any crime in relation to the 2009 Agreements and alleges that criminal charges against MOL's CEO are "baseless" and represent an attempt by Croatia to take control of INA.[388] The investor asserts that allegations of bribery constitute an "illegal effort to harass and intimidate MOL"[389] and Croatia maintains that initiation of the ICSID proceedings was "just another attempt [made by the investor's CEO] to evade justice."[390]

In November 2012, Ivo Sanader was convicted in Croatia for accepting a EUR5 million bribe from MOL in exchange for facilitating the conclusion of the 2009 Agreements. However, in July, 2015, Croatia's Constitutional Court annulled the conviction and ordered a retrial, which began in September of 2015. Croatian law enforcement authorities also issued an indictment against MOL's CEO and chairman Zsolt Hernádi, but Hungarian authorities declined Croatia's requests to question him.

On 2 December, 2014, the ICSID tribunal declined Croatia's application to dismiss the investor's claims on a summary basis and decided that consideration of the objections put forward by the respondent should be postponed to a later stage of the proceedings.[391] It remains to be seen how the tribunal will approach the issue of corruption in light of the

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[386] *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia*, ICSID Case No ARB/13/32, Decision on Respondent's Application under ICSID Arbitration Rule 41(5) (2 December 2014).

[387] For the facts of the case, see *ibid* at paras 1-21; Margareta Habazin, "*MOL v. Republic of Croatia*: The ICSID Case Where Investor Corruption as a Defense Strategy of the Host State in International Investment Arbitration Might Succeed" (16 November 2015), *Kluwer Arbitration Blog*, online: <http://kluwerarbitrationblog.com/2015/11/16/mol-v-republic-of-croatia-the-icsid-case-where-investor-corruption-as-a-defense-strategy-of-the-host-state-in-international-investment-arbitration-might-succeed/>; Luke Eric Peterson, "Croatia Fails in Bid to Argue that Umbrella Clause Carve-out Should Knock Out Claim; UNCITRAL Tribunal Finalized in Separate Case", *Investment Arbitration Reporter* (3 December 2014), online: <https://www.iareporter.com/articles/croatia-fails-in-bid-to-argue-that-umbrella-clause-carve-out-should-knock-out-claim-uncitral-tribunal-finalized-in-separate-case/>.

[388] *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia*, ICSID Case No ARB/13/32, Decision on Respondent's Application under ICSID Arbitration Rule 41(5) (2 December 2014) at para 17.

[389] *Ibid* at para 19.

[390] *Ibid* at para 39.

[391] *Ibid* at paras 46, 52.

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ongoing criminal investigation and what effect, if any, the allegations of corruption by the host state will have on the outcome of the case.

13.5 Conclusions: International Investment Arbitration and the Global Fight against Corruption

International arbitration is, by nature, a private and consensual procedure. Its neutrality and flexibility, as well as the enforceability of arbitration agreements and final and binding character of arbitral awards, make international arbitration the primary mechanism for the settlement of disputes arising out of international commercial and investment transactions. But the global nature of modern business, increasing involvement of states and state-owned enterprises in international investment and rising sophistication of regulatory and reporting schemes in various countries inevitably result in a corresponding surge in the number of investment disputes. In 2015, investors initiated 70 known treaty-based international investment arbitrations, the highest number of cases ever filed in a single year, and the respondent was a developing country in approximately 40% of these cases.[392] As of 2015, 107 countries have been named as respondents in one or several known treaty-based investment arbitration disputes.[393]

Not surprisingly, the issue of corruption has found its way into some investment disputes. Arbitration cases reviewed in this section demonstrate that both foreign investors and host states may make allegations of corruption. On the one hand, investors have made attempts to seek compensation from host states for damages or losses caused by public officials who allegedly solicited bribes or were corruptly influenced by the investors' competitors. Tribunals have hinted that corruption on the side of the host state's public officials, if proven, may engage the host state's liability for the breach of national treatment or fair and equitable treatment standards, as well as for illegal expropriation. However, while the arbitrators accepted the possibility that corruption may be proven with circumstantial evidence, by "connecting the dots," the investors failed to furnish "clear and convincing" evidence of corruption. On the other hand, where the claimants' investments were tainted by corruption, the arbitrators exercised their duty to uphold international public policy and thus rejected the investors' claims.

In summary, international arbitration principles and procedures discourage investors from getting involved in corrupt activities, as such activities deny recovery to claimants whose investments are tainted by bribery. At the same time, international arbitration remains a private and consensual dispute resolution mechanism in which arbitrators have no power or authority to investigate allegations of corruption on their own. This means that in some cases (at least theoretically), public officials may get away with soliciting bribes or being bribed by the investors' competitors.

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[392] UNCTAD, *World Investment Report 2016* (United Nations, 2016) at 104-105.
[393] *Ibid* at 104.

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CHAPTER 8

THE LAWYER'S ROLE IN ADVISING BUSINESS CLIENTS ON CORRUPTION AND ANTI-CORRUPTION ISSUES

[*The first draft of this chapter was written by Erin Halma as a directed research and writing paper under Professor Ferguson's supervision. It was subsequently revised and substantially expanded by Professor Ferguson with Erin Halma's assistance.* R*evisions were also made by Dmytro Galagan in 2017.*]

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1. INTRODUCTION

This chapter focuses on the role of lawyers in assisting their business clients to avoid corrupt acts by their officers, employees and agents, and to advise their clients on how to deal with allegations of corruption if they arise. In particular, it will address the following: identification of exactly who the client is in a corporation or other business organization; examination of a lawyer's relationship with a client; circumstances where a lawyer may encounter corruption; the duties lawyers owe to their clients in regard to corruption; and the prevention of corruption by the exercise of due diligence including compliance programs and risk assessments.

This chapter will often refer to corporate lawyers or corporate counsel. For the purposes of this chapter, the term corporate lawyer refers to both in-house and external counsel acting on behalf of their business clients. Also, this chapter focuses on the lawyer acting in a solicitor's role (e.g., advising clients on legal issues related to business transactions, negotiating and drafting agreements, settling disputes, etc.). The lawyer's role as a barrister or litigator is dealt with more prominently in Chapters 6 and 7 of this book.

2. ROLES OF LAWYERS IN BUSINESS

2.1 Multiple Roles

In the context of business law, lawyers have an increasingly large role to play in anti-corruption compliance. Lawyers provide legal, and sometimes business, advice to their

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clients. The critical distinction between legal and business advice will be addressed later in this chapter. In providing legal advice, lawyers are "transaction facilitators" and are expected to construct transactions in a way that complies with the relevant laws, including laws prohibiting the offering or paying of bribes.[1] In addition to providing legal advice, lawyers educate their clients on the law and on how to comply with the law while achieving business objectives.[2] Lawyers may act as internal or external investigators if an allegation of corruption is made against a client.[3] Frequently they will have to conduct or oversee due diligence investigations prior to closing certain transactions. Lawyers may act as compliance officers or ethics officers by creating, enforcing and reviewing their client's compliance program.[4] Lawyers may act as assurance practitioners and conduct an assurance engagement on the effectiveness of the organization's control procedures, discussed more fully below in Section 6.2.3, item (7). Finally, some lawyers may be in the position of a gatekeeper in the sense that, by advising their client on the illegality or potential illegality of a proposed transaction and refusing to do the necessary legal work for the transaction, they may prevent their client from breaching the law. In each of these roles, the lawyer may come face to face with issues of corruption.

2.2 Who Is your Client?

Lawyers owe various duties to their clients. To fulfill those duties, the lawyer must of course know who their client is. In most cases, the client's identity is self-evident. If either Mr. Smith or Ms. Brown hires a lawyer to buy a house for him or her, it is clear who the client is. However, in the business world, the client is usually an organization, not an actual person. Businesses are usually conducted under one of the many forms of business organizations, which include:

- Incorporated companies (both for-profit and not-for-profit and including special corporate structures such as universities, hospitals, municipalities and unions);
- Unincorporated associations or societies;
- Sole proprietorships;
- Partnerships; and
- Trusts (e.g., pension fund trusts, mutual trusts, and real estate investment fund trusts).

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[1] Sarah Helene Duggin, "The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility" (2006-2007) 51 Saint Louis ULJ 1004 at 1006 (HeinOnline). Duggin's article provides an examination of the different roles in-house counsel play in a corporation.
[2] *Ibid* at 1005.
[3] *Ibid* at 1008. Dealt with more fully in Chapter 6, Section 4.2 of this book.
[4] *Ibid* at 1011-12.

In this chapter, I will focus only on incorporated companies, both for simplicity and because incorporated companies are the most prevalent business form for most commercial entities of any significant size.

In common law countries (and some civil law countries) a corporation is a separate legal entity. While treating the corporation as a person is a legal fiction, it nonetheless means the corporation can act as a legal entity. For example, it can own property, enter into contracts for goods and services, hire and fire employees, and sue or be sued by others. Most importantly, it also means the corporation has limited liability; if the corporation fails financially, the individual owners and/or shareholders are not personally liable for the debts of the corporation. The legal authority for the actions of a corporation is vested in the board of directors. Thus, when a lawyer is hired by a corporation, the lawyer's client is the corporation whose authority and ultimate directions come from the board of directors. While a lawyer may operationally receive instructions from and interact with senior management, including CEOs and CFOs, the lawyer's client is still the corporation (i.e., the corporate entity that speaks through its board). The lawyer owes his or her professional duties to the corporation, not to senior management, the CEO, the chair of the board, or individual owners or shareholders.[5]

2.3 In-House Counsel and External Counsel

There are two primary relationships a lawyer may have with his or her business client: in-house counsel or external counsel. External counsel are not employees of the client; they operate independently and normally have multiple clients. The employment of lawyers as in-house counsel has largely developed over the past 75 to 100 years.[6] More than forty years ago, Lord Denning described the position of in-house counsel in the legal profession as follows:

> Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority

[5] American Bar Association (ABA), *Model Rules of Professional Conduct*, 2016 ed. [Model Rules (2016)] Rule 1.13(a), online: <http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html>; Federation of Law Societies of Canada (FLSC), *Model Code of Professional Conduct* [Model Code (2016)] (FLSC, 2016), Rule 3.2-3, online: <http://flsc.ca/wp-content/uploads/2014/12/Model-Code-as-amended-march-2016-FINAL.pdf>. In discussing the duties to clients and ethical obligations that a lawyer owes to clients in the Canadian context, reference will be made to the FLSC Model Code of Professional Conduct. This is a model code rather than the code that binds lawyers; however, it includes a comprehensive assessment of the general rules that lawyers in Canada are expected to abide by. Provincial Law Society websites can be accessed for detailed information on each province's Code of Professional Conduct.

[6] "Legal Profession" (1985) 11 Commonwealth L Bull 962 at 974 (HeinOnline). See also John C. Coffee, *Gatekeepers: The Role of the Professions in Corporate Governance* (Oxford University Press, 2006) at 194.

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> … In every case these legal advisers do legal work for their employer and for no-one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer … They are regarded by the law as in every respect in the same position as those who practice on their own account. The only difference is that they act for one client only and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidence. They and their clients have the same privileges.[7]

The above description of in-house counsel remains generally accurate. The number of in-house counsel compared to external counsel continues to grow. In-house counsel constitute 10 to 20 percent of practicing lawyers and they have an active professional association in Canada called the Canadian Corporate Counsel Association.[8] While many corporations have in-house counsel, a corporation will often turn to external counsel for highly specialized legal areas or for litigation. Some smaller corporations have no in-house counsel. They refer all their legal work to one or more external law firms. While the balance of work between in-house and external lawyers is often in flux, Woolley et al. describe some attractions of in-house counsel:

> Companies have found it valuable to have dedicated legal expertise resident within their walls, with professionals who know both the law and the organization intimately. Hiring corporate counsel can also be far more cost-efficient than hiring outside law firms on a case-by-case basis. For many lawyers, in-house practice can offer the combined attractions of interesting work, a lifestyle often perceived as more accommodating than that offered by private practice, greater job security, and significant financial reward through both substantial salaries and the chance to participate in the success of the company through compensation plans that include stock options.[9]

While in-house lawyers have the same general duties as external lawyers, their status as an employee of the corporate client can raise professional issues requiring careful consideration. In particular, it is essential for in-house counsel to expressly indicate to the corporation whether they are giving business advice as opposed to legal advice. This distinction is very important, for example, in claims of legal privilege (discussed below).

Difficult issues around solicitor-client privilege and conflict of interest may arise more frequently for in-house counsel than external counsel. For example, a member of the upper management in a company may seek out the advice of in-house counsel on a matter of

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[7] *Crompton Amusement Machines Ltd v Commission of Customs and Excise (No. 2),* [1972] 2 QB 102, 2 All ER 353 at 376 (CA).

[8] Canadian Corporate Counsel Association, online: <http://www.ccca-accje.org/>.

[9] Alice Woolley et al, *Lawyers' Ethics and Professional Regulation* (LexisNexis Canada, 2012) at 427.

corporate business.[10] That person may mistakenly believe there is a degree of confidentiality covering the conversation. However, the in-house counsel may feel duty-bound to immediately disclose those seemingly confidential conversations to the board of directors. In addition, the role of in-house counsel may involve advising the board of directors or audit committee on acts or omissions of the officers and upper managers of the organization with whom the lawyer works and from whom the lawyer regularly receives directions.[11] Legally and ethically, in-house counsel's client is the corporation, but as a practical matter, in-house counsel are hired by and receive legal advice requests from officers or upper management. Reporting on some or all matters to the Board of Directors may greatly strain the relationship between the lawyer and company officers.[12]

Another concern for in-house counsel in respect to faithfully fulfilling their professional legal duties, and in particular their duty to act objectively and independently, has been referred to as the problem of "cognitive dissonance." Woolley et al. explain as follows:

> Further, in-house lawyers have to be especially aware of the challenges to their independence, and the phenomenon described as "cognitive dissonance." As many legal ethics experts have noted, in cases of client misconduct, lawyers' professional norms of client loyalty often conflict with personal norms of honesty and integrity. To reduce the "cognitive dissonance," lawyers will often unconsciously dismiss or discount evidence of misconduct and its impact on third parties. This becomes even more of a problem when lawyers bond socially and professionally with other employees, including senior management. The more a lawyer blends into insider culture, the greater the pressures to conform to the organization's cultural norms. That can in turn lead lawyers to underestimate risk and to suppress compromising information in order to preserve internal solidarity. In the long run, this dynamic can create problems for everyone: clients lose access to disinterested advice; lawyers lose capacity for independent judgment and moral autonomy; and the public loses protection from organizational misconduct. While this is a problem for all lawyers, the challenge is especially strong for corporate counsel. Although the financial and other consequences of terminating a relationship with a major client can be significant for lawyers in law firms, they pale in comparison to the consequences faced by an in-house counsel who is in essence walking away

[10] Out of 70 general counsel surveyed by Deloitte across Canada, 68% indicated that members of legal department in their organization are required to spend time with business units or in the front line of the business. See Deloitte, *Spotlight on General Counsel* (2015), at 4-5, online: <https://www2.deloitte.com/content/dam/Deloitte/ca/Documents/finance/ca-EN-fa-2015-General-Counsel-Survey-AODA.pdf>.

[11] Duggin (2006-2007) at 1004.

[12] William Alan Nelson II, "Attorney Liability under the Foreign Corrupt Practices Act: Legal and Ethical Challenges and Solutions" (2008-2009) 39 U Mem L Rev 255 at 273 (HeinOnline).

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> from their job and their financial security. The pressures – personal and professional – are enormous.[13]

2.4 The Lawyer as a Corporate Gatekeeper

The term gatekeeper in the world of business generally refers to an outside or independent monitor or watchdog.[14] A corporate gatekeeper is someone who "screen[s] out flaws or defects or who verifies compliance with standards or procedures."[15] A corporate gatekeeper will normally have at least one of two roles: (1) prevention of a corporate client's wrongdoing by withholding their legal approval from actions that appear illegal and/or disclosing such actions if the client does not desist from those actions; and (2) acting as a "reputational intermediary" who assures investors of the quality of the message or signal sent out by the corporation.[16] It has been suggested that there are four elements involved in gatekeepers' responsibilities:

(1) independence from the client;
(2) professional skepticism of the client's representations;
(3) a duty to the public investor; and
(4) a duty to resign when the [gatekeeper's] integrity would otherwise be compromised.[17]

Gatekeeping is "premised on the ability of professionals to monitor and control their client's conduct."[18] Failure to do so can result in gatekeeper liability. Some scholars consider auditors, attorneys and securities analysts to be the primary gatekeeping professions. However, the legal profession generally seeks to distance itself from the view that lawyers are gatekeepers, promoting instead the view that the lawyer's role is to facilitate transactions.[19] Since legal liability may extend to gatekeepers for their failure to advise a corporation appropriately or to disclose illegal dealings, the legal profession resists the label of gatekeeper. Being a gatekeeper, with the attached obligation of protecting the public from potential harm caused by clients, runs contrary to the traditional role of the lawyer as a committed and loyal advocate for the client's interests and a guardian of the confidentiality

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[13] Woolley et al (2012) at 428. See also Deborah Rhode & Paul Paton, "Lawyers, Ethics, and Enron" (2002-2003) 8 Stan JL Bus & Fin 9 at 20 (HeinOnline). This article uses the Enron scandal as an example of how counsel reviewing its own work could have been viewed as contrary to professional ethics. However, no action was taken against the firm for breach of ethical duties.

[14] Coffee (2006) at 2.

[15] *Ibid.*

[16] *Ibid.*

[17] John C. Coffee Jr, "The Attorney as Gatekeeper: An Agenda for the SEC" (2003) 103 Colum L Rev 1296
at 1299 (HeinOnline). These four elements also define the responsibilities of securities lawyers practicing in front of the SEC.

[18] Andrew F. Turch, "Multiple Gatekeepers" (2010) 96 Va L Rev 1583 at 1584 (HeinOnline).

[19] Coffee, (2006) at 3.

between lawyer and client. Regulators and the legal profession disagree over whether lawyers should play a gatekeeping role in certain large corporate affairs. On the one hand, the government has an obligation to regulate the corporate arena to prevent widespread public harm and, on the other hand, the legal profession has an interest in upholding the legal duties of confidentiality and loyalty to their clients.

Nonetheless, in some contexts lawyers are considered gatekeepers. The strongest argument for the lawyer's role as a gatekeeper has arisen in the context of the securities and banking sectors in the US, in which lawyers facilitated the questionable or illegal behaviour that lead to major stock market collapses and harm to the economy and public. The US Congress described lawyers as gatekeepers in the sense of "[p]rivate intermediaries who can prevent harm to the securities markets by disrupting the misconduct of their client representatives."[20] If corporate lawyers are seen as transaction engineers rather than advocates for their clients, this strengthens the argument that (some) corporate lawyers may have a gatekeeping role.[21] Litigators are not generally in the same position; they are approached on an *ex post* basis, i.e., after trouble has arisen, and are by definition advocates for their clients. However, corporate lawyers that provide services on an *ex ante* basis are described as "wise counselors who gently guide their clients toward law compliance."[22] In that sense, they may be seen as having a role to play in ensuring that all transactions they assist and advise comply with the law.

The key debate centers on the question of whether corporate lawyers have or should have a duty to report their client or employer to market regulators when that client or employer refuses to comply with the law. As noted, the primary arguments against assigning lawyers the role of corporate gatekeeper (i.e., requiring disclosure of client wrongdoing) are that (1) the role of gatekeeper destroys the duty of confidentiality and loyalty owed by a lawyer to his or her client, and (2) it will tend to have a chilling effect on full and open solicitor-client communications.[23] These risks exist where gatekeepers must report wrongdoing externally rather than simply withhold their consent and withdraw from representation. Critics of the imposition of gatekeeper obligations on lawyers also oppose the idea that lawyers owe a duty to anyone aside from their clients and the courts, since additional duties may be at odds with the interests of clients.[24] Acting as a gatekeeper, the lawyer is put in a potentially adversarial position with their client. This diminishes the lawyer's ability to effectively fulfill his or her essential role of "promoting the corporation's compliance with law."[25] The American Bar Association Task Force on Corporate Responsibility found that lawyers are not gatekeepers in the same way that auditors are:

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[20] Sung Hui Kim, "Naked Self-Interest – Why the Legal Profession Resists Gatekeeping" (2011) 63 Fla L Rev 131 at 131 (HeinOnline).
[21] Coffee (2006) at 192.
[22] *Ibid.*
[23] Coffee (2003) at 1296.
[24] Sung Hui Kim (2011).
[25] American Bar Association, "Report of the American Bar Association Task Force on Corporate Responsibility" (2003-2004) 59 Bus Law 156 at 156 (HeinOnline).

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> Accounting firms' responsibilities require them to express a formal public opinion, based upon an independent audit, that the corporation's financial statements fairly present the corporation's financial condition and results of operations in conformity with generally accepted accounting principles. The auditor is subject to standards designed to assure an arm's length perspective relative to the firms they audit. In contrast … corporate lawyers are first and foremost counselors to their clients.[26]

The American Bar Association also asserts that lawyers do not have an obligation or a right to disclose reasonable doubts concerning their clients' disclosures to the Securities and Exchange Commission.[27]

If corporate lawyers are considered gatekeepers, or at least partial gatekeepers, it should be recognized that the extent of influence they can or will practically exert on a corporation can vary. The employment relationship between in-house counsel and their client dampens the lawyer's independence from their client. The practical ability of in-house counsel to give unwelcome but objective advice may be lessened by the existence of internal reviews of counsel and pressure from senior managers, as well as reprisals if lawyers refuse to provide legal approval for a transaction.[28] Since the legality of certain conduct may be grey, rather than black or white, in-house counsel may consciously or unconsciously tend to approve grey areas in circumstances where an external counsel may not.

However, external counsel may also feel pressure to approve grey-area transactions due to the desire to maintain the corporation as a client, especially if that corporation comprises a significant portion of their billing. Additionally, as the role of in-house counsel expands and less transactional business goes through external counsel, external counsel may have less opportunity to discover and put a stop to corrupt or unlawful practices. Although in-house counsel arguably have less professional independence than external counsel, they may be able to exert greater influence over corporate officers and directors because of their working relationship and the ability of corporations to shop for another law firm if unhappy with the advice or lack of cooperation of their current external law firm.[29]

A different aspect of a gatekeeper's role is the use of their reputation to assure the marketplace that the corporation is abiding by various rules and regulations. External law firms are arguably better suited to this role than in-house counsel. In-house counsel will generally have less credibility in acting as a reputational intermediary, since they are seen as

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[26] *Ibid*.

[27] American Bar Association, "Statement of Policy Adopted by the American Bar Association Regarding Responsibilities and Liabilities of Lawyers Advising with Respect to the Compliance by Clients with Laws Administered by the Securities and Exchange Commission" (1975) 31 Bus Law 543 at 545.

[28] *Ibid.*

[29] Duggin (2006-2007) at 1004.

too closely associated with their company to provide an objective and impartial assurance to the marketplace.[30]

At present, it seems that corporate lawyers in the US, UK and Canada are not gatekeepers in the same way auditors are, since lawyers generally do not have a duty to report a client's past wrongdoing or a duty to report a client's planned crimes unless death or serious bodily harm to others is reasonably imminent. (These disclosure exceptions are discussed in more detail in Section 3.4 below.) They do, however, have a duty not to assist in breaching the law. If asked to engage in illegal transactions, they are under a duty to withdraw as counsel.

Even if lawyers are not gatekeepers in the sense that auditors are, counsel often have the influence and ability to alter an organization's direction and propose a plan of action that achieves a client's objective without illegality.[31] While both in-house and external counsel must say no to illegal methods of achieving the client's objectives, they are entitled and expected to attempt to accomplish the client's objectives through alternative legal means.

3. LEGAL AND ETHICAL DUTIES OF LAWYERS

All lawyers owe certain duties to their clients. In the case of a corporate client, fulfilling those duties may sometimes be challenging. Although an incorporated company has the legal status of a person, it cannot physically act on its own; instead, the corporation acts through its officers, employers, directors, agents and shareholders. This may create tension, as individual and corporate interests do not always align. A corporate lawyer works with any number of officers, employees, directors, agents and shareholders, but the lawyer's ultimate duty is to the corporation itself.[32] As in-house counsel are employees of the corporation, they have duties to their corporate employer, but also duties to their corporate client as the client's lawyer. Like in-house counsel, external counsel's client is the corporation, not an individual director or officer. This part of the chapter will briefly discuss four of the legal and ethical duties that lawyers, whether in-house or external, owe to their clients and how they can come into play in the context of corporate corruption. In the most general sense, a lawyer's duties to a client involve integrity and competence. Integrity includes honesty, trustworthiness, candor, loyalty, civility, adherence to rules of confidentiality and avoidance of conflicts of interest while vigorously serving the client's stated interests within the limits of the law.

[30] Coffee (2006) at 195.
[31] Duggin (2006-2007).
[32] The duty to shareholders fluctuates with the shareholder makeup. For example, when one shareholder holds all the shares of a corporation the corporate lawyer owes a complete duty to that shareholder. However, if a shareholder only held one share of millions, the lawyer would not owe the individual shareholder a duty, but rather the shareholders as a whole.

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3.1 Conflicts of Interest

A conflict of interest results from the existence of a factor(s) that materially and adversely affects the lawyer's ability to act in the best interests of his or her client.[33] Generally, there are two main categories of conflicts of interest: client conflict and own interest conflict. Client conflict occurs when two of the lawyer's clients have interests that are at odds with each other. Client conflict will normally only arise with external counsel, not in-house counsel. Of course, in-house counsel may raise the issue if he or she thinks that the external lawyer acting for the company has a client conflict. Own interest conflicts occur when a lawyer's interests are at odds with that of a client. This latter genre of conflicts of interest requires a lawyer to avoid placing his or her own interests before the interests of his or her clients. In order to avoid the appearance of a conflict of interest, lawyers must avoid taking or keeping clients whose interests are adverse, or potentially adverse, to their own.

The rationale for a lawyer's duty not to proceed with a case in the face of a conflict of interest is often explained by reference to a broader duty—the lawyer's duty of loyalty to a client. As Proulx and Layton state: "The leitmotif of conflict of interest is the broader duty of loyalty. Where the lawyer's duty of loyalty is compromised by a competing interest, a conflict of interest will exist."[34] And, as Graham notes:

> Lawyers have an overriding duty to be loyal to their clients, and this duty of loyalty is undermined where lawyers act in cases that involve undisclosed conflicts of interests. As a result, lawyers are generally prohibited from acting in cases involving undisclosed conflicts of interest.
>
> If the basis of the rules regarding conflicts of interest can truly be explained by reference to an overriding duty of loyalty, it should be noted that the word "loyalty," when used in the context of lawyer's conflicts of interest, bears an unusual meaning … [A] lawyer need not agree with his or her client's position, nor even hope that the client succeeds in achieving his or her legal objectives …. The lawyer may represent a client whose position the lawyer abhors, or a client whose specific legal project the lawyer considers immoral.… As a result, the lawyer may be unlikely to characterize his or her feelings toward the client as feelings of "loyalty."
>
> Such cases reveal that the lawyer's duty of loyalty does not truly imply loyalty to the client, or even loyalty to the client's legal objectives. Instead, the lawyer is loyal to his or her position as the client's legal adviser. If the lawyer fulfills the role of legal counsel, the lawyer will act as though he or she is loyal to the client. In reality, however, the lawyer's loyalty is to the job of lawyering. The lawyer's loyalty to his or her profession can be explained

[33] Model Rules (2016), Rule 1.7(a); Solicitors Regulatory Authority (SRA), *SRA Code of Conduct* (2011), c. 3, online: <http://www.sra.org.uk/solicitors/handbook/welcome.page>; Model Code (2016), Rule 1.1-1; *R v Neil*, 2002 SCC 70 at para 31, [2002] 3 SCR 631.

[34] Michel Proulx and David Layton, *Ethics and Canadian Criminal Law* (Irwin Law, 2001) at 287.

> by reference to the lawyer's interests in (1) promoting access to justice by fulfilling a social role that the lawyer believes to be important; (2) promoting his or her own professional reputation as a skilled and zealous advocate; and (3) receiving legal fees for services rendered.[35]

Conflicts of interest may arise for corporate lawyers in many aspects of their practice unrelated to concerns of corporate corruption. But when an allegation or discovery of corruption in a client's business first arises, there is potential for a conflict of interest. For example, if a lawyer is working for two corporations, both of whom are alleged to have been involved in the same corrupt scheme, the two companies' best interests may be in conflict with one another (e.g., one company may agree to cooperate with the prosecution and testify against the other company). In such circumstances, the lawyer cannot continue to act for both client companies.[36]

It should also be noted that the restriction against acting for two or more clients with opposing interests also restricts lawyers from acting for a corporation while acting personally for the CEO or other senior official connected to the corporation. A somewhat related ethical duty for corporate counsel arises when there is an allegation of corruption in respect to a corporate client. The corporate lawyer's client is the corporation. The corporation's best interests may be in conflict with the interests of senior officers of the company if those officers are allegedly involved in the corruption in some active or passive way. Any admissions made by senior officers to corporate counsel are not privileged nor confidential. It would be unethical in my opinion—showing an absence of integrity—for a corporate lawyer to allow a senior officer to make statements damaging to that officer without first warning the officer that the lawyer is not, and cannot be, the officer's lawyer and that any statements to the lawyer are not confidential or privileged and may subsequently be used against the officer.

The conflict between advising the corporation and acting for senior officers creates difficulties because a corporation can only act through its officers and employees. The corporation and its internal counsel are disadvantaged in determining the facts of a case if its corporate actors (the senior officers) do not cooperate in supplying information. It may be possible to mitigate this problem through various means. For example, the corporation could agree to indemnify the officer for his or her independent and separate legal fees in exchange for cooperation. In doing so, attention must be paid to problems of maintaining privilege, as referred to above, and outlined in detail below.

Other concerns can arise in regard to "own interest conflicts," especially for in-house counsel due to the very nature of their employment relationship with their corporate client. Since in-house counsel are employees of the organization, they may benefit financially from any lucrative deals the organization makes.[37] In addition, in-house counsel may fear being seen

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[35] Randal Graham, *Legal Ethics: Theories, Cases, and Professional Regulation,* 3rd ed (Edmond Montgomery Publications, 2014) at 321-322.

[36] Model Code (2016), Rule 3.4-5(c).

[37] Nelson (2008-2009) at 276.

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as obstructionist if they vigorously oppose business activities on legal grounds (especially grey legal grounds). In-house counsel work daily with upper management officers and this can affect their ability to be fearlessly objective in delivering legal advice that may be unwelcome to their client's senior officers. As noted earlier, in-house counsel have to be especially aware of these types of challenges to their professional duty to act objectively and independently (i.e., the phenomenon of cognitive dissonance).

Finally, although not specifically related to corruption and conflicts of interest, it is worth noting that conflicts of interest can arise when a lawyer or his or her firm acts for a corporation and the lawyer serves as a director of the corporation.[38] Conflicts may occur in this situation because the dual roles may (1) affect the lawyer's independent judgment and fiduciary obligations, (2) make it difficult to distinguish between legal and business advice, (3) threaten solicitor-client privilege, and (4) potentially disqualify the lawyer or law firm from acting for the organization.[39]

3.1.1 US Rules on Conflicts of Interest

In the following sections, in both Canada and the US, I refer to the model rules of professional conduct. These rules are "proposed" model rules. They are not binding in themselves. Rather, the rules of conduct laid down by the provincial or state law societies (i.e., the body which has the power to regulate lawyers) are binding for lawyers. It is these latter rules which lawyers must follow, but in general, the province/state rules of professional conduct reflect the content of the model rules.

The American Bar Association Model Rules of Professional Conduct contain rules regarding conflicts of interest. Rule 1.7 of the ABA's model rules states:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) The representation of one client will be directly adverse to another client; or
>
> (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

[38] Federation of Law Societies of Canada (FLSC), *Model Code of Professional Conduct* (FLSC, 2016), Commentary to Rule 3.4-1, para 11(e), online: <http://flsc.ca/wp-content/uploads/2014/12/Model-Code-as-amended-march-2016-FINAL.pdf>.

[39] *Ibid*.

(1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) The representation is not prohibited by law;

(3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceedings before a tribunal; and

(4) Each affected client gives informed consent, confirmed in writing.[40]

3.1.2 UK Rules on Conflicts of Interest

The UK Solicitor Regulations Authority Code of Conduct (SRA Code) restricts lawyers from acting when there is "a conflict, or a significant risk of conflict, between you and your client."[41] Also, "if there is a conflict, or significant risk of conflict, between two or more current clients," lawyers are restricted from acting for all of the clients, subject to a few exceptions.[42] The SRA Code outlines various systems that lawyers should have in place to ensure they make themselves aware of any conflicts or potential conflicts and deal with them accordingly. The SRA Code, in Outcome 4.3, explains that if a lawyer is working for multiple clients who are in conflict with each other under one of the allowed exceptions, a lawyer's duty of confidentiality to one client takes precedence over the lawyer's duty to disclose to the opposing client.[43]

3.1.3 Canadian Rules on Conflicts of Interest

In Canada, the general rule in regard to conflicts of interests is set out in the Federation of Law Society's Model Code of Professional Conduct (FLS Model Code), rule 3.4-1:

> A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.[44]

Conflict of interest is defined by the FLS Model Code in rule 1.1-1 as:

> The existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own

[40] Model Rules (2016), Rule 1.7.

[41] *SRA Code of Conduct* (2011), c. 3, Outcome 3.4. In the UK, solicitors and barristers have different regulatory authorities and different codes of conduct. To access the Barrister's Code of Conduct please see: Bar Standards Board, *The Bar Standards Board Handbook,* 2nd ed, Barrister's Regulation Authority, 2015, online: <https://www.barstandardsboard.org.uk>.

[42] *Ibid*, c. 3, Outcome 3.5.

[43] *Ibid*, c. 4, Outcome 4.3.

[44] Model Code (2016), Rule 3.4-1.

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> interest or the lawyer's duties to another client, a former client, or a third person.[45]

The commentary to rule 3.4-1 expands this definition as follows:

> The lawyer or law firm will still be prevented from acting if representation of the client would create a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer.[46]

The Code permits acting where a conflict of interest exists if the lawyer has permission from their client(s). The Code provides examples of where conflicts of interest may arise. Lawyers are free to engage in other professions, businesses and occupations simultaneously with their practice of law. However, the Canadian Bar Association's Code of Professional Conduct states that lawyers who do so are not to allow this outside interest to jeopardize their "professional integrity, independence, or competence" as lawyers.[47] Since "outside interest" includes lawyers acting as directors for organizations or companies, law firms and lawyers should decline such directorships or take special care if a lawyer does serve on the board of a client corporation.[48]

3.2 Duty to Not Advise or Assist in a Violation of the Law

Lawyers have a duty to not advise or assist in the violation of the law. Professional obligations generally require lawyers to resign as counsel if they are put in a situation where, after explaining to their client that the proposed course of conduct is illegal and that they cannot participate in that conduct, the client continues to instruct them to engage in or facilitate the illegal act. Most codes of conduct expressly forbid lawyers from implementing corporate instructions that would involve the commission of a crime, a fraud, or a breach of professional ethics.[49] Lawyers who do advise or assist in the violation of the criminal law are subject to prosecution under criminal law for conspiring, aiding, abetting, or counselling a breach of the law (see Chapter 3). The lawyer's duty not to facilitate a crime may arise where a lawyer is asked to act in a transaction that the lawyer believes is corrupt, such as when the lawyer is asked to draft a contract that likely includes a bribe or when a client approaches

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[45] *Ibid*, Rule 1.1-1.
[46] *Ibid*, Commentary to Rule 3.4-1, para 2.
[47] The Canadian Bar Association, *CBA Code of Professional Conduct* (CBA, 2006) at c. VII.
[48] *Ibid* at commentary 1.
[49] The Law Society of Alberta, *Code of Conduct* (2016), Rule 3.2-13, online: <https://learningcentre.lawsociety.ab.ca/pluginfile.php/68/mod_page/content/5/Code.pdf>.

the lawyer and requests advice on how to prevent a planned illegal transaction from being detected.

Lawyers can advise clients on how to achieve a business objective in compliance with the law. For example, a business development contract without certain limiting instructions might lead to a high probability of bribes being paid by company agents; ignoring that risk can constitute assisting in that bribery and therefore would be a violation of the lawyer's legal and ethical duties. However, properly documenting the nature of the work to be performed and the identity of those performing the work, along with prohibiting contact by the agent with government officials without specific company approval, can mitigate the potential misuse of the contract in an unlawful scenario.

Another factor that confuses the issue is the definition of "law." Advising on "hard law," like the *Corruption of Foreign Public Officials Act* (*CFPOA*), *Criminal Code*, or *Foreign Corrupt Practices Act* (*FCPA*), is often (though not always) relatively easy. What can be more difficult is advising on the stance to be taken toward "soft law," such as unratified treaty obligations or guidelines from multinational organizations like the UN. Strictly speaking, the "law" means hard law; however, it is advisable to at least alert clients to potential soft law concerns, as a client's level of adherence to these soft law obligations may affect public perceptions and prosecutorial positions.

3.2.1 US Rules

The American Bar Association model rules prohibit lawyers from counselling or assisting a client to engage in conduct that the lawyer knows is criminal or fraudulent. The rules allow the lawyer to discuss the legal consequences of proposed conduct and to "counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."[50]

3.2.2 UK Rules

The SRA Code of Conduct provides that a solicitor must not attempt to deceive or knowingly or recklessly mislead the court,[51] or be complicit in another person deceiving or misleading the court,[52] and has to refuse to continue acting for a client if a solicitor becomes aware they have committed perjury, misled the court or attempted to mislead the court in any material matter, unless the client agrees to disclose the truth to the court.[53]

The lawyer's duty to a client does not trump the lawyer's duty to the court, as was noted by the House of Lords in *Myers v Elman*:

[50] Model Rules (2016), Rule 1.2(d).
[51] *SRA Code of Conduct* (2011), c. 5, Outcome 5.1.
[52] *Ibid*, Outcome 5.2.
[53] *Ibid*, Indicative Behaviour 5.5.

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> A lawyer is an officer of the Court and owes a duty to the Court; he is a helper in the administration of justice. He owes a duty to his client, but if he is asked or required by his client to do something which is inconsistent with this duty to the Court, it is for him to point out that he cannot do it and, if necessary, cease to act.[54]

In this case the lawyer did not assist in breaking the law, but rather failed to ensure proper disclosure was made to the Court. The lawyer failed to uphold his duty to the Court and the Court made a costs order against him.

3.2.3 Canadian Rules

The FLS Model Code prohibits lawyers from knowingly assisting in or encouraging dishonesty, fraud, crime or illegal conduct:

> 3.2-7 When acting for a client, a lawyer must never knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment.[55]
>
> 3.2-8 A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally, or illegally, must do the following, in addition to his or her obligations under rule 3.2-7:
>
> (a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped;
>
> (b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and
>
> (c) if the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with the rules in section 3.7.[56]

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[54] *Myers v Elman*, [1940] AC 282 at 307, [1939] 4 All ER 484 (HL (Eng)).

[55] Model Code (2016), Rule 3.2-7.

[56] *Ibid*, Rule 3.2-8.

The commentary to the FLS Model Code further elaborates on the lawyer's duty not to assist in fraud or money laundering:

> A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.
>
> Before accepting a retainer, or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include verifying who are the legal or beneficial owners of property and business entities, verifying who has the control of business entities, and clarifying the nature and purpose of a complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries.[57]

In addition to the professional obligations listed above, the *Criminal Code* provisions on conspiracy, aiding, abetting, and counselling criminalize the conduct of anyone, including a lawyer, who knowingly assists their client in the commission of a crime.

3.3 The Duty of Confidentiality and Solicitor-Client Privilege

Both the duty of confidentiality and solicitor-client privilege restrict lawyers from disclosing information about their client without client permission. These concepts are important to a corporate lawyer working on corruption and anti-corruption issues. For example, providing assistance in developing, implementing, reviewing and assessing a client's anti-corruption compliance programs may reveal corporate information that is "secret" or "private" or may involve privileged advice about a company's past or future risk areas or wrongdoing. A fundamental purpose of the duty of confidentiality and privilege is to encourage full disclosure from clients to their lawyer, so the lawyer can best represent their client's interests. As the information disclosed may be harmful or embarrassing to the client's interests, providing protection from disclosure ensures that clients feel safe in making disclosures. A lawyer cannot assist in preventing or addressing corruption if the client is afraid that if they divulge information about a past potentially corrupt act, the lawyer will share this information with others. The privilege belongs to the client, and therefore the

[57] *Ibid*, Commentary to Rule 3.2-7, paras 2-3.

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lawyer cannot unilaterally disclose otherwise privileged or confidential information without the client's permission unless a legally recognized exception applies, as discussed below.

The duty of confidentiality requires lawyers to hold "in strict confidence" all information concerning the affairs of their client acquired throughout the professional relationship. A breach of this duty, if not otherwise authorized, is a breach of the lawyer's professional and fiduciary obligations and may result in the lawyer being subject to fines, civil liability, or debarment from practicing law.[58] The rationale for the duty is described by Proulx and Layton as:

> [T]he client who is assured of complete secrecy is more likely to reveal to his or her counsel all information pertaining to the case. The lawyer who is in possession of all relevant information is better able to advise the client and hence provide competent service. The client's legal rights are furthered, as is the truth-finding function of the adversarial system.[59]

The duty of confidentiality prevents both the use of confidential information as well as disclosure of confidential information. This protects the client's confidential business information and prevents a lawyer from using this information to the lawyer's advantage or the client's detriment. This may arise in the corruption context, for example, through disclosure of due diligence procedures for preventing or finding violations of the company's policies, which are considered confidential and proprietary information by the company. A lawyer assisting or assessing a client's corruption compliance program may be restricted from using any information learned through that process when later assisting a second client on a similar project.

The duties of confidentiality and solicitor-client privilege are not identical. First, the duty of confidentiality is much broader and encompasses all communications between the solicitor and client, including the fact that the client has approached and hired the solicitor for a legal issue. As Proulx and Layton note:

> [C]rucial distinctions exist between a lawyer's ethical duty of confidentiality and legal-professional privilege. First, the privilege applies only in proceedings where the lawyer may be a witness or otherwise compelled to produce evidence relating to the client. The ethical rule of confidentiality is not so restricted, operating even where there is no question of any attempt to compel disclosure by legal process. Second, legal-professional privilege encompasses only matters communicated in confidence by the client, or by a third party for the dominant purpose of litigation. Once again, the rule of confidentiality is broader, covering all information acquired by counsel whatever its source. Third, the privilege applies to the communication itself, does not bar the adduction of evidence pertaining to the facts communicated if gleaned from another source, and is often lost where other

[58] Graham (2014) at 192.

[59] Proulx & Layton (2001) at 170-71.

> parties are present during the communication. In contrast, the rule of confidentiality usually persists despite the fact that third parties know the information in question or the communication was made in the presence of others.[60]

Second, the duty of confidentiality affords less protection than solicitor-client privilege. The duty of confidentiality is an ethical duty, whereas solicitor-client privilege has evolved from a rule of evidence to a substantive rule of law and is "a principle of fundamental importance to the administration of justice."[61] As solicitor-client privilege affords greater protection due to its status as a rule of law, any exceptions that apply to the privilege necessarily apply to duties of confidentiality as well.[62]

Legislative override of solicitor-client privilege and the duty of confidentiality has been attempted in cases where there appears to be a compelling public benefit in the disclosure of otherwise confidential information. These attempts have generally occurred where the lawyer holds information relevant to the question of whether or not the client has committed an offence. However, the courts tend to fiercely guard the duty of confidentiality and guard the solicitor-client privilege even more actively. In *R v Fink*, the Supreme Court of Canada struck down the *Criminal Code* provision (s. 588.1) that allowed police to obtain a warrant to search a lawyer's office and seize documents that may be privileged.[63] The Supreme Court struck down that provision as an unreasonable search and seizure power. The Supreme

[60] *Ibid* at 173.
[61] *Smith v Jones*, [1999] 1 SCR 455, 169 DLR (4th) 385.
[62] *Ibid.*
[63] *R v Fink*, 2002 SCC 61, 216 DLR (4th) 257.

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Court held that solicitor-client privilege is "a civil right of extreme importance" and it "must remain as close to absolute as possible."[64]

3.3.1 The Duty of Confidentiality under US Rules

The American rule regarding the duty of confidentiality is set out in the ABA's Model Rules of Professional Conduct at rule 1.6:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) To prevent reasonably certain death or substantial bodily harm;
>
> (2) To prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) To prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result

[64] According to D. Watt & M. Fuerst in *The 2017 Annotated Tremeear's Criminal Code* (Thomson Reuters Canada, 2016) at 894: "The principal constitutional flaws in the regime created by s. 488.1 have to do with the *potential breach* of the privilege *without* the client's knowledge, let alone consent, and the *absence of* judicial *discretion* in the determination of an asserted claim of privilege. *Reasonableness* requires that the courts retain a *discretion* to decide whether materials seized in a lawyer's office should remain inaccessible to the state as privileged if and when it is in the interests of justice to do so. No search warrant can be issued for documents *known* to be protected by solicitor-client privilege. Before issuing a warrant to search a law office, the justice must be satisfied that there is no other reasonable alternative to the search. In issuing a warrant, the justice must afford maximum protection of solicitor-client privilege. All documents must be sealed before being examined or removed from a lawyer's office, except where the warrant specifically authorizes the immediate examination, copying and seizure of an identified document. Every effort must be made to contact the lawyer and the client at the time of execution of the warrant. If the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents. All potential privilege holders should be contacted by the police and should have a reasonable opportunity to assert a claim of privilege and to have it judicially decided. If such notification is not possible, the lawyer who had possession of the documents, or another lawyer appointed by the Law Society or the court, should examine the documents to determine whether a claim of privilege should be asserted. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents unless it is determined by a judge that the documents are not privileged. Documents found to be privileged are to be returned immediately to the holder of the privilege, or to a person designated by the court. Documents found *not* to be privileged may be used in the investigation."

or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) To secure legal advice about the lawyer's compliance with these Rules;

(5) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) To comply with other law or court order; [or]

(7) To detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.[65]

Note that the Model Rules allow, but do not require, disclosure under any of the circumstances in Rule 1.6(b).

3.3.2 The Duty of Confidentiality under UK Rules

The UK Solicitor's Regulation Authority's Code of Conduct requires that a lawyer "keep the affairs of clients confidential unless disclosure is required or permitted by law or the client consents."[66] Solicitors also have to have effective systems and controls in place to enable them to identify risks to client confidentiality and to mitigate those risks.[67]

3.3.3 The Duty of Confidentiality under Canadian Rules

The Canadian rule set out in Rule 3.3 of the FLS Model Code is as follows:

> A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:
>
> (a) expressly or impliedly authorized by the client;

[65] Model Rules (2016), Rule 1.6.
[66] *SRA Code of Conduct* (2011), c. 4, Outcome 4.1.
[67] *Ibid*, Outcome 4.5.

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(b) required by law or a court to do so;

(c) required to deliver the information to the Law Society; or

(d) otherwise permitted by this rule.[68]

A lawyer must not use or disclose a client's or former client's confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client.[69]

A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.[70]

If it is alleged that a lawyer or the lawyer's associates or employees:

(a) have committed a criminal offence involving a client's affairs;

(b) are civilly liable with respect to a matter involving a client's affairs;

(c) have committed acts of professional negligence; or

(d) have engaged in acts of professional misconduct or conduct unbecoming a lawyer,

the lawyer may disclose confidential information in order to defend against the allegations, but must not disclose more information than is required.[71]

A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but must not disclose more information than is required.[72]

A lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer's proposed conduct.[73]

A lawyer may disclose confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a law firm, but only if the information disclosed does not compromise the solicitor-client privilege or otherwise prejudice the client.[74]

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[68] Model Code (2016), Rule 3.3-1.
[69] *Ibid*, Rule 3.3-2.
[70] *Ibid*, Rule 3.3-3.
[71] *Ibid*, Rule 3.3-4.
[72] *Ibid*, Rule 3.3-5.
[73] *Ibid*, Rule 3.3-6.
[74] *Ibid*, Rule 3.3-7.

3.3.4 Solicitor-Client Privilege: Legal Advice and Litigation Privilege

As discussed above, the scope of the application of solicitor-client privilege is narrower than what is encompassed under the duty of confidentiality. Solicitor-client privilege is also referred to as legal professional privilege. It is composed of two aspects: legal advice privilege and litigation privilege. Legal advice privilege does not apply to all communications or advice between lawyer and client; it only extends to information that is regarded as legal advice.[75] It does not extend to business advice provided by the lawyer. Many corporate lawyers serve as officers or directors for a company and in that "dual capacity" they may provide business advice alongside legal advice.[76] This may bring about issues in assessing whether privilege exists; it is sometimes difficult for lawyers or courts to separate legal and business advice. Each jurisdiction takes a slightly different view in interpreting the difference between legal and business advice and the application of and exceptions to legal advice privilege, as discussed more fully below. Generally, lawyers are able to divulge their clients' otherwise confidential information if required by law. However, few laws require such divulgence as new laws that seek to infringe upon legal professional privilege are generally not upheld by the courts.[77] As there are differing exceptions to legal advice privilege in the jurisdictions discussed, only those pertaining to corruption will be discussed.

When providing legal as opposed to business advice to a client, a lawyer should clearly indicate that the advice is legal advice and therefore covered by legal professional privilege. As outlined in the CBA Code, Chapter III, "Advising Clients," Commentary 10:

> 10. In addition to opinions on legal questions, the lawyer may be asked for or expected to give advice on non-legal matters such as the business, policy or social implications involved in a question, or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who advises on such matters should, where and to the extent necessary, point out the lawyer's lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other such advice.[78]

For example, lawyers may want to give their written legal opinions to the client-employer on their own letterhead stationery, with non-legal advice or opinions being forwarded on the letterhead of the client employer and being clearly marked as being non-legal in nature.[79]

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[75] Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, 4th ed (Thomson Carswell, 2006) at 20-11. However, a lawyer's duty of confidentiality to their client is broader than solicitor-client privilege and applies to all communications between lawyer and client.
[76] Nelson (2008-2009) at 274.
[77] In Canada, see e.g. *R v Fink*, 2002 SCC 61, 216 DLR (4th) 257.
[78] *CBA Code of Professional Conduct* (2006) at c. III, commentary 10.
[79] Beverley Smith, *Professional Conduct for Lawyers and Judges*, 4th ed, (Maritime Law Book, 2011) at 13.

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Litigation privilege applies to communications or documents created primarily for the purpose of current or anticipated litigation. It extends to communications beyond just the lawyer and client, and encompasses any experts the lawyer may retain to learn about the issues as well as other third parties who may assist in preparing for litigation. Unlike legal advice privilege, the extent of litigation privilege is not infinite but rather ends with the litigation. Litigation privilege may arise for a corporate lawyer where the company has been charged or where litigation is pending in regards to their own alleged corrupt acts or the corruption of another company (for example, a civil suit for loss of a contract). A corporate lawyer may have to assist the litigation team by sending documents or informing them of the company's anti-corruption compliance program. Although the corporate lawyer would not be the litigator in charge of the litigation, their communications to the litigation team would be protected under the litigation privilege. Equally important, the litigation team may need various expert reports. Those reports will also be protected by the litigation privilege.

3.3.5 Solicitor-Client Privilege: Distinguishing Business and Legal Advice

Although the duty of confidentiality extends to all communications between a lawyer and his or her client, solicitor-client privilege only exists where the advice is "legal advice." American courts take two differing approaches to determining whether advice is business or legal. The first approach is to determine whether the person is acting as a lawyer or a business person and treat all advice provided by that person accordingly.[80] A businessperson will be found to only give business advice and a lawyer will be found to only give legal advice. Under the second method, the court will determine whether the advice is business or legal on an ad hoc basis and provide privilege only for legal advice.[81] This involves looking at individual communications to determine the purpose and nature of the communication.

UK legal advice privilege requires that the advice given is legal in nature, in the sense that there is a relevant legal context. As Lord Denning stated:

> It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps an executive capacity. Their communications in that capacity would not be the subject of legal professional privilege. So the legal adviser must be scrupulous to make the distinction.[82]

The rationale for the distinction was described as:

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[80] Robert J. Wilczek, "Corporate Confidentiality: Problems and Dilemmas of Corporate Counsel" (1982) 7 Del J Corp L 221 at 240.

[81] *Ibid.*

[82] *Crompton Amusement Machines Ltd v Commission of Customs and Excise (No. 2)*, [1972] 2 QB 102, 2 All ER 353 at 376 (CA).As discussed by John S Logan & Michael Dew, *Overview of Privilege and Confidentiality* (Paper) (Continuing Legal Education Society of British Columbia, 2011) at 1.1.7.

> To extend privilege without limit to all solicitor and client communication upon matters within the ordinary business of a solicitor and referable to that relationship [would be] too wide.[83]

As such, the court must make the determination of whether the advice was business or legal.

In Canada, the Supreme Court has stated:

> Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.[84]

However, the courts have generally interpreted "legal advice" broadly. The following excerpts show that the line between business and legal advice is fuzzy:

> [Legal advice privilege] is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context.
>
> Whether communications are made to the lawyer himself or employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality.
>
> I am satisfied that a communication which does not make specific reference to legal advice is nevertheless privileged if it falls within the continuum of communication within which the legal advice is sought or offered: see *Manes and Silver*, *supra*, p. 26. If the rule were otherwise, a disclosure of such documents would tend in many cases to permit the opposing side to infer the nature and extent of the legal advice from the tenor of the documents falling within this continuum. Thus, the intent of the rule would be frustrated.[85]

Although specifically referencing in-house counsel, this would apply to all lawyers who provide business advice in addition to legal advice.

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[83] *Balabel v Air India*, [1988] 2 All ER 246, 1 Ch 317 CA (Eng).

[84] *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para 20, [2004] 1 SCR 809.

[85] In order from top: *Samson Indian Nation and Band v. Canada*, [1995] 2 FCR 762 at para 8, 125 DLR (4th) 294 (CA); *Descôteaux v. Mierzwinski*, [1982] 1 SCR 860 at 876, 141 DLR (3d) 590; *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of B.*, 18 BCLR (3d) 150, 1996 CanLII 2311 at para 5 (SC). As discussed by Logan & Dew, (2011) at 1.1.7.

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3.4 Solicitor-Client Privilege, Confidentiality and Reporting Wrongdoing

Lawyers are under a duty to protect the interests of their client, the corporation. A lawyer that notices wrongdoing on the part of one of the officers, agents, etc. has an obligation to report that wrongdoing within the corporation.[86] This reporting usually requires the lawyer to bring the matter to a more senior individual in the corporation, particularly if the wrongdoing is committed by an individual the lawyer normally reports to.[87] As lawyers have a duty of confidentiality, reporting of wrongdoing must be internal, except in rare circumstances.[88] This is not a violation of solicitor-client privilege because the communication is still with the client.

Some jurisdictions allow for external reporting when a lawyer believes that a serious crime is about to be committed.[89] Where the client has not waived privilege, this is a violation of solicitor-client privilege, and as such, any confidential information that is reported should be the minimum necessary to prevent the crime.[90] Where lawyers are *allowed* to report wrongdoing externally, the idea that the lawyer is a gatekeeper is more accurate. Where lawyers are *required* to report wrongdoing externally, the lawyer has an even more significant role as a gatekeeper. As discussed previously, the gatekeeping role of lawyers has not yet been fully accepted in the same way that the auditor's role as gatekeeper has been. This is primarily due to legal professional privilege and the lawyer's duty of loyalty to their client.

3.4.1 US Rules on Internal and External Disclosure of Wrongdoing

Following the Enron scandal, the US implemented the *Sarbanes-Oxley Act of 2002 (SOX*). A primary objective of *SOX* was to address major corporate and accounting scandals and promote lagging investor confidence in the stock market. Section 307 of the *SOX* requires lawyers to internally report up the ladder (to the CEO or even the board of directors or audit committee) evidence of material violations of federal and state securities laws and other fraudulent acts.[91] This rule applies to the record keeping provisions of the *FCPA* and anti-bribery provisions of the *Securities Exchange Act* of 1934,[92] as per 15 USC § 78dd-1.

The ABA Model Rules of Professional Conduct state that lawyers have a duty to protect the corporation's interests:

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[86] MacKenzie (2006) at 20-12.
[87] *Ibid.*
[88] *Ibid* at 20-11.
[89] The US and Canada both allow lawyers to divulge otherwise privileged information in order to prevent a serious crime. The UK does not have a similar exception to allow for a breach of solicitor-client privilege.
[90] MacKenzie (2006) at 20-13.
[91] Nelson (2008-2009) at 280.
[92] *Ibid* at 281.

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.[93]

[93] Model Rules (2016), Rule 1.13.

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There is *no professional duty to report* wrongdoing outside of the corporation; rather, they *may* report wrongdoing externally:

> [T]o prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.[94]

The SEC attempted to require lawyers who practice before it to report knowledge of their client's wrongdoing to the SEC. The American Bar Association and many others vehemently opposed this stance, claiming solicitor-client privilege must prevail.[95] As a result of the resounding opposition to the SEC's proposed requirements for external reporting, the SEC implemented provisions that allow, but do not require, lawyers to report material violations of the SEC rules to them.[96] The SEC also included a provision that requires subordinate lawyers to report evidence of a material violation of the SEC rules to their supervising attorney.[97]

3.4.2 UK Rules on Internal and External Disclosure of Wrongdoing

Lawyers are under a duty to their client to report wrongdoing up the ladder to a higher ranking official or to the board of directors.[98] If the board of directors are the wrongdoers, the lawyer may be obligated to report to the general meeting of the shareholders.[99] However, although there have been cases about how directors are liable for failing to prevent co-directors from breach of fiduciary duty or other wrongdoing, the courts have not specifically addressed the lawyer's obligation to disclose wrongdoing of executives and directors.[100]

The UK House of Lords, in *Three Rivers Council and others v Governor and Company of the Bank of England* (*Three Rivers)*, explains that if legal professional privilege exists, it is absolute and cannot be overridden for public policy concerns; the only way around it is if the client (or

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[94] *Ibid*, Rule 1.6.

[95] US, Securities Exchange Commission, *Final Rule: Implementation of Standards of Professional Conduct for Attorneys* (RIN 3235-AI72) (Securities Exchange Commission, 2003), online: <https://www.sec.gov/rules/final/33-8185.htm>.

[96] *Ibid*, 17 CFR § 205.5.

[97] *Ibid.*

[98] Joan Loughrey, *Corporate Lawyers and Corporate Governance,* (Cambridge University Press, 2011) at 119.

[99] *Ibid*. This stems from the principle established in *Barron v Potter*, [1914] 1 Ch 895, and *Foster v Foster*, [1916] 1 Ch 532, that the general meeting of shareholders has the ability to act when the board of directors is unable or incapable of acting. In *Foster v Foster,* the board of directors was unable to act due to conflict of interest.

[100] *Ibid* at 120.

individual entitled to it) waives the privilege or it is overridden by statute.[101] The court has found that a balancing act between legal professional privilege and the public interest is not required because legal professional privilege is the "dominant public interest" and "the balance must always come down in favour of upholding the privilege."[102] The court's strict interpretation of the scope of legal professional privilege does not allow for the disclosure of otherwise privileged communications in order to prevent a crime from being committed. Under the rule in *Bullivant v Att-Gen of Victoria,* legal professional privilege extends to information given to a client on how to avoid committing a crime.[103] Legal professional privilege also extends to communications informing a client that their actions may result in prosecution, as per *Butler v Board of Trade.*[104] However, legal professional privilege may not extend to documents which form part of the crime itself or to communication that occurs in order to obtain advice with the intent of committing an offence.[105] In order to disclose otherwise privileged communications, lawyers must show they have prima facie evidence their client is involving them in a fraud without their consent.[106]

3.4.3 Canadian Rules on Internal and External Disclosure of Wrongdoing

The Canadian rules vary from province to province. However, the Model Code places the following requirement on lawyers, and applies to all lawyers in jurisdictions that have adopted the Model Code:

> A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally, or illegally, must do the following, in addition to his or her obligations under rule 3.2-7: (a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped; (b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief

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[101] *Three Rivers District Council and others v Governor and Company of the Bank of England*, [2004] UKHL 48 at paras 10 and 25, [2005] 4 All ER 948. Note that in-house counsel in the UK maintain legal professional privilege with their client. This is, however, contrary to the EU Rule. As per the European Court of Justice decision in *Akzo Nobel Chemicals Limited & anor v European Commission* (Case C-550/07 P), solicitor-client privilege does not extend to in-house counsel and their client.

[102] *R v Derby Magistrates' Court*, [1995] 4 All ER 526, [1995] 3 WLR 681. The SCC came to the same conclusion in *R v Fink*, 2002 SCC 61, 216 DLR (4th) 257.

[103] *Bullivant v Att-Gen of Victoria,* [1901] AC 196. This is different than giving advice on how to avoid getting caught after committing a crime. For more information on legal professional privilege when a crime or fraud is being committed, see UK, Law Society, *Anti-money laundering* (Practice Note) (The Law Society, 2013) at c. 6, online: <http://www.lawsociety.org.uk/support-services/advice/practice-notes/aml/>.

[104] *Butler v Board of Trade,* [1971] Ch 680, [1970] 3 WLR 822.

[105] *R v Cox & Railton* (1884), 14 QBD 153.

[106] *O'Rourke v Darbishire,* [1920] UKHL 730, [1920] AC 581.

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> executive officer refuses to cause the proposed conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and (c) if the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with the rules in section 3.7.[107]

Some Canadian jurisdictions also specifically require that if a lawyer receives relevant information regarding the corporation for whom they act, the lawyer must disclose this information to a proper authority within the organization.[108]

The Supreme Court of Canada differs from the UK's traditional judicial approach to applying legal professional privilege. The SCC has allowed for limited exceptions to its application. Where an exception exists, the scope of the privileged communication to be disclosed is to be interpreted as narrowly as reasonably possible.[109] Where a former client alleges misconduct by their former lawyer, the privilege may be set aside to protect the lawyer's self-interest.[110] If a client seeks legal advice for an unlawful purpose, privilege will not exist.[111] Where privilege may be set aside, no requirement has been placed on the lawyer to disclose the confidential information. Rather, a permissive "may disclose" allows the lawyer to exercise his or her discretion in the matter.

In *Smith v Jones*, the Supreme Court of Canada provided guidance on where solicitor-client privilege may be overridden for public policy concerns.[112] The Court advised that an exception to the privilege be allowed where "public safety is involved and death or serious bodily harm is imminent."[113] The test from *Smith v Jones* was that (1) the harm had to be targeted at an identifiable group, (2) the risk was of serious bodily harm or death, and (3) the harm was imminent.[114] In *Smith v Jones*, solicitor-client privilege was claimed for a doctor's report that was completed for the purpose of assisting in the preparation of the defence or with sentencing submissions. The psychiatrist felt that the accused was likely to commit further crimes based on the assessment, and sought to have the report considered

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[107] Model Code (2016), Rule 3.2-8.

[108] The Law Society of Alberta, *Code of Professional Conduct* (Law Society of Alberta, 2004) at c. 12, rule 3.

[109] *Ibid* at para 86.

[110] *R v Dunbar* (1982), 138 DLR (3d) 331, 68 CCC (2d) 13 (Ont CA).

[111] *R v McClure*, 2001 SCC 14 at para 36, [2001] 1 SCR 445. See also *Descoteaux v Mierzwinksi*, [1982] SCJ No 43, [1982] 1 SCR 860, 141 DLR (3d) 590.

[112] *Smith v Jones*, [1999] 1 SCR 455, 169 DLR (4th) 385.

[113] *Ibid* at para 35.

[114] Although serious economic harm is not included in this test, law societies will allow lawyers to disclose aspects of otherwise confidential or privileged information if the lawyer is at risk (i.e. when the lawyer faces allegations of misconduct or is not getting paid, etc.). See: <www.cba.org/CBA/activities/pdf/Dodek-English.pdf>.

by the Court in sentencing. As the report was cloaked by solicitor-client privilege, the Court set out a test for where solicitor-client privilege may be overridden for public policy concerns.

The Supreme Court of Canada has also allowed solicitor-client privilege to be overridden where an accused's innocence is at stake.[115] Additionally, lawyers are not as tightly bound to solicitor-client privilege where the interests of the lawyer are at stake; this may occur where the lawyer is collecting fees or is defending against a client's claim of professional misconduct.[116]

3.5 Duty to Know Your Customer

Some jurisdictions have enacted legislation requiring lawyers to confirm the identity of their clients prior to engaging in high risk transactions, particularly in cases of suspected money laundering or terrorist activities (for further information, see Chapter 4). This duty has the potential to infringe upon solicitor-client privilege because the client's personal information must be confirmed and recorded by the lawyer, and this information can later be seized by the government if the client is under investigation.

4. WHERE LAWYERS MIGHT ENCOUNTER CORRUPTION

Corporate lawyers may come across corruption in a multitude of circumstances. Corruption can be a part of any transaction, and lawyers should be careful they are not assisting their client in the violation of the law or acquiring the liabilities associated with a violation of the law by third parties. Certain financing agreements or procurement contracts may require special attention. Likewise, clients' lobbying and political contributions need careful screening for legality. Lawyers may uncover a corrupt act when providing routine assistance on corporate contracts for the sale of goods and services. In acquisitions and mergers, it is critical to determine whether the target of an acquisition has engaged in corrupt practices in the past, as the acquiring corporation may be liable for past corruption after a merger. A lawyer has a duty to undertake risk assessments to determine the potential for corrupt behaviours. This does not always need to be a full systemic risk assessment, as outlined below. Normally an internal counsel will know enough about the business that a conclusion is intuitively obvious. On the other hand, the use of third party agents, consultants or joint venture partners from foreign countries requires careful attention. In that regard, Robert Tarun lists 25 red flags to assist in determining the appropriate nature and level of due diligence required in each circumstance.[117] Transparency International UK has also

[115] *R v McClure*, 2001 SCC 14, [2001] 1 SCR 445.
[116] Graham (2014) at 272-274; MacKenzie (2006) at 3-15 – 3-19. See e.g. *R v Dunbar* (1982), 138 DLR (3d) 331, 68 CCC (2d) 13 (Ont CA).
[117] Robert W. Tarun, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 3rd ed (American Bar Association, 2013) at 119-120.

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published a very helpful guide to anti-bribery due diligence in acquisitions, mergers and investments.[118]

5. RELATIONSHIP BETWEEN DUE DILIGENCE, ANTI-CORRUPTION COMPLIANCE PROGRAMS AND RISK ASSESSMENTS

Due diligence, anti-corruption compliance programs and risk assessments are distinct but interrelated concepts. "Due diligence" can be viewed as a generic legal concept. In that sense, it means using reasonable care and taking into account all the surrounding circumstances to avoid breaking the law or causing harm to others in carrying out one's business. It is relevant in criminal law, regulatory law and civil liability. Due diligence by an accused is not a substantive defence to the commission of a subjective *mens rea* offence such as bribery, but it is a relevant mitigating factor that can affect the nature of the charge and the sentence or sanction.[119] For strict liability regulatory offences in Canada[120] and the UK[121] (including s.7 of the UK *Bribery Act, 2010*), due diligence provides a defence. However, due diligence is not a defence to regulatory offences in the US and liability can be found even where companies have implemented compliance programs to prevent regulatory offences from occurring.[122] Due diligence is also a defence to civil actions based on negligence or malpractice.

In the context of assisting a client to avoid the commission of corruption offences, careful creation and implementation of an anti-corruption compliance program that is geared to the size and nature of the business has quickly become the expected norm of due diligence. Due diligence or reasonable care must be used in designing an anti-corruption program and due diligence must be used in ensuring that the program is implemented, monitored and evaluated from time to time. In this context, due diligence requires compliance with a number of steps and safeguards specific to the particular business activity in question.

An anti-corruption compliance program will set out the steps that are reasonably required to avoid corruption in the course of one's business. Those reasonable steps will be based on

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[118] Transparency International UK, *Anti-Bribery Due Diligence for Transactions* (Transparency International UK, May 2012), online: <http://www.transparency.org.uk/publications/anti-bribery-due-diligence-for-transactions/>. See also Tarun, *ibid,* at 140-141 for a list of 15 risk factors which warrant consideration of heightened due diligence for mergers, acquisitions and investments. These factors are listed in Section 7.2 of this chapter.

[119] Due diligence acts as a substantive defence in the UK under section 7 of the *Bribery Act.* In Canada and the US, due diligence is not a substantive defence to charges of bribery or corruption.

[120] *R v Sault Ste Marie*, [1978] 2 SCR 1299, 85 DLR (3d) 161.

[121] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, [1971] 2 All ER 127. Note that in the UK the defence of due diligence must be included in the statutory scheme to be available to the defendant charged with a regulatory offence.

[122] See Mark Pieth & Radha Ivory, "Emergence and Convergence: Corporate Criminal Liability Principles in Overview" in Mark Pieth & Radha Ivory, eds, *Corporate Criminal Liability: Emergence, Convergence, and Risk*, (Springer, 2011) at 22-23.

the actual risk of corruption arising in the client's business transactions. Thus, the first step in developing an effective anti-corruption compliance program is to conduct a thorough risk assessment. To achieve the standard of due diligence, the risk assessment must be designed and carried out with reasonable care based on all the circumstances including the risk of corruption occurring, the nature and extent of harm if it does occur and the cost and effectiveness of procedures to minimize or eliminate that risk.

As enforcement becomes more frequent and the penalties sought increase in amount, the cost of any corrupt act has greatly increased. As such, companies seek guidance on complying with the law in order to avoid prosecutions and fines. Two theories indicate differing approaches on the type of guidance or regulations governments should provide: rules-based theory and principles-based theory.[123] The rules-based theory suggests that governments and enforcement agencies should set out the rules that companies need to play by.[124] This would effectively set a minimum standard for organizations to comply with and would provide certainty for companies. A significant issue with this approach is that such rules tend to be inflexible and unable to address changing situations as they arise. In addition, this approach can result in creative interpretations of the rules that ignore the spirit of the rules and allow individuals to bend them in their favour. The principles-based theory focuses on principles that governments would like to see corporations uphold.[125] This provides more flexibility in a court's interpretation of whether or not the company was in compliance, but provides less certainty to the corporation as to whether their compliance program is adequate to avoid criminal or regulatory liability.[126]

The next three sections examine anti-corruption compliance policies, risk assessments and due diligence in various contexts including mergers and acquisitions and the use of foreign agents.

6. ANTI-CORRUPTION COMPLIANCE PROGRAMS

6.1 Introduction

An increasing global expectation exists for companies to create and enforce an anti-corruption compliance program within their company. Although such programs are often not a legislative requirement, they are becoming a standard factor that enforcement bodies

[123] Todd Archibald, Kenneth Jull & Kent Roach, *Regulatory and corporate liability: From due diligence to risk management*, 2nd ed (Canada Law Book, 2004) at 14-3.
[124] *Ibid*.
[125] *Ibid*.
[126] For more information on rules-based versus principles-based regulation, see Cristie Ford, "Principles-Based Securities Regulation in the Wake of the Global Financial Crisis" (2010) 55 McGill LJ 257, and Cristie Ford, "New Governance, Compliance, and Principles-Based Securities Regulation" (2008) 45 Am Bus LJ 1. These papers do not address corruption directly, but some of the points addressed provide insight into the debate between rules-based and principles-based regulation.

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and courts consider when deciding whether to charge a company, or if charges are laid, in setting the penalty for a convicted organization. Under s. 7(2) of the UK *Bribery Act 2010*, the implementation of "adequate procedures" provides a substantive defence for the corporation to a charge under section 7(1) (see Chapter 2, Section 2.4.3(i)). The courts and enforcement agencies consider whether there is a program in place and evaluate its effectiveness in preventing corrupt acts. These programs are seen as critical to ensuring that corporations are complying with anti-corruption and anti-bribery laws. The primary purpose of these programs is to reduce the risk of corrupt acts taking place in an organization.

In light of the legal ramifications of creating and enforcing a sound anti-corruption program, lawyers advising business clients have an important role to play in informing clients of the practical utility of having such programs and ensuring that the client's program is up to date and meets minimum international standards. Enforcement agencies and courts have repeatedly advised that anti-corruption efforts should be custom-designed for the organization and should consider the particular risks that the organization is subject to. The United Nations Office on Drugs and Crime (UNODC) has produced a guide on compliance programs that states "an ounce of prevention is worth a pound of cure, and for business organizations, this is achieved through an effective internal programme for preventing and detecting violations."[127] A strong, effective program protects the company and the shareholders from directors, managers, or employees who are in a position to put the organization at risk. Although an effective compliance program cannot protect against all corrupt acts, largely due to *respondeat superior* (the vicarious liability of companies for the acts of their employees in the course of business) and the risk of hiring rogue employees, it can help to effectively manage and minimize risk.[128] For more information on the relevance of compliance programs in sentencing, refer to Chapter 7, Sections 4 to 6.

There are two approaches to corporate responsibility for self-regulation under anti-corruption law. The first is for the State to place a legal requirement on organizations to develop a compliance program and then enforce any breaches. An alternative is for the State to publicize best practices with notice to organizations that they may have to justify any departures from those practices.[129] As of yet, the US, UK and Canada have not specifically made the absence of a compliance program a crime or regulatory offence; however, compliance programs are effectively necessary due to the enforcement of anti-corruption legislation, the consideration of compliance programs in sentencing and, in the case of the UK, the substantive defence of adequate due diligence.

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[127] UNODC, *A Resource Guide on State Measures for Strengthening Corporate Integrity* (United Nations, 2013) at 1.

[128] Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Edward Elgar Publishing, 2014) at 304.

[129] Archibald, Jull & Roach (2004) at 14-3.

6.2 International Framework for Anti-Corruption Compliance Programs

6.2.1 UNCAC

As previously noted, UNCAC came into force on December 14, 2005 and is the broadest and most widely agreed to anti-corruption measure.[130] As of October 3, 2017, UNCAC has been ratified by 183 member states.[131] UNCAC does not specifically require its ratifying parties to provide guidelines on anti-corruption compliance programs. Instead, Article 12 states that "each party shall take measures ... to prevent corruption involving the private sector" and lists possible measures, including:

> Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State.[132]

While not specifically requiring state parties to provide guidance to businesses on what constitutes an effective anti-corruption compliance program, it does encourage parties to promote the use of good commercial practices. UNODC has published a *Resource Guide on State Measures for Strengthening Corporate Integrity (Integrity Guide),* which indicates that governments should consider providing guidance to the private sector on legal compliance responsibilities.[133] It suggests that the core elements of an effective anti-corruption compliance program include: executive leadership, anti-corruption policies and procedures, training and education, advice and reporting channels, effective responses to problems, a risk-based approach, and continuous improvement via periodic testing and review.[134]

6.2.2 OECD Anti-Bribery Convention

The OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (*OECD Convention*), which came into force on February 15, 1999, has been ratified by 35 OECD countries and 8 non-member countries (Argentina, Brazil, Bulgaria,

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[130] UNODC, *Background of the United Nations Convention against Corruption,* online: <http://www.unodc.org/unodc/en/treaties/CAC/>.
[131] UNODC, *United Nations Convention against Corruption Signature and Ratification Status as of 21 September 2016*, online: <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.
[132] *United Nations Convention Against Corruption,* 9 to 11 December 2003, A/58/422, (entered into force 14 December 2005) at article 12 s 2(b), online: <https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>.
[133] UNODC, *A Resource Guide on State Measures for Strengthening Corporate Integrity* (New York: UN, 2013) at 1, online: <https://www.unodc.org/documents/corruption/Publications/2013/Resource_Guide_on_State_Measures_for_Strengthening_Corporate_Integrity.pdf>.
[134] *Ibid* at 13-14.

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Colombia, Costa Rica, Lithuania, Russia, and South Africa).[135] It does not place any requirements on state parties to provide guidance on key aspects of effective compliance programs for the private sector. Furthermore, it does not require states to implement laws that require organizations to implement effective compliance programs. However, in 2009, the OECD *Recommendations for Further Combating Bribery of Foreign Public Officials (OECD Recommendations)* were adopted by all 41 states that had ratified the OECD Convention. Recommendation III requests that its members encourage companies to develop and implement adequate internal controls and compliance programs and also provides companies with *Good Practice Guidance on Internal Controls, Ethics, and Compliance*.[136]

6.2.3 Key Elements of Compliance Guidelines Published by Various International Organizations

The international community has created various tools to guide companies in the prevention of corruption within their organization. These tools recognize the complexity of identifying and combating corruption and address the need for a multi-faceted approach with the involvement of the entire organization. To aid companies in their anti-corruption policies, the following organizations have published guidelines to assist companies in the implementation of effective compliance programs:[137]

- The Asia-Pacific Economic Cooperation (APEC) has released the Anti-Corruption Code of Conduct for Business.[138]
- Transparency International (TI) has released Business Principles for Countering Bribery.[139]
- Transparency International-Canada (TI Canada) has released the Anti-Corruption Compliance Checklist.[140]

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[135] OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, online: <http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm>.
[136] OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (26 November 2009), online: <https://www.oecd.org/daf/anti-bribery/44176910.pdf>.
[137] See *Anti-Corruption Ethics and Compliance Handbook for Business* (OECD, UNODC & World Bank, 2013) for an overview of the principles in the various compliance programs and guidelines for implementing a successful anti-corruption compliance program.
[138] Asia-Pacific Economic Cooperation, *APEC Code of Conduct for Business*, APEC#207-SO-05.1 (September 2007), online: <http://publications.apec.org/publication-detail.php?pub_id=269>.
[139] Transparency International, *Business Principles for Countering Bribery*, 3d ed (October 2013), online: <http://www.transparency.org/whatwedo/publication/business_principles_for_countering_bribery>.
[140] Transparency International-Canada, Anti-Corruption Compliance Checklist, 3rd ed (2014), online: <http://www.transparencycanada.ca/wp-content/uploads/2014/09/2014-TI-Canada_Anti-Corruption_Compliance_Checklist-Third_Edition-20140506.pdf>.

- The Organisation for Economic Co-operation and Development (OECD) has produced the Good Practice Guidance on Internal Controls, Ethics, and Compliance.[141]
- The World Bank created the Integrity Compliance Guidelines.[142]
- The World Economic Forum Partnering Against Corruption Initiative (PACI) created the Principles for Countering Bribery.[143]
- The International Chamber of Commerce (ICC) has produced the Rules on Combating Corruption.[144]
- The International Organization for Standardization (ISO) has developed and published ISO 37001 anti-bribery management system (ABMS) standard for organizations.[145]

These guidelines and principles provide organizations with suggestions on how to create and maintain anti-corruption programs that fall within expectations under the OECD Convention and UNCAC. Lawyers who are assisting a client in drafting or amending its compliance program should familiarize themselves with these guidelines. For in-house lawyers, the Association of Corporate Counsel (ACC) has prepared a *How-To Manual on Creating and Maintaining an Anti-corruption Compliance Program*.[146]

Organizations in the public, private and voluntary sectors may obtain independent certification of compliance of their ABMS with ISO 37001 standard and require their major contractors, suppliers and consultants to provide evidence of compliance.[147] In relation to the organization's activities, this standard addresses:

- bribery in the public, private and not-for-profit sectors;
- bribery by the organization;
- bribery by the organization's personnel acting on the organization's behalf or for its benefit;

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[141] OECD, *Good Practice Guidance on Internal Controls, Ethics, and Compliance* (18 February 2010), online: <http://www.oecd.org/daf/anti-bribery/44884389.pdf>.
[142] World Bank, *Integrity Compliance Guidelines* (2010), online: <http://pubdocs.worldbank.org/en/489491449169632718/Integrity-Compliance-Guidelines-2-1-11.pdf>.
[143] World Economic Forum Partnering Against Corruption Initiative, *Principles for Countering Bribery* (2004), online: <http://www3.weforum.org/docs/WEF_PACI_Principles_2009.pdf>.
[144] International Chamber of Commerce Commission on Corporate Responsibility and Anti-Corruption, *Rules on Combating Corruption* (17 October 2011) online: <http://www.iccwbo.org/Data/Policies/2011/ICC-Rules-on-Combating-Corruption-2011/>.
[145] International Organization for Standardization, "ISO 37001 – Anti-bribery management systems", online: <http://www.iso.org/iso/iso37001>.
[146] Kristen Collier Wright, Wally Dietz & Lindsey Fetzer, "How-To Manual on Creating and Maintaining an Anti-corruption Compliance Program" (2015) 33:5 ACC Docket 38, online: <http://www.acc.com/docket/articles/resource.cfm?show=1401723>.
[147] Global Infrastructure Anti-Corruption Centre, "International Standard ISO 37001 Anti-bribery Management Systems Standard", online: <http://www.giaccentre.org/ISO37001.php>.

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- bribery by the organization's business associates acting on the organization's behalf or for its benefit;
- bribery of the organization;
- bribery of the organization's personnel in relation to the organization's activities;
- bribery of the organization's business associates in relation to the organization's activities;
- direct and indirect bribery (for instance, a bribe offered or accepted through or by a third party).[148]

To help prevent, detect and deal with bribery, ISO 37001 requires the organization to:

1. Implement the anti-bribery policy and supporting anti-bribery procedures (ABMS);
2. Ensure that the organization's top management has overall responsibility for the implementation and effectiveness of the anti-bribery policy and ABMS, and provides the appropriate commitment and leadership in this regard;
3. Ensure that responsibilities for ensuring compliance with the anti-bribery policy and ABMS are effectively allocated and communicated throughout the organization;
4. Appoint a person(s) with responsibility for overseeing anti-bribery compliance by the organization (compliance function);
5. Ensure that controls are in place over the making of decisions in relation to more than low bribery risk transactions. The decision process and the level of authority of the decision-maker(s) must be appropriate to the level of bribery risk and be free of actual or potential conflicts of interest;
6. Ensure that resources (personnel, equipment and financial) are made available as necessary for the effective implementation of the ABMS;
7. Implement appropriate vetting and controls over the organization's personnel designed to ensure that they are competent, and will comply with the anti-bribery policy and ABMS, and can be disciplined if they do not comply;
8. Provide appropriate anti-bribery training and/or guidance to personnel on the anti-bribery policy and ABMS;
9. Produce and retain appropriate documentation in relation to the design and implementation of the anti-bribery policy and ABMS;

[148] International Organization for Standardization, "ISO 37001:2016(en) Anti-bribery management systems — Requirements with guidance for use", s 1 (Scope), online: <https://www.iso.org/obp/ui/#iso:std:iso:37001:ed-1:v1:en>.

10. Undertake periodic bribery risk assessments and appropriate due diligence on transactions and business associates;
11. Implement appropriate financial controls to reduce bribery risk (e.g. two signatures on payments, restricting use of cash, etc.);
12. Implement appropriate procurement, commercial and other non-financial controls to reduce bribery risk (e.g. separation of functions, two signatures on work approvals, etc.);
13. Ensure that all other organizations over which it has control implement anti-bribery measures which are reasonable and proportionate to the nature and extent of bribery risks which the controlled organization faces;
14. Require, where it is practicable to do so, and would help mitigate the bribery risk, any business associate which poses more than a low bribery risk to the organization to implement anti-bribery controls which manage the relevant bribery risk;
15. Ensure, where practicable, that appropriate anti-bribery commitments are obtained from business associates which pose more than a low bribery risk to the organization;
16. Implement controls over gifts, hospitality, donations and similar benefits to prevent them from being used for bribery purposes;
17. Ensure that the organization does not participate in, or withdraws from, any transaction where it cannot appropriately manage the bribery risk;
18. Implement reporting (whistle-blowing) procedures which encourage and enable persons to report suspected bribery, or any violation of or weakness in the ABMS, to the compliance function or to appropriate personnel;
19. Implement procedures to investigate and deal appropriately with any suspected or actual bribery or violation of the ABMS;
20. Monitor, measure and evaluate the effectiveness of the ABMS procedures;
21. Undertake internal audits at planned intervals which assess whether the ABMS conforms to the requirements of ISO 37001 and is being effectively implemented;
22. Undertake periodic reviews of the effectiveness of the ABMS by the compliance function and top management;
23. Rectify any identified problem with the ABMS, and improve the ABMS as necessary.[149]

[149] Global Infrastructure Anti-Corruption Centre, "International Standard ISO 37001 Anti-bribery Management Systems Standard", online: <http://www.giaccentre.org/ISO37001.php>.

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In general, the keys to success promoted by various anti-corruption compliance guidelines tend to fall within the following six categories: (1) clear policy from the top; (2) communication and training; (3) developing and implementing an anti-corruption program; (4) incentivizing and promoting compliance; (5) detecting and reporting violations; and (6) continual testing and improvement.[150] I will briefly comment on each of these categories.

(1) Clear policy from the top

An effective compliance program requires commitment from the top level of the organization. A strong program may be prone to failure if senior management is not committed to its implementation. Senior management establish the culture of ethics for the organization, and without a zero tolerance policy on corruption, it is unlikely that the program will be effective in combating corrupt transactions. The policy should be clear and spoken from one voice, so there is no confusion about company expectations and the company's definition of corruption. Senior management's support and commitment to the program should be an "ongoing demonstration of the company's norms and values."[151] They must make it clear that the company's zeal for more business and profit does not mean getting more business by the use of bribery.

(2) Communication and training

Companies are required to communicate and train their employees on their compliance programs and on anti-corruption laws. Communication and training must be in the local language of the employee in order to be effective. Orthofix International was targeted by the DOJ for failing to adequately communicate compliance programs with its employees. In its enforcement action against the company, the DOJ stated: "Orthofix International, … failed to engage in any serious form of corruption-related diligence before it purchased [the subsidiary]. Although Orthofix International promulgated its own anti-corruption policy, that policy was neither translated into Spanish nor implemented at [the subsidiary]."[152] Companies should tailor training to the position of the employee: different aspects of corruption law will apply to employees in accounting versus employees in sales, which means different controls to prevent and report corruption will be required for each group. Training should also consider the level of the employee, as higher level managers, who often

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[150] TI Canada suggests that a corporate anti-corruption compliance program may be developed and implemented in the following six steps: (1) commit to the anti-corruption program from the top, (2) assess the current status and risk environment, (3) plan the anti-corruption program, (4) act on the plan, (5) monitor controls and progress, and (6) report internally and externally on the program. See Transparency International-Canada, Anti-Corruption Compliance Checklist, (2014), at 5-6.

[151] UNDOC, *Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide,* (Unite Nations, 2013) [ebook]. For more information on the importance of corporate culture in combating corruption, see David Hess & Cristie Ford, "Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem" (2008) 41 Cornell Int'l LJ 301.

[152] Koehler (2014). See also: *United States v Orthofix International*, NV, 4:12-CR-00150-RAS-DDB-1, online: <https://www.justice.gov/criminal-fraud/case/united-states-v-orthofix-international-nv-court-docket-number-412-cr-00150-ras>.

set the tone for the office or department, may require more extensive training and knowledge of anti-corruption initiatives than lower level employees.

(3) Developing and implementing an anti-corruption program

An effective anti-corruption program should be specifically tailored to the risks the company faces. Controls should be in place to reduce to a reasonable level the chance that corrupt transactions occur and to ensure that employees are not given unreasonable opportunities to participate in corrupt acts.[153] Characteristics of a well-designed compliance program include consistency with applicable laws, adaptation to specific requirements, participation of stakeholders, shared responsibility, accessibility, readability, promotion of a trust-based internal culture, applicability, continuity and efficiency.[154]

TI's *Business Principles for Countering Bribery* state that the Board of Directors, or equivalent body, is responsible for implementing and overseeing the compliance program.[155] The CEO is responsible for ensuring the program is implemented and adhered to.[156] The Board of Directors and/or CEO should enlist various experts, such as lawyers, accountants and compliance officers, to design and implement the program. Additionally, managers and staff, particularly those faced with bribery demands or forms of corruption, may provide assistance in the development of the program. In medium-sized or large companies, the Board of Directors, or similar governing body, should create a special internal unit to develop and implement the compliance program.[157]

A primary aspect of a company's compliance program is that it implements adequate financial controls and follows generally accepted accounting standards. The complexity of these features will depend on the risk level and size of the company. Payments of a certain type, or over a certain amount, could require multiple authorizations to ensure that they are in line with company policies. Procedures must prohibit and prevent actions such as the creation of off-the-book accounts, the making of inadequately identified transactions, the recording of non-existent expenditures, the use of false documents, the recording of liabilities with incorrect identification and the intentional and unlawful destruction of book-keeping records.[158] Accounting controls should not only prevent wrongful transactions and

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[153] This section will address several areas that compliance programs should cover. Depending on the company, the compliance program will be expanded or reduced to suit the risks the company faces and the types of transactions it enters into.

[154] UNDOC (2013) at 28-29. The Guide describes each of these characteristics in more detail.

[155] *Ibid* at 29; Transparency International, (October 2013) at 6.1.

[156] *Ibid*.

[157] Stefania Giavazzi, Francesca Cottone & Michele De Rosa, "The ABC Program: An Anti-Bribery Compliance Program Recommended to Corporations Operating in a Multinational Environment" in Stefano Manacorda, Francesco Centonze & Gabrio Forti, eds, *Preventing Corporate Corruption: The Anti-Bribery Compliance Model* (Springer International Publishing, 2014) at 140 [ebook].

[158] *United Nations Convention Against Corruption*, 9 to 11 December 2003, A/58/422, (entered into force 14 December 2005) at article 12.3.

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other forms of wrongdoing, but should also assist in bringing wrongdoing to light through regular audits.[159]

Compliance programs should also address gifts and entertainment expenses, particularly for government officials. Company policy should outline appropriate levels for gift or entertainment expenses, as well as any exceptions to allowable expenses. These expenses may require multiple levels of approval and increased disclosure as the size and nature of the gift reasonably dictates. Suggested best practice requires prior written approval by the direct supervisor for receipt or offer of gifts, with consideration of the aggregate amount of gifts or promotional expenses provided to or received from the public official in the recent past.[160] Any gifts or other benefits provided or received should be recorded in an accurate and transparent manner and the company should record gifts offered but not accepted.[161]

Charitable and political donations should also be addressed in the compliance program. The company may wish to set out various approval levels; for example, greater donations might require approval from a more senior individual within the company. Public disclosure is suggested for both charitable and political donations.[162] Any political donations must be carried out in accordance with applicable laws, which vary greatly from jurisdiction to jurisdiction. Preliminary checks are suggested for charitable donations to ensure the charity is legitimate and not affiliated with public officials with whom the company deals.[163] Suggested minimum standards for charitable donations include:

- All contributions must be approved by senior management, with evidence provided of the nature and scope of the individual contribution.
- The beneficiary must show that it has all relevant certifications and has satisfied all requirements for operating in compliance with applicable laws.
- An adequate due diligence review on the beneficiary entity must be carried out.
- Contributions shall be made only in favor of well-known, reliable entities with outstanding reputations for honesty and correct business practices and which have not been recently incorporated.
- Contributions must be properly and transparently recorded in the company's books and records.
- The beneficiary entity shall guarantee that contributions received are recorded properly and transparently in its own books and records.[164]

The compliance program must also address contracts for services and procurement policies. Contracts should include "express contractual obligations, remedies, and/or penalties in

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[159] World Bank, *Integrity Compliance Guidelines* (2010) at 6.1, online: <http://pubdocs.worldbank.org/en/489491449169632718/Integrity-Compliance-Guidelines-2-1-11.pdf>.
[160] Giavazzi, Cottone & De Rosa (2014) at 151.
[161] *Ibid.*
[162] Transparency International (October 2013) at 5.3.2 & 5.4.2.
[163] Giavazzi, Cottone & De Rosa (2014) at 159.
[164] *Ibid* at 159-160.

relation to misconduct."[165] Additionally, various approval levels may be needed for contracts with third parties depending on the size or nature of the contract. Higher risk areas or contracts for large amounts should normally require more approvals than standard low-value contracts. Project financing should normally require additional safeguards to ensure that all applicable laws are being complied with.

Conflicts of interest should be addressed by the compliance program:

> The enterprise should establish policies and procedures to identify, monitor and manage conflicts of interest which may give rise to a risk of bribery – actual, potential or perceived. These policies and procedures should apply to directors, officers, employees and contracted parties such as agents, lobbyists and other intermediaries.[166]

Human resource policies and practices, particularly in regard to hiring, remunerating and incentivizing employees need to be considered as an aspect of the compliance program. It is particularly important to include a policy that "no employee will suffer demotion, penalty, or other adverse consequences for refusing to pay bribes even if such refusal may result in the enterprise losing business."[167]

(4) Incentivizing and promoting compliance

Compliance with anti-corruption programs should be adequately incentivized and promoted in order to ensure that employees are more likely than not to avoid corrupt transactions. This area requires careful implementation because incentivizing employees often results in adverse effects for anti-corruption (e.g., rewards for high sales or punishment for low sales may incentivize employees to reach sales targets, regardless of the means employed). Companies should ensure that they are complying with local law in structuring their incentive schemes. They also should test their program to ensure that it does not promote corrupt behaviour.

(5) Detecting and reporting violations

A compliance program is more effective if it also works to detect and report violations. Although adequate safeguards may be in place, if the organization is not actively seeking to detect violations, employees will not be properly incentivized to stop their corrupt behaviour. As corrupt individuals will be able to find a way around any scheme, the program must ensure that there is active detection and reporting of violations to ensure that there is a risk to engaging in corrupt practices.

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[165] World Bank, *Integrity Compliance Guidelines* (2010) at 6.2, online: <http://pubdocs.worldbank.org/en/489491449169632718/Integrity-Compliance-Guidelines-2-1-11.pdf>.

[166] Transparency International (October 2013) at 5.1.

[167] *Ibid* at 6.3.3.

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(6) Continual testing and improvement

Compliance programs should evolve with companies and their work environments. Without continually testing the program for effectiveness and improving any weaknesses, a company's compliance program can quickly become outdated. For example, the use of technology and the Internet has completely changed what an effective compliance program should look like. Additionally, the company's area of business may change and require new mechanisms for preventing, detecting and reporting corrupt acts.

An anti-corruption compliance program may be evaluated in two ways: (1) the suitability of the program design; and (2) the operational effectiveness of the controls in place.[168] External counsel may have to undertake more due diligence than in-house counsel when performing tests of a compliance system, since external counsel may be less aware of the actual operating practices of the company. External counsel may also be accused of trying to gold plate compliance systems by making them more complex than necessary. On the other hand, internal counsel must be aware of the problem of cognitive dissonance and its tendency to promote assumptions that the status quo is effective.

(7) *TI's Assurance Framework*

In 2012, TI published an *Assurance Framework* aimed at assisting enterprises in receiving "independent assurance of their anti-bribery programmes."[169] In its guidelines on the *Bribery Act 2010*, the UK Ministry of Justice recommends the use of external verification or independent assurance to achieve the measures necessary to prevent bribery.[170] Independent assurance, defined by the AA1000 Assurance Standard 2008, is:

> the methods and processes employed by an assurance practitioner to evaluate an organization's public disclosures about its performance as well as underlying systems, data and processes against suitable criteria and standards in order to increase the results of the assurance process in an assurance statement credibility of public disclosure.[171]

Benefits of conducting independent assurance of anti-corruption compliance programs include the following:

> Strengthening its programme by identifying areas for improvement;
>
> Providing confidence to the board and management of the adequacy of its anti-bribery programme;

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[168] Jermyn Brooks, Susan Côté-Freeman & Peter Wilkinson, *Assurance Framework for Corporate Anti-Bribery Programmes* (Transparency International, 2012) at 9.
[169] *Ibid* at 5.
[170] UK, Ministry of Justice, *Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)*[UK Min J Guidance (2012)] (Her Majesty's Stationary Office, 2012) at 31.
[171] Brooks, Côté-Freeman & Wilkinson (2012) at 6.

> Increasing the credibility of its public reporting on its anti-bribery programme;
>
> Maintaining and/or enhancing its reputation as an enterprise committed to high standards of integrity and transparency;
>
> Contributing to a case for mitigation of sentencing in the event of a bribery incident in jurisdictions where this applies;
>
> Helping restore market confidence following the discovery of a bribery incident; and
>
> Meeting any future pre-qualification requirements.[172]

Lawyers may serve as assurance practitioners to oversee the assurance process. In this capacity they are able to test and review the effectiveness of the anti-corruption compliance program and assist the company in identifying any risks that still need addressing.

6.3 US Framework

6.3.1 *Foreign Corrupt Practices Act*

The *FCPA* does not explicitly require companies to have an anti-corruption compliance program. Even though there is no affirmative defense for having an active and effective anti-corruption compliance program under the *FCPA*, enforcement agencies consider compliance programs to be a necessary mechanism and, as explained more fully in Chapter 6, Section 6.1.6.2 and Chapter 7, Section 6, will treat companies that follow a reasonable compliance program far more leniently.

6.3.2 Guidelines and Interpretation

The DOJ often sets specific requirements for compliance programs in companies that have agreed to a resolution under the *FCPA*. These resolutions provide further illustration as to what the DOJ considers to be reasonable standards for company compliance. In regard to DPAs and NPAs,[173] the DOJ has stated:

> DPAs and NPAs benefit the public and industries by providing guidance on what constitutes improper conduct.… Because the agreements typically provide a recitation of the improper conduct at issue, the agreements can serve as an educational tool for other companies in a particular industry.[174]

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[172] *Ibid* at 7.

[173] DPA refers to deferred prosecution agreement. NPA refers to non-prosecution agreement.

[174] Koehler (2014) at 313. For more information on the use of DPAs and NPAs, see: US Government Accountability Office, *Corporate Crime: DOJ Has Taken Steps to Better Track its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness* (GA-10-110) (US Government Accountability Office, 2009).

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These settlement agreements are in relation to potential *FCPA* charges against specific companies, but they can be useful in tailoring a compliance program to the specific needs of other organizations and to keep other companies abreast of new requirements that the DOJ may look for.

Another resource is provided by SEC enforcement orders against companies charged under the *FCPA*. These orders indicate areas of a business or industry where the SEC has pursued charges in the past and may continue to do so in the future. In 2014, Avon Products Inc. (Avon) was charged with violating the *FCPA* because it failed to implement controls to prevent and detect bribe payments in the form of gifts at its Chinese subsidiary.[175] In addition to a US$135 million fine for SEC violations and criminal charges, Avon was required to have its compliance program reviewed by an independent compliance monitor for 18 months and self-report on its compliance efforts for an additional 18 months.[176] In September 2016, Och-Ziff Capital Management Group agreed to a nearly $200 million settlement with the SEC for paying bribes to secure mining rights and corruptly influence public officials in Libya, Chad, Niger, Guinea, and the Democratic Republic of the Congo.[177] The SEC order found that Och-Ziff failed, in particular, to devise and maintain an adequate system of internal controls to prevent corrupt payments to foreign government officials.[178] As part of the settlement, Och-Ziff agreed to implement enhanced internal accounting controls and policies, designate a Chief Compliance Officer who, for a period of five years, would not simultaneously hold any other officer position at Och-Ziff, and to retain an independent monitor for a period of no less than 36 month.[179] The SEC's enforcement actions against Avon and Och-Ziff speak to the importance of implementing an effective compliance program.

6.3.2.1 The DOJ and SEC: A Resource Guide

The DOJ and SEC view a corporate compliance program as essential to ensuring compliance with the *FCPA*, as the program will assist in detection and prevention of violations. The DOJ and SEC have released *A Resource Guide to the US Foreign Corrupt Practices Act* (*Resource Guide*) to assist organizations in their compliance with the *FCPA*. The *Resource Guide* provides information for all sizes and types of businesses on implementing effective anti-corruption programs within their organization.

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[175] US Securities Exchange Commission, Press Release, 2014-285, "SEC Charges Avon with *FCPA* Violations" (17 December 2014), online: <http://www.sec.gov/news/pressrelease/2014-285.html>.
[176] *Ibid*.
[177] US Securities and Exchange Commission, Press Release, 2016-203, "Och-Ziff Hedge Fund Settles FCPA Charges" (29 September 2016), online: <https://www.sec.gov/news/pressrelease/2016-203.html>.
[178] US Securities and Exchange Commission, "Order Instituting Administrative and Cease-and-Desist Proceedings pursuant to Section 21C of the Securities Exchange Act of 1934, and Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, Making Findings, Imposing Remedial Sanctions and a Cease-and-Desist Order, and Notice of Hearing", Administrative Proceeding File No. 3-17595, at 5, online: <https://www.sec.gov/litigation/admin/2016/34-78989.pdf>.
[179] *Ibid* at 32-33, 36-44.

The *Resource Guide* also indicates that companies with adequate compliance programs will fare better if they, despite their compliance program, somehow violate the *FCPA*. The implementation and enforcement of an adequate compliance program is a major factor in encouraging the DOJ and SEC to resolve charges through a deferred prosecution agreement (DPA) or a non-prosecution agreement (NPA).[180] As noted, having an effective compliance program will also influence whether a DPA or NPA is made, the terms of the corporate probation and the amount of the fine. The DOJ and SEC look for three basic requirements when evaluating a compliance program: (1) effective design of the program, (2) good faith application of the program, and (3) actual effectiveness.[181] At the time of sentencing, a culpability score is assigned to the company.[182] This score is multiplied against the original fine determination and can reduce the fine to 5% of the original fine or increase it by four times the original fine. One aspect of determining the culpability score is the organization's compliance program (see Chapter 7, Sections 4.5 and 4.6).

According to the *Resource Guide*, "effective compliance programs are tailored to the company's specific business and to the risks associated with that business. They are dynamic and evolve as the business and the markets change."[183] When implemented throughout the entire organization, a program that is carefully calculated to address the specific risks faced by the business will help "prevent, detect, remediate, and report misconduct, including *FCPA* violations."[184] The *Resource Guide* stresses the importance of tailoring the compliance program to fit the needs of the organization:

> One-size-fits-all compliance programs are generally ill-conceived and ineffective because resources inevitably are spread too thin, with too much focus on low-risk markets and transactions to the detriment of high risk areas. Devoting a disproportionate amount of time policing modest entertainment and gift-giving instead of focusing on large government bids, questionable payments to third-party consultants, or excessive discounts to resellers and distributors may indicate that a company's compliance program is ineffective.[185]

Implementing an effective compliance program requires an assessment of the types of risks a company faces and an analysis of the best use of compliance dollars to prevent corruption in the organization. The *Resource Guide* stresses the importance of the following aspects in an effective compliance program:

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[180] US, Department of Justice & Securities Exchange Commission, *A Resource Guide to the US Foreign Corrupt Practices Act* [DJSEC Resource Guide (2012)] (US Government Printing Office, 2012) at 56, online: <https://www.justice.gov/criminal-fraud/fcpa-guidance>.

[181] *Ibid*.

[182] *Ibid*.

[183] *Ibid*.

[184] *Ibid*.

[185] *Ibid* at 58.

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- Commitment from Senior Management and a Clearly Articulated Policy Against Corruption
- Code of Conduct and Compliance Policies and Procedures
- Oversight, Autonomy, and Resources
- Risk Assessment
- Training and Continuing Advice
- Incentives and Disciplinary Measures
- Third Party Due Diligence and Payments
- Confidential Reporting and Internal Investigation
- Continuous Improvement: Periodic Testing and Review
- Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration.[186]

Additionally, the Resource Guide alerts companies to the international organizations' guidelines previously discussed.

6.3.2.2 US DOJ Sentencing Guidelines

The *US Sentencing Guidelines* set out seven minimum standards for complying with due diligence requirements and promoting an ethical organizational culture. As these are the DOJ's own guidelines and not legislation or regulations, they are not binding; however, the DOJ frowns upon deviation from these guidelines absent a very good reason to do so. The guidelines specify that the organizations must:

- establish standards and procedures to prevent and detect criminal conduct;
- ensure that the compliance program is coming from the top down throughout the organization;
- make reasonable efforts to ensure that personnel with substantial authority are not known to have engaged in illegal activities;
- make reasonable efforts to communicate standards and procedures to personnel with substantial authority and the governing body;
- take reasonable steps to monitor compliance with the program and audit the program for effectiveness;
- promote and enforce the program throughout the organization and appropriately incentivize compliance; and
- respond appropriately when criminal conduct is detected, including making any necessary modifications to the compliance program.[187]

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[186] *Ibid* at 57-62.

[187] Unites States Sentencing Commission, *Guidance Manual* (2016), c. 8, §8B2.1, online: <http://www.ussc.gov/guidelines/2016-guidelines-manual>.

The *Sentencing Guidelines* are a starting point for organizations to determine what is required for an adequate compliance program. The *Guidelines* advise that in determining how to meet each requirement, factors to consider are (i) industry practice and government regulation; (ii) an organization's size; and (iii) similar misconduct.[188] The *Sentencing Guidelines*, created to guide prosecutors in seeking the appropriate punishment for corporations, "have become the benchmark for US corporations seeking to both satisfy corporate governance standards and to minimize sentencing exposure in the event of a prosecution and conviction."[189] These guidelines are stated to be a minimum requirement and thus do not necessarily reflect best practices. More information about these guidelines can be found in Chapter 7, Section 4.

6.4 UK Framework

6.4.1 *Bribery Act 2010*

Section 7(1) of the *Bribery Act* creates a strict liability offence if an organization fails to prevent bribery by a person associated with it, while section 7(2) provides a complete defence to this offence if the organization has "adequate procedures" in place. Section 7 provides:

> (1) A relevant commercial organization (C) is guilty of an offence under this section if a person associated (A) with C bribes another person intending -
>
> (a) to obtain or retain business for C, or
>
> (b) to obtain or retain an advantage in the conduct of business for C.
>
> (2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.[190]

Under section 7, "businesses who fail to have adequate procedures in place and whose 'associated persons' commit bribery are at risk of being prosecuted."[191] The effect of this provision is that anti-bribery compliance programs are mandatory for all "relevant commercial organizations" if they want to avoid liability for bribery offences committed by persons associated with the organization. Section 9 of the *Bribery Act* requires the Secretary of State to "publish guidance about procedures that relevant commercial organizations can put in place to prevent persons associated with them from committing bribery."[192] The guidelines were published in April 2011.

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[188] *Ibid*, c. 8, Commentary to §8B2.1, para 4(B).
[189] Tarun (2013) at 94.
[190] *Bribery Act 2010* (UK), c 23, s 7.
[191] Colin Nicholls QC et al, *Corruption and Misuse of Public Office*, 2nd ed (Oxford University Press, 2011) at 90.
[192] *Bribery Act 2010* (UK), s 9.

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In December 2016, Sweett Group PLC pleaded guilty to failing to prevent an act of bribery committed by its subsidiary, Cyril Sweett International Limited, in order to secure a contract with Al Ain Ahlia Insurance Company (AAAI) for the building of the Rotana Hotel in Abu Dhabi.[193] In February 2016, Sweett Group PLC was sentenced and ordered to pay £2.25 million, thus becoming the first company to be fined under s. 7 of the *Bribery Act*.[194] The SFO's successful prosecution of Sweett Group speaks to the importance of implementing an adequate anti-corruption compliance program.

6.4.2 Guidelines and Interpretation

UK case law provides insight on the interpretation of the phrase "carries on business" in section 7. The courts have found that a singular transaction, if essential to the carrying on of business or carried out in the course of business, can constitute carrying on business under section 7.[195] The courts have also found a business to be carried on in the case of a company engaged only in collecting debts owed and paying off creditors.[196]

On March 30, 2011, the Ministry of Justice (MOJ) published statutory *Guidance*, which came into force on July 1, 2011.[197] On the same day, the Serious Fraud Office (SFO) and Crown Prosecution Service (CPS) published the *Bribery Act 2010: Joint Prosecution Guidance of the Director of the SFO and the DPP (the Joint Guidance)* to ensure consistency in prosecutions.[198]

6.4.2.1 *Bribery Act 2010*: Guidance

The MOJ *Guidance* provides insight into the objectives of the *Anti-Bribery Act 2010*, particularly in regard to section 7:

> The objective of the Act is not to bring the full force of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf. So in order to achieve an appropriate balance, section 7 provides a full defence. This is in recognition of the fact that no bribery prevention regime will be capable of preventing bribery at all times. However, the defence is also included in order to encourage

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[193] UK Serious Fraud Office, "Sweett Group PLC pleads guilty to bribery offence" (18 December 2015), online: <https://www.sfo.gov.uk/2015/12/18/sweett-group-plc-pleads-guilty-to-bribery-offence/>.

[194] UK Serious Fraud Office, "Sweett Group PLC sentenced and ordered to pay £2.25 million after Bribery Act conviction" (19 February 2016), online: <https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/>.

[195] *Morphitis v Bernasconi,* [2003] EWCA Civ 289 at paras 42-49, [2003] 2 WLR 1521.

[196] *Re Sarflax Ltd* [1979] Ch 592 (Ch D) 993, 1 All ER 529.

[197] UK Min J Guidance (2012).

[198] Nicholls QC et al (2011) at 131.

> commercial organisations to put procedures in place to prevent bribery by persons associated with them.[199]

The MOJ *Guidance* sets out six principles to inform evaluation of a company's compliance program:[200] (1) proportionate procedures; (2) top level commitment; (3) risk assessment; (4) due diligence; (5) communication; and (6) monitoring and review. The principles are intended to focus on the outcome of preventing bribery and corruption and should be applied flexibly, as commercial organizations encounter a wide variety of circumstances that place them at risk.[201]

(1) Proportionate Procedures

This principle requires that the organization's anti-bribery procedures be proportionate to the bribery risks the organization faces and proportionate to the "nature, scale and complexity of the commercial organisation's activities."[202] The use of the term "procedure" encompasses both the organization's policies and the implementing procedures for those policies. The level of risk the organization faces may be affected by factors such as the size of the organization and the type and nature of the persons associated with it.[203] In the commentary to the guidance, the MOJ suggests topics that will normally be included in anti-bribery policies as well procedures that could be implemented to prevent bribery.

(2) Top Level Commitment

This principle requires the board of directors, or equal top level management of the organization, to be committed to the prevention of bribery by persons within or working with their organization.[204] It also states that top level management should "foster a culture within the organization in which bribery is never acceptable."[205]

(3) Risk Assessment

This principle requires the organization to conduct periodic assessments of the internal and external risks that the organization faces.[206] These assessments should be informed and documented.[207] Risk assessments will be discussed more fully later in this chapter.

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[199] UK Min J Guidance (2012) at 8.
[200] *Ibid* at 20.
[201] *Ibid*.
[202] *Ibid* at 21.
[203] *Ibid*.
[204] *Ibid* at 23.
[205] *Ibid*.
[206] *Ibid* at 25.
[207] *Ibid*.

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(4) Due Diligence

This principle requires the organization to apply appropriate due diligence procedures when its employees and agents are performing services for or on behalf of the organization.[208] Due diligence will be discussed more fully later in this chapter.

(5) Communication (including training)

This principle requires the organization to ensure that its anti-corruption policies and procedures are known and understood throughout the organization.[209] This requires internal and external communications and training.[210] External communications are suggested in order to assure people outside of the organization of the organization's commitment to compliance with anti-bribery laws, as well as to discourage people intending to engage in bribery from approaching the organization.[211] Training is necessary to inform employees of what bribery is and should be tailored to the risks involved in the employee's position.[212]

(6) Monitoring and Review

This principle requires the organization to monitor and review its procedures so the organization can make any necessary changes.[213] The MOJ *Guidance* suggests that organizations may want to involve external verification or assurance of the effectiveness of their compliance procedures.[214]

6.4.2.2 *Bribery Act 2010*: Joint Prosecution Guidance

The SFO and the CPS developed the *Joint Prosecution Guidance* to ensure consistent enforcement of the *Act* across jurisdictions. The *Joint Prosecution Guidance* sets out factors that weigh against or in favour of prosecution. For example, prosecution will be favoured if a company has "a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have not been correctly followed."[215] Non-prosecution will be favoured if these same procedures and policies have been followed.[216]

The *Guidance* addresses defences to section 7 offences. The defendant organization must show the existence of adequate procedures on a balance of probabilities. The courts will consider the adequacy of a company's procedures on a case-by-case basis because adequate

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[208] *Ibid* at 27.
[209] *Ibid* at 29.
[210] *Ibid.*
[211] *Ibid* at 29-30.
[212] *Ibid* at 30.
[213] *Ibid* at 31.
[214] *Ibid.*
[215] UK, *Bribery Act 2010: Joint prosecution guidance of the Director of the Serious Fraud Office and Director of Public Prosecutions* (Her Majesty's Stationary Office, 2011) at 9.
[216] *Ibid.*

procedures are entirely dependent on the risks faced by and the nature and size of each company. Prosecutors are required to take into account the MOJ *Guidance* when assessing whether the organization's anti-corruption procedures are adequate.

6.5 Canadian Framework

6.5.1 Corruption of Foreign Public Officials Act

The *CFPOA* does not create a legal requirement for organizations to implement an anti-corruption compliance program. Nevertheless, many organizations are looking for guidance from the government on how to comply with the *CFPOA*.[217] The Canadian government's guidance on the *CFPOA* is, however, brief and general and does not address the creation of adequate compliance programs.[218] Unlike the US and UK, there is no meaningful prosecutorial guidance on either the content or prosecutorial impact of reasonable anti-corruption compliance programs (see Chapter 6, Section 6.3). At this point, Canadian companies have to rely on the courts' interpretation of the legislation in order to determine Canadian standards for implementing effective anti-corruption programs. However, to date, there is only one case (*Niko Resources*) where a Canadian court has indicated what a reasonable compliance program would look like for a mining company carrying on business in Bangladesh.

6.5.2 Judicial Guidance

In 2011, Niko Resources Ltd was charged with bribery under the *CFPOA* after a six-year investigation. The company pled guilty, was fined CAD$9.5 million and was placed on probation for three years, requiring independent audits and court supervision. In its probation order, the Alberta Court of Queen's Bench worked with the US DOJ in drafting the terms of the probation order, particularly the compliance program requirements. It provides some guidance on how Canadian courts may view an effective anti-corruption compliance program. Although it is a trial level decision and therefore has limited binding effect, courts will examine the decision in the future when deciding what constitutes an adequate anti-corruption compliance program. Clearly, the Court in *Niko Resources* relied to some degree on US standards for compliance programs, as it adopted terminology found in US DPAs in relation to compliance programs. The Alberta Court of Queen's Bench required the following from Niko Resources as part of its probation order:

- internal accounting controls for maintaining fair and accurate books and records;

[217] Norm Keith, *Canadian Anti-Corruption Law and Compliance* (LexisNexis, 2013) at 146.
[218] Department of Justice, *The Corruption of Foreign Public Officials Act: A Guide* (Canada, Department of Justice, 1999), online: <http://publications.gc.ca/collections/Collection/J2-161-1999E.pdf>.

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- a rigorous anti-corruption compliance code designed to detect and deter violations of *CFPOA* and other anti-corruption laws, which includes:
    - a clearly articulated written policy against violations of the *CFPOA* and other anti-bribery laws;
    - strong, explicit and visible support from senior management;
    - compliance standards and procedures that apply to all directors, officers, employees, and outside parties acting on behalf of the company; and
    - policies governing gifts, hospitality, entertainment and expenses, customer travel, political contributions, charitable donations and sponsorships, facilitation payments and solicitation and extortion.
- conducting risk assessment in order to develop these standards and procedures based on specific bribery risks facing the company and taking into account a number of specified factors, including the company's geographical organization, interactions with various types and levels of government officials, industrial sectors of operation, and involvement in joint venture agreements;
- reviewing and updating anti-corruption compliance measures at least annually;
- assigning anti-corruption compliance responsibility to senior corporate executive(s) with direct reporting to independent monitoring bodies, such as internal audit or the Board of Directors;
- a system of financial and accounting procedures designed to ensure fair and accurate books and records and that they cannot be used to effect or conceal bribery;
- periodic training and annual certification of directors, officers employees, agents and business partners;
- systems for providing anti-corruption guidance and advice within the company and to business partners, confidential reporting of possible contraventions, protection against retaliation, and responding to reports and taking appropriate action;
- disciplinary procedures for violations of anti-corruption laws and policies;
- due diligence and compliance requirements for the retention and oversight of agents and business partners, including the documentation of such due diligence, ensuring they are aware of the company's commitment to anti-corruption compliance, and seeking reciprocal commitments;
- standard provisions in agreements with agents and business partners to prevent anti-corruption violations – representations and

undertakings, the right to audit books and records of agents and business partners, and termination rights in the event of any breach of anti-corruption law or policy; and

- periodic review and testing of anti-corruption compliance systems.[219]

In other cases involving offences under the *CFPOA*, Canadian courts have not imposed corporate compliance programs as part of their sentences. Although the RCMP is reportedly investigating around 10 to 15 possible corruption cases, until more sentencing judgments are rendered, the best guidelines for Canadian companies in relation to adequate compliance programs are found in *Niko Resources Ltd*. However, it is unclear how compliance programs will impact prosecutorial decisions and sentence mitigation. For more information about Canadian cases involving the *CFPOA*, see Chapter 7, Section 6.

6.6 Critiques of Compliance Programs

As guidelines and frameworks to prevent corruption are becoming more prevalent, there is criticism that increased enforcement is resulting in wasteful over-compliance. Instead of investing in efficient compliance programs, companies are implementing programs intended only to impress prosecutors.[220] US Senators Amy Klobuchar and Christopher Coons argue that over-compliance can negatively impact the economy through decreasing product development, export production and expansion of the workforce.[221]

Another criticism is that the US's over enforcement of the *FCPA* has caused compliance fatigue:

> Rules and controls and training programs are essential in any organization but at some point, the burdens imposed by intricate matrices of rules, complete reporting and approval processes, and seemingly never-ending training requirements become a net drag on the business.... A system that is overly-controlled, that has passed its optimal point of compliance activities, will engender backlash and bewilderment from those who are being controlled. Managers and other employees will balk at the sclerotic network of rules and processes, and they won't – and in many instances may not be able to – comply. Rules and signoffs will be overlooked and training courses never taken.[222]

As governments seek compliance with their laws, attention must be directed to the question of whether laws and enforcement actions are having their intended effect: are they actually

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[219] John Boscariol, "A Deeper Dive Into Canada's First Significant Foreign Bribery Case: *Niko Resources Ltd*", Case Comment (2011), online: McCarthy Tetrault <http://mccarthy.ca/article_detail.aspx?id=5640>.
[220] Miriam Baer, "Insuring Corporate Crime" (2008) 83 Indiana LJ 1035 at 1036.
[221] Koehler (2014) at 331.
[222] LRN Corporation, *Culture and the Optimal Degree of Compliance* (2011), online: <http://lrn.com/ethics-compliance/>.

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reducing the prevalence of global corruption? Continual analysis of the most effective ways to prevent corruption is required to ensure that governments are not using excessive enforcement orders to serve a political agenda.

A further problem with anti-corruption compliance programs is the issue of program design: the program designers tend to be "external to the context of deployment and use."[223] "Disciplinary externality" occurs when the designer is not the person who will be implementing the program and has a different work background than those who will be implementing the program.[224] Work background includes factors like the educational background, departmental culture and "language" spoken by the designer and implementer.[225] "Country externality" occurs when a program designer is from a different country than those implementing and using the program, and may result in incompatibility with the political, social and economic conditions of the country of implementation.[226]

7. RISK ASSESSMENT

7.1 What is a Risk Assessment?

Risk assessments are premised on the concept that "[p]reventing and fighting corruption effectively, and proportionately, requires an understanding of the risks an enterprise may face."[227] Risk assessment is a necessary starting point for all anti-corruption compliance programs, as well as a way to review the success of an existing program and assess where changes are needed. Risk assessments examine an organization's exposure to internal and external risks of corruption and bribery.[228] An overview of risk areas allows the company to determine necessary compliance measures and target high-risk business sectors or countries. Tarun describes how organizations can use risk assessments as a tool:

> A risk assessment is inter alia designed to evaluate the compliance roles and activities of the board of directors, the chief executive officer, chief financial officer, general counsel, and the internal audit staff and the company as a whole; to review international operations and contracts, anti-corruption training, and due diligence in hiring and mergers and acquisitions; and to

[223] Richard Heeks & Harald Mathisen, "Understanding success and failure of anti-corruption initiatives" (2012) 58 Crime, L and Soc Change 533 at 543.
[224] *Ibid.*
[225] *Ibid.*
[226] *Ibid.*
[227] United Nations Global Compact, "A Guide for Anti-Corruption Risk Assessment" (UN Global Compact, 2013) at 10.
[228] UK Min J Guidance (2012) at 25.

> then weigh the multinational company's country risks, regional and/or in-country management weaknesses, and prior enforcement history issues.[229]

A risk assessment seeks to promote informed decision making.[230] Effective risk assessments are seen to fulfill four goals:

> (1) Identify areas of business and activities that are at risk of corruption;
> (2) Evaluate and analyze the risks identified and prioritize all relevant risks of corruption;
> (3) Carry out a gap analysis of the current internal standard of procedures, systems, and controls; and
> (4) Undertake a root cause analysis of internal and external causes.[231]

Risk assessments not only provide the company with an overview of risks in order to prevent those risks from materializing, but also demonstrate to law enforcement personnel that the company is proactively seeking to comply with the law.[232] As with an anti-corruption compliance program, the nature and scope of the risk assessment should be proportionate to the size, activities, customers and markets of the organization. A risk assessment will help determine the scope and nature of the company's anti-corruption compliance program, ensuring that resources are allocated to major risk areas and spent where they produce the greatest benefit. As enforcement agencies do not look fondly on "cookie cutter" compliance programs or compliance programs that are only found on paper, it is important that any investments made in a compliance program produce effective results while consuming resources that match the benefit gained. Effective anti-corruption compliance programs require an up-to-date and accurate understanding of the risks the company encounters. Risk assessments should not be a one-time event; regular reviews should be made to ensure that resources are properly deployed to deal with evolving risks.[233] Not only does a corporation's business evolve, but the external environment evolves as governments and laws change. The OECD *Recommendations* provide guidance on the use of risk assessments for companies:

> Effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery should be developed on the basis of a risk assessment addressing the individual circumstances of a company, in particular the foreign bribery risks facing the company (such as its geographical and industrial sector of operation). Such circumstances and risks should be regularly monitored, re-assessed, and adapted as

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[229] Tarun (2013) at 99.
[230] *Anti-Corruption Ethics and Compliance Handbook for Business* (2013) at 10.
[231] Giavazzi, Cottone & De Rosa (2014) at 129.
[232] Jeffrey Harfenist & Saul Pilchen, "Anti-Corruption Risk Assessments: A Primer for General Counsels, Internal Auditors, and Other Compliance Personnel" (2010) 2 Financial Fraud LR 771 at 773.
[233] United Nations Global Compact, "A Guide for Anti-Corruption Risk Assessment" (UN Global Compact, 2013).

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necessary to ensure the continued effectiveness of the company's internal controls, ethics, and compliance programme or measures.[234]

7.2 What Risk Areas Are Being Assessed?

According to the UK MOJ *Guidance*, there are ten types of risk that fall into two broad categories: external risk and internal risk. The external risks that should be assessed during the risk assessment are: country risk, sectoral risk, transaction risk, business opportunity risk, and business partnership risk.[235] Country risk is affected by such factors as government structure, the role of the media and whether the country has implemented and enforced effective anti-corruption legislation.[236] Sectoral risk recognizes that different sectors or industries are at a higher risk of corruption than others. For example, corruption is more prevalent in extractive industries. Certain types of transactions also entail higher risks of corruption. Campaign donations and charitable donations are transactions that have traditionally been prone to corruption. Business opportunity risk is heightened when working with a multitude of contractors or intermediaries on projects that do not have clear objectives. Business partnership risk refers to the increased risk that comes with working with intermediaries or partners, especially when utilizing the connections they have. This risk is especially high when their connections are with prominent public officials. These external risks require risk assessments when companies engage in business in a new country or acquire another company. Risks assessments may also be appropriate prior to starting a large scale project.

The UK MOJ has also identified a number of internal risk factors: (1) deficiencies in employee training, skills and knowledge; (2) a bonus culture that rewards excessive risk taking; (3) lack of clarity in policies on hospitality and promotional expenditures and political or charitable contributions; (4) lack of clear financial controls; and (5) lack of a clear anti-bribery message from top-level management.[237] When conducting a risk assessment, these risks may be rated by their probability of occurrence and the potential impact if the risk were to come to fruition (this is called inherent risk). Companies should then assess the controls required to reduce these risks.

Tarun's *Foreign Corrupt Practices Act Handbook* outlines 15 key risk factors that should be considered in a risk assessment prior to the acquisition and merger of another company. These are:

(1) A presence in a BRIC country and other countries where corruption risk is high;

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[234] OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, 26 November 2009 at Annex II.

[235] UK Min J Guidance (2012).

[236] For more information on countries' risks of corruption, see Transparency International's rating system.

[237] UK Min J Guidance (2012) at 26.

(2) An industry that has been the subject of recent anti-bribery or FCPA investigations;

(3) Significant use of third party agents;

(4) Significant contracts with a foreign government or instrumentality;

(5) Significant revenue from a foreign government or instrumentality;

(6) Substantial projected revenue growth in a foreign country;

(7) High amount or frequency of claimed discounts, rebates, or refunds in a foreign country;

(8) Substantial system of regulatory approvals in a foreign country;

(9) History of prior government anti-bribery or FCPA investigations or prosecutions;

(10) Poor or no anti-bribery or FCPA training;

(11) Weak corporate compliance program and culture, in particular from legal, sales, and finance perspectives at the parent level or in foreign country operations;

(12) Significant issues in past FCPA audits;

(13) The degree of competition in the foreign country;

(14) Weak internal controls at the parent or in foreign country operations; and

(15) In-country managers who appear indifferent or uncommitted to US laws, the FCPA, and/or anti-bribery laws.[238]

In its guide on anti-corruption third party due diligence for small and medium-size enterprises, the International Chamber of Commerce considers that a risk assessment must include the following five factors: (1) whether the third party is an entity owned or controlled by the government or a public official, or whether the third party will be interacting with public officials in order to perform the contract; (2) the country the third party is based in and the country where the services are being performed; (3) the industry the third party operates in; (4) the value of the contract; and (5) the nature of the work or services to be performed.[239]

7.3 Conducting an Effective Risk Assessment

At its most basic, a risk assessment involves determining the risks a company is willing to live with, as elimination of all risks is impossible. It then involves valuing the risks faced by the company based on probability of occurrence and the consequences of the risk being realized. This process reveals a company's inherent risk. A risk assessment should then

[238] Tarun (2013) at 140-41.

[239] International Chamber of Commerce, *ICC Anti-corruption Third Party Due Diligence: A Guide for Small- and Medium-sized Enterprises* (2015), Document 195-64 Rev2, at 8-9, online: <https://iccwbo.org/publication/icc-anti-corruption-third-party-due-diligence/>.

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evaluate what actions can be taken to mitigate those risks, and the costs associated with doing so. The company will then consider the residual risk (inherent risk less the mitigated risk), which will likely never reach zero. If the company's residual risk is higher than the risk the company is willing to tolerate, the company will need to add additional protections or reconsider the protections it has in place.[240]

When assessing risks, companies should consult a variety of sources to ensure that risk areas are not overlooked. UNODC has suggested five ways to determine the risks a company faces.[241] The first is to determine the legal requirements applicable to the company's operations, remembering that highly bureaucratic processes entail greater risks of corruption, particularly with regard to bribery and/or facilitation payments.[242] Second, the company should consult with its internal and external stakeholders, such as employees and business partners.[243] These stakeholders are likely able to identify risks of corruption that may have been initially overlooked, and also may provide valuable insight on ways to mitigate the risk. Third, the company should consider previous corruption cases to see where other companies failed or had weaknesses.[244] Fourthly, a company may wish to hire external consultants; these consultants can provide a fresh set of eyes and point out risks that have been overlooked by internal controls and reviews.[245] Lastly, companies should review risk assessment guidelines to incorporate best practices into their assessments.[246]

Companies may consider engaging external experts and consultants to conduct an effective risk assessment. For instance, TRACE International, a non-profit business association founded in 2001 by in-house anti-bribery compliance experts, provides its members with anti-bribery compliance support, and TRACE Incorporated offers risk-based due diligence, anti-bribery training and advisory services to both members and non-members.[247] In collaboration with the RAND Corporation, TRACE International developed the TRACE Matrix, a global business bribery risk index for compliance professionals, which scores 199 countries in four domains—business interactions with the government, anti-bribery laws and enforcement, government and civil service transparency, and capacity for civil society oversight, and may be used by businesses to understand the risks of business bribery in a particular country.[248]

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[240] For more information on conducting a risk assessment, see the *Anti-Corruption Ethics and Compliance Handbook for Business* (2013), published by the OECD, UNODC and The World Bank.
[241] UNODC (2013) at 10.
[242] *Ibid* at 10.
[243] *Ibid* at 11.
[244] *Ibid.*
[245] *Ibid.*
[246] *Ibid.*
[247] TRACE, "About TRACE", online: <https://www.traceinternational.org/about-trace>.
[248] TRACE, "TRACE Matrix", online: <https://www.traceinternational.org/trace-matrix>.

7.4 US Law

The DOJ and SEC see risk assessments as an essential component of an effective anti-corruption compliance program.[249] Both organizations stress the importance of implementing a risk-based compliance program and risk-based due diligence.

7.5 UK Law

Principle 3 of the UK MOJ's *Guidance* provides insight into what constitutes an "adequate process" for a risk assessment in order to form a full defence to strict liability under section 7 of the *Bribery Act*:

> The commercial organization assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.[250]

The *Guidance* suggests that a common sense approach should be taken to this principle to ensure that efforts are proportionate.[251] In order to comply with the principle, assessments for multinational firms should be performed annually at a minimum. To be informed, assessments require top-level management oversight and the input of various legal, compliance, financial, audit, sales and country managers. Documentation is required to prove that the risk assessment took place, particularly if the adequacy of the risk assessment comes into question.[252] The *Guidance* goes on to say that risk assessment procedures will generally include the following characteristics:

- oversight of the risk assessment by top-level management;
- appropriate resourcing – this should reflect the scale of the organization's business and the need to identify and prioritize all relevant risks;
- identification of the internal and external information sources that will enable risk to be assessed and reviewed;
- due diligence inquiries; and
- accurate and appropriate documentation of the risk assessment and its conclusions.[253]

7.6 Canadian Law

The Court in *Niko Resources* required the company to complete a risk assessment:

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[249] DJSEC Resource Guide (2012) at 58.
[250] UK Min J Guidance (2012) at 25.
[251] Nicholls QC et al (2011) at 135.
[252] Tarun (2013) at 439-40.
[253] UK Min J Guidance (2012) at 25.

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> The company will develop these compliance standards and procedures, including internal controls, ethics and compliance programs, on the basis of a risk assessment addressing the individual circumstances of the company, in particular foreign bribery risks facing the company, including, but not limited to, its geographical organization, interactions with various types and levels of government officials, industrial sectors of operation, involvement in joint venture agreements, importance of licenses and permits in the company's operations, degree of governmental oversight and inspection, and volume and importance of goods and personnel clearing through customs and immigration.[254]

Canadian legislation and Canadian courts have not provided any guidelines on implementing risk assessments as part of a compliance program; however, *Niko Resources* shows the Court's inclination to assess the compliance procedures in place on the basis of the risk assessment the company is expected to complete. *Niko Resources* demonstrates that Canadian prosecutors may work with the US DOJ and use standard aspects of American orders to make recommendations to the courts regarding ways companies can be directed to comply with *CFPOA*.[255]

8. DUE DILIGENCE REQUIREMENTS

As already noted, a risk assessment is one of the first steps to take in fulfilling due diligence requirements for various transactions.[256] The risk assessment will help focus the due diligence procedures efficiently and effectively. Risk-based due diligence, the process of assessing the level of risk posed to determine the level of due diligence requirements,[257] should be conducted at a minimum during mergers and acquisitions and when working with third-party intermediaries.[258]

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[254] John Boscariol, "Canada: Anti-Corruption Compliance Message Received? Risk Assessment is Your Next Step", McCarthy Tetrault (16 August 2012), online: <www.mccarthy.ca/article_detail.aspx?id=5985>.

[255] John Boscariol , "A Deeper Dive Into Canada's First Significant Foreign Bribery Case: *Niko Resources Ltd"*, McCarthy Tetrault (21 November 2011), online: <http://www.mccarthy.ca/article_detail.aspx?id=5640>.

[256] Ernst & Young, *Third-party due diligence: Key components of an effective, risk-based compliance program* (2011) at 5, online: <http://www.ey.com/Publication/vwLUAssets/Third-party_due_diligence/$FILE/Third-Party-Due-Diligence.pdf>.

[257] *Ibid.*

[258] This is not to suggest that due diligence should only be conducted in these scenarios. Investments, contracts with governments and large sales or service contracts also may require due diligence procedures.

8.1 Third Party Intermediaries

Companies often use third parties to conceal corrupt acts, particularly bribes to foreign officials.[259] Because many countries make companies liable for the acts of their agents, it is important to conduct adequate due diligence on third party intermediaries, particularly when working in high risk environments or on high-risk transactions. The essential purpose of due diligence in relation to third party intermediaries is to increase knowledge of the third party.[260] The DOJ and SEC guidelines indicate three criteria in undergoing due diligence on third party intermediaries. First, companies need to understand "the qualifications and associations of its third party partners" and particularly any relationship with foreign officials. Second, companies should understand the business rationale for including a third party intermediary in the transaction and define the role that the third party will serve. Third, a company should conduct ongoing monitoring of its third party relationships. The World Economic Forum suggests four steps in conducting risk-based due diligence on third parties. The first is to understand third parties and determine which ones should be subject to due diligence procedures; the second is to assess the level of risk associated with the third party; the third is to conduct the due diligence; and lastly, the process should be managed to identify and mitigate risks.[261]

The International Chamber of Commerce suggests that, for small and medium sized entities, anti-corruption third party due diligence may be conducted without the use of external consultants.[262] It lists the following six "pillars" upon which background information should be sought: (1) beneficial ownership; (2) financial background and payment of contract; (3) competency of third party; (4) history of corruption and adverse news (from public records resources); (5) reputation (consulting third party's commercial references); and (6) approach to ethics and compliance.[263] In particular, to establish competency of the third party, a company should ask whether the third party (1) has experience in the industry and the country where the services are to be provided; (2) has necessary qualifications and experience to provide the services; (3) has provided a competitive estimate for the services to be provided; (4) has a business presence in the country where the services are to be provided; (5) has been recommended by a public official; (6) has requested urgent payments or unusually high commissions; (7) has requested payments to be made in cash, to a third party, or to a different country; (8) suggested they know the "right people" to secure the contract; and (9) has been selected in a transparent way.[264]

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[259] DJSEC Resource Guide (2012) at 60.

[260] World Economic Forum/Partnering Against Corruption Initiative, *Good Practice Guidelines on Conducting Third-Party Due Diligence,* (2013) at 7, online: <www3.weforum.org/docs/WEF_PACI_ConductingThirdPartyDueDiligence_Guidelines_2013.pdf>.

[261] *Ibid*.

[262] International Chamber of Commerce (2015), at 8-9.

[263] *Ibid* at 14.

[264] *Ibid* at 17.

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8.2 Transparency Reporting Requirements in Extractive Industries

8.2.1 Extractive Industries Transparency Initiative (EITI)

The Extractive Industries Transparency Initiative (EITI)[265] is "a global standard to promote the open and accountable management of oil, gas and mineral resources."[266] The standard requires implementing countries to disclose certain information regarding the governance of oil, gas, and mining revenues because poor natural resource governance has frequently led to corruption and conflict.[267] The EITI is an international multi-stakeholder initiative involving representatives from governments, companies, local civil society groups, and international NGOs.[268] The aim of the EITI is to "strengthen government and company systems, inform the public debate and promote understanding."[269]

In order to be an EITI member, a country must fulfill the seven requirements of EITI, which can be briefly summarized as follows:[270]

1. **Oversight by a multi-stakeholder group.**

   The multi-stakeholder group must involve the country's government and companies as well as "the full, independent, active and effective participation of civil society." The multi-stakeholder group must agree to and maintain a work plan that includes clear objectives for EITI implementation and a timetable that meets the deadlines established by the EITI Board.[271]

2. **Legal and institutional framework, including allocation of contracts and licenses.**

   An implementing country must disclose information about the legal framework and fiscal regime relating to its extractive industries. It must also disclose information relating to licences, contracts, beneficial ownership of companies, and state participation in the extractive industries. Implementing countries must maintain a publicly accessible register for licenses awarded to companies involved in the extractive industries.[272]

   An important new element in the February 2016 version of the EITI Standard is disclosure of beneficial ownership. In December of 2015, the EITI Board decided that

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[265] The full EITI standard can be found online at <https://eiti.org/document/standard>.
[266] EITI, "Who We Are," online: <https://eiti.org/about/who-we-are>.
[267] Kjerstin Andreasen and Victor Ponsford, eds, *2016 Progress Report: From Reports to Results* (EITI, 2016) at 7, online: <https://eiti.org/sites/default/files/documents/progressreport.pdf>.
[268] EITI International Secretariat, *EITI Board Manual* (EITI International Secretariat, 2016) at 3, online: <https://eiti.org/sites/default/files/documents/eiti_board_manual_updated_11_july_2016_website.pdf>.
[269] EITI, "Who We Are," online: <https://eiti.org/about/who-we-are>.
[270] Dyveke Rogan, ed, *The EITI Standard 2016* (EITI International Secretariat, 2016), online: <https://eiti.org/sites/default/files/documents/english-eiti-standard_0.pdf>.
[271] *Ibid* at 13-16.
[272] *Ibid* at 17-21.

disclosure of the beneficial ownership of companies that are involved in the extractive industries must be mandatory.[273] The second requirement of the EITI Standard sets out the timeline and requirements for how the disclosure for beneficial ownership will be gradually implemented beginning in 2017.[274] Disclosure of beneficial ownership for all companies, regardless of what sectors of the economy they operate in, is discussed in more detail in Chapter 5, Section 5.2.2.

3. Exploration and production

The third EITI requirement stipulates that implementing countries must report on the exploration for and production of oil, gas, and mineral resources.

4. Revenue collection

This requirement necessitates the disclosure of government revenue from the extractive industries as well as material payments to the government by companies involved in the extractive industries. A credible Independent Administrator must then reconcile these revenues and payments. Implementing countries must produce their first EITI report within 18 months of becoming a Candidate and must produce subsequent reports annually.[275]

5. Revenue allocations

Requirement 5 provides for disclosure of the allocation of revenue generated by the extractive industries.[276]

6. Social and economic spending

Implementing countries are required to disclose certain relevant information when companies involved in the extractive industries must make material social expenditures because of legal or contractual obligations. Implementing countries must also disclose information relating to quasi-fiscal expenditures and the impact of the extractive industries on the economy.[277]

7. Outcomes and impact

Requirement 7 seeks to promote public awareness and understanding of the extractive industry data. It also encourages public debate about the effective use of resource revenues. This section sets out requirements for the form, accessibility, and promotion of the information set out in the EITI reports of implementing countries. It also mandates review of the outcome and impact of EITI implementation.[278]

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[273] Andreasen and Ponsford, eds, (2016) at 5.
[274] Rogan, ed, (2016) at 17-21.
[275] *Ibid* at 22-26.
[276] *Ibid* at 26-27.
[277] *Ibid* at 28-29.
[278] *Ibid* at 29-31.

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8. Compliance and deadlines for implementing countries

This final requirement sets out in detail the timeframes set out by the EITI Board for the completion of the various actions required by the EITI, such as the publication of EITI Reports.[279]

When a country pledges to adhere to the EITI standard, it will be deemed a "Candidate" and have 2.5 years in order to meet all seven EITI requirements. The country will then be evaluated independently. If the country has met all requirements, it will be deemed "Compliant," and from then on it will be revaluated every three years.[280]

As of June 2016, fifty-one countries, including the US and UK, had implemented the EITI Standard. However, only 31 countries had been deemed EITI compliant at that time.[281] Canada has not signed on to become an EITI Candidate, but it is an EITI "supporting country."[282] Canada's legislation mandating reporting by the extractive industries, described below in Section 8.2.4, somewhat provides an equivalent level of reporting to the EITI standards.

8.2.2 US

In the United States, Section 1504 of the 2010 *Dodd-Frank Act* added Section 13(q) to the 1934 *Securities Exchange Act*, which now requires "resource extraction issuers" (all US and foreign companies that are required to file an annual report with the SEC and are engaged in the commercial development of oil, natural gas or minerals) to include in their annual reports information relating to any payment made by the resource extraction issuer, its subsidiary or an entity under its control, to the United States federal government or any foreign government for the purpose of the commercial development of oil, natural gas, or minerals.[283] The reports must specify the type and total amount of such payments made (i) for each project and (ii) to each government.

The SEC first adopted the rules implementing Section 13(q) in August 2012, but they were vacated by the US District Court for the District of Columbia in July 2013. The revised version of the rules was adopted by the SEC on June 27, 2016.[284] Under the rules, resource extraction issuers are required to disclose payments that are:

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[279] *Ibid* at 32-38.
[280] EITI, *Fact Sheet* (2016), online: <https://eiti.org/sites/default/files/documents/eiti_factsheet_en.pdf>.
[281] *Ibid*.
[282] *Ibid*.
[283] *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, HR 4173, s. 1504, online: <https://www.sec.gov/about/laws/wallstreetreform-cpa.pdf>.
[284] Securities and Exchange Commission, *Disclosure of Payments by Resource Extraction Issuers*, 17 CFR Parts 240 and 249b, Release No 34-78167, File No S7-25-15, online: <https://www.sec.gov/rules/final/2016/34-78167.pdf>. See also US Securities and Exchange Commission, "SEC Adopts Rules for Resource Extraction Issuers Under Dodd-Frank Act" (27 June 2016), online: <https://www.sec.gov/news/pressrelease/2016-132.html>.

(i) made to further the commercial development (exploration, extraction, processing, export or acquisition of a license for any such activity) of oil, natural gas or minerals;

(ii) not *de minimis* (i.e. any payment, whether made as a single payment or a series of related payments, which equals or exceeds $100,000 during the same fiscal year); and

(iii) within the types of payments specified in the rules, namely:

(a) taxes;

(b) royalties;

(c) fees (including license fees);

(d) production entitlements;

(e) bonuses;

(f) dividends;

(g) payments for infrastructure improvements; and

(h) community and social responsibility payments, if required by law or contract.[285]

Resource extraction issuers are required to comply with the new SEC rules starting with their fiscal year ending no earlier than September 30, 2018.[286]

8.2.3 UK

The United Kingdom Extractive Industries Transparency Initiative Multi Stakeholder Group (MSG) is charged with implementing the EITI in the UK. The UK has no legislation requiring companies to disclose payments, making the UK EITI a voluntary process. Her Majesty's Revenue and Customs department can only disclose information from extractive companies who give their consent. A total of 71 extractive companies participated in compiling the UK EITI's first report, published in 2016, while six oil and gas companies made material payments, but did not participate.[287] The report included detailed information about £3,233 million of revenues received by UK Government Agencies from extractive companies in 2014. An independent administrator has been able to reconcile £2,431 million of those payments to disclosures made by companies.[288]

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[285] *Ibid* at 25-28.

[286] *Ibid* at 28.

[287] United Kingdom Extractive Industries Transparency Initiative, *UK EITI Report for 2014*, (2016), at 5, 11, online: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537177/bis-16-194-uk-eiti-report-2014.pdf>.

[288] United Kingdom Extractive Industries Transparency Initiative (UK EITI), *UK EITI Report for 2014* (April 2016), online: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537177/bis-16-194-uk-eiti-report-2014.pdf>.

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8.2.4 Canada

In Canada, the *Extractive Sector Transparency Measures Act* (*ESTMA*), which came into force on June 1, 2015, requires specified companies involved in the extractive sector to report payments made to domestic and foreign governments.[289] The stated purpose of the *ESTMA* is:

> to implement Canada's international commitments to participate in the fight against corruption through the implementation of measures applicable to the extractive sector, including measures that enhance transparency and measures that impose reporting obligations with respect to payments made by entities. Those measures are designed to deter and detect corruption including any forms of corruption under any of sections 119 to 121 and 341 of the *Criminal Code* and sections 3 and 4 of the *Corruption of Foreign Public Officials Act*.[290]

The *ESTMA* applies to a corporation, trust, partnership or other unincorporated organization that is engaged in the commercial development of oil, gas or minerals, either directly or through a controlled organization, and (1) is listed on a stock exchange in Canada or (2) has a place of business in Canada, does business in Canada or has assets in Canada and, based on its consolidated financial statements, meets at least two of the following conditions for at least one of its two most recent financial years: (a) it has at least $20 million in assets, (b) it has generated at least $40 million in revenue, and (c) it employs an average of at least 250 employees.[291] Thus, an entity that has its shares listed on any stock exchange in Canada will be subject to the *ESTMA* reporting requirements even if it does not do business, does not have assets in Canada or does not meet the size-related criteria.

An entity must report every payment, whether monetary or in kind, that is made to a single payee in relation to the commercial development of oil, gas or minerals and that totals, as a single or multiple payments, CAD$100,000 or more within one of the following categories:

(1) Taxes (other than consumption taxes and personal income taxes);
(2) Royalties;
(3) Fees (including rental fees, entry fees and regulatory charges, as well as fees or other consideration for licences, permits or concessions);
(4) Production entitlements;
(5) Bonuses (including signature, discovery and production bonuses);

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[289] *Extractive Sector Transparency Measures Act*, SC 2014, c 39, s 376, online: <http://laws-lois.justice.gc.ca/eng/acts/E-22.7/FullText.html>.
[290] *Ibid*, s 6.
[291] *Ibid*, ss 2 (entity), 8(1).

(6) Dividends (other than dividends paid to payees as ordinary shareholders); and

(7) Infrastructure improvement payments.[292]

The term "payee" in the *ESTMA* includes:

(a) any government in Canada or in a foreign state;

(b) a body that is established by two or more governments; or

(c) any trust, board, commission, corporation or body or authority that is established to exercise or perform, or that exercises or performs, a power, duty or function of government for a government referred to in paragraph (a) or a body referred to in paragraph (b).[293]

Reports are due within 150 days after the end of the financial year and must include an attestation made by a director or officer of the entity, or an independent auditor or accountant, that the information in the report is true, accurate and complete.[294] An entity must keep records of its payments for a seven-year period from the day on which it provides the report.[295]

Non-compliance with the *ESTMA* and its reporting and record-keeping obligations is punishable on summary conviction by a fine of up to CAD$250,000.[296] As each day of non-compliance forms a new offence, an unreported payment could result in a multimillion-dollar liability. However, s. 26(b) of the *ESTMA* creates a defence to liability if the person or entity "establish that they exercised due diligence" to prevent the commission of the offence.

In 2016, the Ministry of Natural Resources released a *Guidance*[297] and *Technical Reporting Specifications*[298] to the *ESTMA*. Since the *ESTMA* came into force in 2015 it has not required companies to provide reports with respect to the financial year in progress on that day or any previous financial year, and the companies are expected to submit their first *ESTMA* reports no later than 2017.[299] The provisions of the *ESTMA* also do not apply to the payments made to Aboriginal governments in Canada before June 1, 2017.[300]

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[292] *Ibid*, ss 2 (payment), 9(2).
[293] *Ibid*, s 2 (payee).
[294] *Ibid*, ss 9(1), (4).
[295] *Ibid*, s 13.
[296] *Ibid*, s 24.
[297] Ministry of Natural Resources Canada, *Extractive Sector Transparency Measures Act – Guidance* (2016), online: <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ESTMA-Guidance_e.pdf>.
[298] Ministry of Natural Resources Canada, *Extractive Sector Transparency Measures Act – Technical Reporting Specifications* (2016), online <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ESTMA-Technical_e.pdf>.
[299] *Extractive Sector Transparency Measures Act*, SC 2014, c 39, s 30.
[300] *Ibid*, s 29.

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While the *ESTMA* has a similar purpose to that of the EITI, it is unlikely that some of the reporting requirements in the *ESTMA* meet the more stringent requirements of the EITI. As mentioned earlier, however, Canada has never pledged to adhere to EITI.

8.3 Mergers and Acquisitions

Due diligence is widely recognized as an important factor in any merger or acquisition (M&A) transaction.[301] When conducting anti-corruption due diligence in the context of M&A transactions, a core aim is to determine the extent to which operations and revenues of the target business have been distorted by bribery and to flag any corruption risks the successor may be liable for.[302] A further aim is to mitigate potential risks and to begin a monitoring program for the target to ensure the acquisition's compliance with anti-corruption laws.[303] Transparency International outlines the following ten good practice principles for anti-bribery due diligence in mergers, acquisitions and investments:

1. The purchaser (or investor) has a public anti-bribery policy;
2. The purchaser ensures it has an adequate anti-bribery program that is compatible with the *Business Principles for Countering Bribery* or an equivalent international code or standard;
3. Anti-bribery due diligence is considered on a proportionate basis for all investments;
4. The level of anti-bribery due diligence for the transaction is commensurate with the bribery risks;
5. Anti-bribery due diligence starts sufficiently early in the due diligence process to allow adequate due diligence to be carried out and for the findings to influence the outcome of the negotiations or stimulate further review if necessary;
6. The partners or board provide commitment and oversight to the due diligence reviews;
7. Information gained during the anti-bribery due diligence is passed on efficiently and effectively to the company's management once the investment has been made;
8. The purchaser starts to conduct due diligence on a proportionate basis immediately after purchase to determine if there is any current bribery and if so, takes immediate remedial action;

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[301] Peter Wilkinson, *Anti-Bribery Due Diligence for Transactions: Guidance for Anti-Bribery Due Diligence in Mergers, Acquisitions and Investments*, ed by Robert Barrington (Transparency International UK, 2012) at 14, online: <http://www.transparency.org.uk/publications/anti-bribery-due-diligence-for-transactions/>. This guide by Transparency International provides details on each stage in the due diligence process. The checklist provides non-comprehensive guidance to companies in conducting adequate anti-bribery due diligence in the context of mergers and acquisitions.

[302] *Ibid* at 6.

[303] *Ibid*.

9. The purchaser ensures that the target has or adopts an adequate anti-bribery program equivalent to its own; and
10. Bribery detected through due diligence is reported to the authorities.[304]

The six stages to the due diligence process are: (1) initiating the process; (2) initial screening; (3) detailed analysis; (4) decision; (5) post-acquisition due diligence; and (6) post-acquisition integration and monitoring.[305] Transparency International also developed the following checklist of 59 indicators to be used as an aid in anti-bribery due diligence:

BEGINNING OF EXCERPT

Bribery Due Diligence Process

1. Is the bribery due diligence integrated into the due diligence process from the start?
2. Have milestones been set for the bribery due diligence?
3. Is the timetable adequate for effective anti-bribery due diligence?
4. Have the deal and due diligence teams been trained in their company's anti-bribery program including the significance of relevant legislation?
5. Have the deal and due diligence teams been trained in anti-bribery due diligence?
6. Is there a process implemented for co-ordination across functions?
7. Has legal privilege been established with use of general counsel and external legal advisers?
8. Is there a process for dealing with any bribery discovered during the due diligence?
9. Is the person responsible for anti-bribery due diligence at a sufficiently senior level to influence the transaction's decision-makers?

Geographical and Sectoral Risks

10. Is the target dependent on operations in countries where corruption is prevalent?
11. Does the target operate in sectors known to be prone to high risk of bribery?

[304] *Ibid* at iv.
[305] *Ibid* at 8.

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12. Are competitors suspected to be actively using bribery in the target's markets?

Business Model Risks

13. Does the organizational structure of the target foster an effective anti-bribery program or present risks?
14. Is the target dependent on large contracts or critical licenses?
15. Does the target implement an adequate anti-bribery program in its subsidiaries?
16. Is the target reliant on agents or other intermediaries?
17. Has the target been assessed for its exposure to use of intermediaries that operate in countries and sectors prone to corruption risks?
18. Does it have policies and effective systems to counter risks related to intermediaries?
19. Does the target require contractual anti-bribery standards of its suppliers?
20. Does the target's organizational structure present bribery risks – e.g. diversified structure?
21. Is the target reliant on outsourcing and if so do the contracted outsourcers show evidence of commitment and effective implementation of the target's anti-bribery program?

Legislative Footprint

22. Is the target subject to the UK Bribery Act and/or the US FCPA?
23. Are there equivalent laws from other jurisdictions that are relevant?

Organizational

24. Does the target's board and leadership show commitment to embedding anti-bribery in their company?
25. Does the target exhibit a culture of commitment to ethical business conduct? (Use evidence such as results of employee surveys)
26. Has the senior management of the target carried out an assessment of bribery risk in the business?
27. Have there been any corruption allegations or convictions related to members of the target's board or management?

28. Have the main shareholders or investors in the target had a history of activism related to the integrity of the target?
29. Have there been any corruption allegations or convictions related to the main shareholders or investors in the target?
30. Does the target have an active audit committee that oversees anti-corruption effectively?

Anti-Bribery Program

31. Does the target have an anti-bribery program that matches that recommended by Transparency International UK?
32. Is the anti-bribery program based on an adequate risk-based approach?
33. Is the anti-bribery program implemented and effective?

Key Bribery Risks

34. Has the target been assessed for its exposure to risk of paying large bribes in public contracts or to kickbacks?
35. Has the target been assessed for risks attached to hospitality and gifts?
36. Has the target been assessed for risks attached to travel expenses?
37. Has the target been assessed for risks attached to political contributions?
38. Has the target been assessed for risks attached to charitable donations and sponsorships?
39. Has the target been assessed for risks attached to facilitation payments?

(Foreign) Public Officials (FPOs)

40. Is there an implemented policy and process for identifying and managing situations where FPOs are associated with intermediaries, customers and prospects?
41. Have any FPOs been identified that are associated with intermediaries, customers and prospects?
42. Is there an implemented policy and process for identifying and managing situations where FPOs are associated with intermediaries, customers and prospects?
43. Have any FPOs been identified that present particular risk?

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44. Is there evidence or suspicion that subsidiaries or intermediaries are being used to disguise or channel corrupt payments to FPOs or others?

Financial and Ledger Analysis

45. Have the financial tests listed on page 11 of this Transparency International's "Anti-Bribery Due Diligence for Transactions" Guidance been carried out?
46. Are the beneficiaries of banking payments clearly identifiable?
47. Is there evidence of payments being made to intermediaries in countries different to where the intermediary is located and if so are the payments valid?
48. Is there evidence of regular orders being placed in batches just below the approval level?
49. Are payments rounded, especially in currencies with large denominations?
50. Are suppliers appointed for valid reasons?
51. Is there evidence of suppliers created for bribery e.g. just appointed for the transaction, no VAT registration?
52. Is there evidence of special purpose vehicles created to act as channels for bribery?

Incidents

53. Has a schedule and description been provided of pending or threatened government, regulatory or administrative proceedings, inquiries or investigations or litigation related to bribery and other corruption?
54. Has the target provided a schedule of any internal investigations over the past five years into bribery allegations?
55. Has the target been involved in any bribery incidents or investigations not reported by the target?
56. Has the target sanctioned any employees or directors in the past five years for violations related to bribery?
57. Has the target sanctioned any business partners in the past five years for violations related to bribery?
58. Is there an implemented policy and process for reporting bribery when discovered during due diligence?

Audit Reports

59. Has the target provided any reviews, reports or audits, internal and external, carried out on the implementation of its anti-bribery program? [306]

END OF EXCERPT

Failure to conduct adequate due diligence when purchasing a company may result in charges under anti-corruption legislation. In February 2015, the SEC announced charges against Goodyear Tire & Rubber Company for violations of the *FCPA* by subsidiaries in Kenya and Angola. The SEC Order indicates that Goodyear did not conduct adequate due diligence when it purchased its Kenyan subsidiary and did not implement adequate anti-corruption controls after the acquisition:

> Goodyear did not detect or prevent these improper payments because it failed to conduct adequate due diligence when it acquired Treadsetters, and failed to implement adequate FCPA compliance training and controls after the acquisition.[307]

Pre-acquisition due diligence is not always possible, particularly in hostile takeovers. The DOJ has indicated that companies who are unable to perform adequate pre-acquisition due diligence may still be rewarded for due diligence efforts conducted post-acquisition.[308] Investigating for corruption prior to acquisition is not sufficient to be in compliance with the *FCPA*. The DOJ and SEC have indicated they will also evaluate the extent the acquiring company integrated internal controls into the acquired company.[309]

The UK MOJ *Guidance*, in Principle 4 on Due Diligence, states:

> The commercial organization applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organization, in order to mitigate identified bribery risks.[310]

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[306] *Ibid* at 14-18.
[307] SEC Order, *USA before the SEC in the Matter of Goodyear Tire & Rubber Company*, no 74356, Feb 24, 2015, at 3, online: <https://www.sec.gov/litigation/admin/2015/34-74356.pdf>.
[308] DJSEC Resource Guide (2012) at 62.
[309] *Ibid*.
[310] UK Min J Guidance (2012) at 27.

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The MOJ encourages companies to carefully consider the bribery risks that transactions pose to the company and assess the requisite due diligence procedures for ensuring that the company is aware of the risks and has a plan to deal with any risks that materialize.

9. INTERNAL INVESTIGATION OF CORRUPTION

When senior officials or the board of a company suspect that the company may have been involved in corruption in one or more of its transactions, they may choose to conduct an internal investigation. As noted in Chapter 6 (on investigation and prosecution of corruption), there are various reasons to conduct an internal investigation:

- To convince enforcement bodies to use prosecutorial discretion not to bring charges;
- To gather evidence and prepare a defence or negotiation strategy for prosecutions, enforcement actions and/or litigation with shareholders;
- To fulfill management's fiduciary duty to the company's shareholders and satisfy shareholder concerns;
- To assess the effectiveness of internal accounting procedures.

To the extent that the internal investigation results will be handed over to the relevant enforcement body as part of a company's attempts to negotiate a favourable resolution with the prosecutor, it is strongly advisable to hire an experienced and respected external lawyer to conduct or manage the internal investigation. An external counsel's investigation will be given far greater credibility by the relevant law enforcement agencies than a similar investigation conducted by in-house counsel or the company's regular external counsel.

Chapter 6, Section 4.2 sets out five basic steps to follow when counsel is advising the board on undertaking an internal investigation in cases of alleged corruption.

10. CORPORATE LAWYERS' POTENTIAL LIABILITY FOR A CLIENT'S CORRUPTION

10.1 Introduction

Lawyers may be liable civilly, criminally, or administratively for their acts or omissions in regard to a client's business activities. Criminal provisions on conspiracy, aiding, abetting and counselling apply to lawyers assisting their clients in illegal transactions. Accessory liability is also applicable in private law actions in tort and contract.[311] Furthermore, legal malpractice is a tort available to individuals injured by the acts or omissions of their lawyers.

[311] Paul Davies, *Accessory Liability* (Oxford University Press, 2015).

Civil liability may arise for economic loss due to a lawyer's intentional or negligent involvement in corrupt transactions. Lastly, regulatory agencies, such as securities commissions, may discipline, expel, or fine lawyers for regulatory violations related to corrupt transactions.

10.2 Criminal Liability

As discussed in Chapter 3, the US, UK and Canada have criminal provisions that could result in a lawyer being criminally liable for membership or participation in a conspiracy to commit an offence of corruption, or for aiding, abetting, or counselling a crime committed by a client. For instance, when the former Nigerian State governor James Ibori pleaded guilty in the United Kingdom to conspiracy to defraud and money-laundering offences, his London solicitor Bhadresh Gohil was also convicted of money laundering. To divert funds from the sale of shares in a state-owned telecommunications company, Ibori's lawyer established Africa Development Finance consulting company. Since both the consultancy and the solicitor charged fees for fictitious services, $37 million in proceeds were diverted to them. The judge, who sentenced Mr. Gohil to 10 years of imprisonment, described him as the architect of this scheme.[312]

10.3 Accessory Liability in Civil Actions

Accessory or assistance liability in tort law may result in civil liability for lawyers who assist clients in committing a tort in relation to a corrupt transaction.[313] The client and lawyer are referred to as joint tortfeasors. This concept originated alongside accessory liability in criminal proceedings, but the criminal and civil actions have since diverged.[314] Accessory liability is a subset of joint tortfeasor law and is divided into its own subsets.[315] This section provides only a brief overview of the topic.

10.3.1 US Law

In the US, a leading case on accessory liability is *Halberstam v Welch*,[316] which was described by the US Supreme Court as being a "comprehensive opinion on the subject."[317] Other leading cases applying this doctrine tend to be statutory securities cases.[318] Generally,

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[312] United Nations Office on Drugs and Crime (UNODC), "Digest of Asset Recovery Cases" (United Nations, 2015), at 11, 22, online: <https://www.unodc.org/documents/corruption/Publications/2015/15-05350_Ebook.pdf>.

[313] *Ibid.* For more details about civil actions for compensation of damages in tort in the context of asset recovery see Section 2.4.5.2(a) of Chapter 5.

[314] Paul Davies, "Accessory Liability for Assisting Torts" (2011) 70 Cambridge LJ 353 at 353.

[315] For a general overview on various subsets of Accessory Civil Liability, see Martin Kenney, "British Virgin Islands: Accessory Civil Liability," *Mondaq Business Briefing* (2008, August 27) (LexisNexis).

[316] *Halberstam v Welch*, 705 F.2d 472, 489 (DC Cir 1983).

[317] *Central Bank of Denver, NA v First Interstate Bank of Denver*, NA, 511 US 164 (1994) at 181.

[318] *Ibid.*

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accessory liability in the US requires that the accessory "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other."[319]

10.3.2 UK Law

A leading UK case, *Sea Shephard UK v Fish & Fish Ltd,* sets out the test for finding a defendant liable as a joint tortfeasor where the defendant:

(1) Has assisted in the commission of the tort by another person;
(2) The tort is pursuant to a common design; and
(3) An act is done that is tortious.[320]

Lord Sumpton noted:

> In both England and the United States, the principles [of joint tortfeasorship] have been worked out mainly in the context of allegations of accessory liability for the tortious infringement of intellectual property rights.[321]

The civil law has tended to require procurement as an element to establish accessory liability.[322] In *CBS Songs v Amstrad Consumer Electronics plc,* a UK Court found that procurement was more than merely "inducement, incitement, or persuasion." Advice alone would not result in a finding of accessory liability; more active participation would be required.[323]

10.3.3 Canadian Law

Canadian courts have adopted and applied the English definition of joint tortfeasors. Canadian courts have not defined the minimum "degree of participation" required for the secondary tortfeasor to be liable for the primary tort.[324] However, Canadian courts have said that a "concerted action to a common end" is required.[325] Although this has not been defined

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[319] Restatement (Second) of Torts § 876(b) (1977). For additional material on this topic, see W. Keeton et al, eds, *Law of Torts,* 5th ed (West Group, 1984).
[320] Sarah Johnson & Alastair Shaw, "UK Supreme Court confirms test for joint liability in tort", *Hogan Lovells* (3 April 2015), online: LimeGreen IP News <http://www.limegreenipnews.com/2015/04/uk-supreme-court-confirms-test-for-joint-liability-in-tort/>.
[321] *Sea Shepherd UK v Fish & Fish Ltd*, [2015] UKSC 10, [2015] WLR 694 at para 40.
[322] Davies (2011).
[323] *CBS Songs v Amstrad Consumer Electronics plc,* [1988] AC 1013, [1988] UKHL 15. For additional materials on this topic, see Hazel Carty, "Joint Tortfeasance and Assistance Liability" (1999) 19 Leg Studies 494.
[324] John Fleming, *Law of Torts,* 5th ed (Thomson Reuters (Professional); Lawbook Co., 1977) at 237-38.
[325] *Ibid.*

by the courts either, this statement suggests that some act must be committed to put the tort in motion or to substantially assist in its commission, as in England.

10.4 Tort of Legal Malpractice

Legal malpractice actions are an option for dissatisfied clients or third parties seeking private redress for harm attributable to a lawyer's violation of his or her duties to a client or the legal profession.[326] The tort may occur when a lawyer is professionally negligent, breaches a contract and/or breaches his or her fiduciary duty to a client. Legal malpractice requires a harmed party with standing to show that malpractice occurred, and that as a result of that malpractice, the harmed party suffered damages.[327] In doing so, the harmed party must show that but for the lawyer's malpractice, the harm would not have occurred or would have been less. As stated in *Hummer v Pulley, Watson, King & Lischer, PA,* "[i]n a legal malpractice case, a plaintiff is required to prove that he would not have suffered the harm alleged absent the negligence of his attorney."[328]

Professional negligence is a common action in the category of legal malpractice. The UK case *Ross v Cauters* states that solicitors owe a duty of care to their clients and to third parties who could reasonably be expected to suffer loss or damage.[329] This has generally been accepted in the US and Canada. This duty could apply to a lawyer who negligently advises that the client's conduct does not constitute an offence of corruption when in fact it does, or that a client's anti-corruption compliance program and its implementation are adequate, when they clearly are not. Malpractice actions may also be possible if a lawyer fails to disclose the actual or planned corrupt conduct of an employee, agent, or officer to more senior officers or the board of directors. In-house counsel in particular may have clauses in their employment contracts requiring certain actions if they encounter corruption in the organization. Failure to act in the way outlined in their employment contract on uncovering corruption may result in a breach of contract claim against the lawyer. The Supreme Court of Canada in *Central Trust Co v Rafuse*[330] held that the standard of care for solicitors is that of "the reasonably competent solicitor, ordinarily competent solicitor and the ordinarily prudent solicitor."[331] This follows the English authorities, which state that the standard of care is one of "reasonable competence and diligence."[332]

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[326] R. Bruce Anderson, *Encyclopedia of White-Collar and Corporate Crime,* 2nd ed by Lawrence Salinger (Sage Publications, 2013) *sub verdo* "legal malpractice".
[327] *Ibid.*
[328] *Hummer v Pulley, Watson, King & Lischer, PA,* 157 NC App 60, 577 SE 2d 918 (2003).
[329] *Ross v Caunters,* [1979] 3 All ER 580, [1979] 3 WLR 605.
[330] *Central Trust Co v Rafuse,* [1986] SCJ No 52, [1986] 2 SCR 147 at 208.
[331] Woolley et al (2012) at 174.
[332] For more information, see: Halsbury's Laws of Canada (online), *Legal Profession,*(IV(5)(2)(a)) (2013 reissue). English authorities include *Fletcher & Son v Jubb, Booth & Helliwell*, [1920] 1 KB 275 (CA); *Groom v Crocker*, [1939] 1 KB 194, [1938] 2 All ER 394 (CA).

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10.5 Shareholders' or Beneficial Owners' Actions Against the Corporation's Lawyer

10.5.1 US Law

In *Stichting Ter Behartigin Van de Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l BV v Schreiber*, the Court of Appeal for the Second Circuit allowed the shareholders of the defendant company to maintain an action for legal malpractice against the company's legal counsel.[333] The company had been found criminally liable under the *FCPA* for paying a bribe after counsel advised that the bribe could be paid through the company's subsidiary to avoid liability under the *FCPA*. The defendant argued that no such cause of action existed in law, but the Court rejected that argument in a pre-trial motion and allowed the shareholders to continue their action against the lawyer defendant.

10.5.2 UK Law

In the UK, Zambia's Attorney General launched a private law claim against two UK lawyers and their firms for their participation in "allegedly giving dishonest assistance in the misappropriation" of public funds.[334] This claim was for "dishonest assistance" and conspiring in corrupt acts; it was not a claim for professional negligence. The Attorney General alleged that the lawyers had assisted the former president of Zambia, Frederick Chiluba, in corrupt acts and the misappropriation of public funds. The Attorney General of Zambia was successful at the lower court level, but on appeal the action failed because the court found that the lawyers had not crossed the line from incompetence to dishonesty.[335] The test applied is known as the "fool or knave test" and is a difficult test to meet when trying to prove legal malpractice. Despite the Court of Appeals decision, Chiluba's lawyer, Mohammed Iqbal Meer, was suspended from the practice of law for three years for failure to uphold professional standards.[336]

In contrast, in the Kuwaiti Investment Organization (KIO) case, Spanish attorney Juan Jose Folchi Bonafonte, was held civilly liable for assisting to divert funds from the KIO's subsidiary, Grupo Torras (GT). Sheikh Fahad, a member of the Kuwaiti royal family of Al-Sabah and the chairman of the KIO between 1984 and 1992, made a number of questionable investments causing a loss of $4 billion to the KIO, of which $1.2 billion were attributable to

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[333] *Stichting Ter Behartigin Van de Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l BV v Schreiber*, 327 F (3d) 173 (2d Cir 2003). For more details about civil actions based on the FCPA violations in the context of asset recovery see section 2.4.5.4(a) of Chapter 5.

[334] Jean-Pierre Brun et al, *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets* (World Bank Publications, 2014) at 122-3.See also *Zambia v Meer Care & Desai (a firm) & Ors,* [2007] EWHC 952 (Ch) and *Zambia v Meer Care & Desai (a firm) & Ors,* [2008] EWCA Civ 1007.

[335] *Ibid* at 124.

[336] UNODC, "Digest of Asset Recovery Cases" (United Nations, 2015) at 21.

fraud, embezzlement and misappropriation.[337] The England and Wales Court of Appeal commented on Mr. Folchi's involvement in this matter as a lawyer in the following manner:

> The [trial] judge was not prepared to hold that Mr Folchi was a conspirator. But his findings of fact about what Mr. Folchi did know, or shut his eyes to, take his conclusion out of the sphere of hypothesis. The assistance that Mr. Folchi gave in all the transactions was crucial and without it they could not have taken place as they did. He was just as much a linchpin in giving dishonest assistance as he would have been if he was a conspirator. It was the obvious duty of an honest lawyer to make more enquiries as to why very large sums of money were being dealt with in highly questionable ways, and to stop the transactions if he did not receive satisfactory explanations. Mr. Folchi repeatedly failed in his duty and in consequence GT suffered losses.[338]

10.5.3 Canadian Law

The common law in Canada provides some limited avenues of redress against lawyers for aggrieved investors. Lawyers may be liable to their corporate clients for misrepresentations or negligence. As stated by Gillen:

> If the client is found liable for a misrepresentation in the prospectus, the client could sue the lawyer for negligent advice or assistance in the preparation of the prospectus. The lawyer may also have a duty to the public requiring the lawyer to discourage the client from distributing securities under a misleading prospectus and possibly requiring the lawyer to disclose, or "blow the whistle", where a client persists with the use of a misleading prospectus.[339]

However, often a corporation is unable or unwilling to pursue its lawyers for unlawful or negligent acts or omissions, particularly if the board of directors is involved in them. Shareholders who wish to pursue corporate lawyers for the torts committed against the company have an additional hurdle in seeking to hold the corporate lawyer liable; they must first establish that a duty of care is owed by the corporate lawyer to the shareholder, rather than just to the corporate client. After establishing the duty of care, they must show that the lawyer breached that duty.

This duty of care is difficult to establish because lawyers owe an overriding duty to their client, and any duty to a third party may come into conflict with their duty to their client. Policy reasons, such as the fear of liability to an indeterminate class for an indeterminate amount, may prevent the court from finding a duty to shareholders. Even if the duty is

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[337] *Ibid* at 9, 21-22.

[338] *Khaled Naser Hamoud Al-Sabah and Juan Jose Folchi Bonafonte v Grupo Torras SA*, [2000] EWCA Civ J1102-9.

[339] Mark Gillen, *Securities Regulation in Canada*, 2nd ed (Carswell, 1998).

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established, Canadian courts rarely find a breach of the duty of care on the part of lawyers. Generally, the court finds that the lawyer took reasonable care to fulfill the duty or that the circumstances did not give rise to reasonable suspicion, which would require increased due diligence on the part of the lawyer.

In *CC&L Dedicated Enterprise Fund v Fisherman,* an Ontario court found that "a *prima facie* duty of care exists when a lawyer makes representations to the investing public for the purpose of furthering the investments in their client."[340] In *Filipovic v Upshall*, the Court found that the lawyer "stood in a sufficient relationship of proximity with the plaintiffs to engender a duty of care on their part."[341] In *Filipovic,* the shareholders confirmed the corporate solicitors' appointments to the corporation, knew the solicitors from previous dealings and wrote their cheques directly to the solicitors on the instructions of the promoters of the investment. The court found that the duty of care "flowed through the company to the shareholders, but did not arise independent of the company itself."[342] However, in *Filipovic,* the court found that the solicitors discharged their duty in a "reasonably competent and professional manner."[343] In coming to this decision, the court considered the fact that the solicitors had worked with the principals before with no history of dishonesty and that the solicitors took instructions from the principals of the company, who would reasonably have the authority claimed. The court also found a lack of circumstances that would reasonably raise the solicitors' suspicions.

10.6 Lawyers' Civil Liability under Securities Acts

Lawyers' liability under securities legislation is important in the corruption context because corporate lawyers often work with publically traded corporations. In addition, the SEC is a major enforcer of the *FCPA*. Violations of anti-corruption and anti-bribery laws may result in additional violations of securities regulations, as the corporation may fail to accurately disclose their financial position and potential liabilities to the financial market. An investor who purchases a share shortly before a company is investigated for or charged with corruption offences could see the value of their investment fall drastically in a short period, either due to negative public perception of the company or because of the massive fines imposed on the company upon conviction or settlement. As disclosure and investigation of

[340] *CC&L Dedicated Enterprise Fund v Fisherman* (2001), 18 BLR (3d) 240, 2001 CanLII 28387 (Ont Sup Ct).
[341] *Filipovic v Upshall (*1998), 19 RPR (3d) 88 (Ont Ct J (Gen Div)), affirmed by the CA at [2000] OJ No 2291.
[342] *Ibid* at para 64.
[343] *Ibid* at para 67.

corruption and bribery may have a significant impact on the value of a company's shares, securities law is applicable in the anti-corruption context.[344]

[344] For US law on this topic see: 17 CFR § 240.10b-5 (1951), 15 USC § 78t(e), *Sarbanes-Oxley Act of 2002*, 15 USC 7201, 116 Stat 745 § 307 (2002), 17 CFR § 205, and Securities Exchange Commission, *Rules of Practice and Rules on Fair Fund and Disgorgement Plans*, 2006, § 102(e) online: <https://www.sec.gov>. For more information on UK Securities Regulation, see Joan Loughery, *Corporate Lawyers and Corporate Governance,* (Cambridge University Press, 2011). For more information on Canadian securities regulation, see David Johnston, Kathleen Rockwell & Cristie Ford, *Canadian Securities Regulation,* 5th ed (LexisNexis, 2014) and Mark Gillen, *Securities Regulation in Canada,* 3rd ed (Thomson Carswell, 2007). Note that Canada's securities law varies provincially.

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CHAPTER 9

PUBLIC OFFICIALS AND CONFLICTS OF INTEREST

[This chapter, subject to some additions and deletions, was written and updated by Joseph Mooney as a directed research and writing paper under Professor Ferguson's supervision. Additional revisions were made by Connor Bildfell in 2017.]

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1. INTRODUCTION

Public confidence in a state's legislature, executive branch, and public service is critical to the functioning of a healthy democratic state. Studies have demonstrated that where the public perceives a legislature to be corrupt, public confidence in the legislature is correspondingly diminished.[1] Corrupt acts or abuses of public office often originate with a public official taking action while in a conflict of interest. Although the definitions vary, generally speaking, a conflict of interest exists where a public official has private interests that could improperly influence the performance of his or her public duties and responsibilities. As conflicts of interest occupy a central position within the broader issue of corruption, the establishment of robust legislation, policies, and sanctions that address conflicts of interest—both before and after they arise—forms an essential part of the fight against corruption.

This chapter contains two major sections. The first section provides an overview of competing definitions of "conflict of interest," how the concept has evolved, and some of the problems and tensions that remain in the effective implementation of regimes governing conflicts of interest in public office. The second section provides a brief discussion of international conventions and instruments pertaining to conflicts of interest, as well as a comparative study of the federal regimes in place in the US, UK, and Canada aimed at regulating and preventing conflicts of interest in public office. The scope of this chapter is largely limited to conflict of interest legislation that applies to senior public officials at the federal level, such as members of Parliament, senators, senior officials in the executive branch, and high-level bureaucrats. While many countries also have conflict of interest legislation governing public officials at the state, provincial, and municipal levels, such legislation is not discussed in this chapter.

[1] Riccardo Pelizzo & Frederick Stapenhurst, *Corruption and Legislatures* (Routledge, 2014) at 74.

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2. AN OVERVIEW OF CONFLICTS OF INTEREST

2.1 Conceptualizing "Conflict of Interest"

An attempt to legally proscribe or regulate a certain type of behaviour, act, or occurrence must begin by defining the given act, behaviour, or occurrence. Recognizing the need to identify and monitor conflicts of interest in the public sector, the OECD in 2003 developed the first international benchmarking tool for reviewing member states' public conflict of interest regimes.[2] In its report entitled *Managing Conflict of Interest in the Public Service*, the OECD developed a simple and pragmatic definition of conflict of interest. It states that a conflict of interest is "a conflict between the public duty and private interest of public officials, in which public officials have private-capacity interests which could improperly influence the performance of their official duties and responsibilities."[3] Generally speaking, one can find similar definitions in official codes of conduct and conflict of interest legislation and policy instruments across the globe. Although the wording may vary, the general concept is widely recognized. In addition to the OECD's benchmarking tool, there are a myriad of legal instruments that exist at the international and regional level with the purpose of preventing and dealing with, among other things, conflicts of interest.[4] Although many of these instruments may be regarded as "soft law" in that their enforcement may be difficult or even non-existent, they nonetheless serve an important role in setting standards of conduct and building consensus.

While the OECD's definition of conflicts of interest is a helpful source of guidance, differing interpretations of the several elements of this definition exist, resulting in inconsistencies between national legal regimes. The OECD's definition can be broken down into three main elements: (1) a public official, (2) with private-capacity interests, (3) that could improperly influence the performance of official duties and responsibilities. The OECD recognizes that there is no "one-size-fits-all" solution.[5] States' political cultures vary widely across the globe, and a provision that is essential to a robust conflict of interest policy in one State may be overly cumbersome and unnecessary in another. Nonetheless, the scope and effectiveness of

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[2] OECD, *Managing Conflict of Interest in the Public Service: OECD Guidelines and Country Experiences* (OECD, 2003), online: <https://www.oecd.org/gov/ethics/48994419.pdf>.

[3] *Ibid* at 15.

[4] See e.g. UN General Assembly, *United Nations Convention against Corruption*, 31 October 2003, UN Doc A/58/422 (entered into force 14 December 2005), online: <https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf>; Council of Europe, *Codes of Conduct for Public Officials*, Recommendation Rec(2000)10, adopted by the Committee of Ministers of the Council of Europe on 11 May 2000, online: <workspace.unpan.org/sites/internet/Documents/UNPAN038306.pdf>; African Union, *African Union Convention on Preventing and Combating Corruption*, adopted by the 2nd Ordinary Session of the Assembly of the Union, 11 July 2013, online: <www.eods.eu/library/AU_Convention on Combating Corruption_2003_EN.pdf>; Organization of American States, Inter-American Convention Against Corruption, adopted at the third plenary session, 29 March 1996, online: <www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_Corruption.asp>; to name only a few.

[5] OECD (2003) at 14.

conflict of interest laws or policies will necessarily vary depending on how one defines and interprets these three elements.

The first element determines who exactly will be subject to a given policy or legislative framework. As will be discussed in greater detail in the comparative section below, most States have multiple, often overlapping statutory and policy-based regimes that govern conflicts of interest in the public realm. The applicability of a given set of rules often depends on factors such as an official's seniority, discretion in decision making, and access to confidential State or political party information. Clearly identifying the persons to whom a given law or policy applies is always a fundamental aspect of the law-making process. As such, legislators tend to provide exhaustive definitions of the individuals who are subject to the requirements of a given conflict of interest law or policy. Consequently, this aspect of the definition tends to cause the least amount of interpretive difficulty.

However, "private-capacity interests," the second element in the OECD's definition, is much harder to define exhaustively. In the context of conflict of interest laws, what constitutes a "private interest" has shifted over time. Historically, a private-capacity interest was conceived of as something objective, almost invariably referring to financial interests such as shareholdings or a directorship position in a corporation. It has been argued, however, that the concept of "private interest" has expanded over time to recognize that subjective private interests informed by ideological, personal, and political matters may improperly influence public duties.[6]

For example, Canada's *Conflict of Interest Act* contains a "preferential treatment" provision that can capture situations in which an official's private interest is not objectively ascertainable, but it is nonetheless clear that an individual or organization has received preferential treatment from the official on the basis of their identity.[7] Implicit in this provision is the assumption that a public official may be improperly influenced by a private interest in relation to a person or organization because of subjective ideological or personal matters. For example, this provision would capture a situation in which an official responsible for reviewing applications for a filmmaking grant allowed a close friend's late application to be reviewed just because that person was a friend and despite the fact that considering late applications was contrary to official policy.[8]

However, it can be difficult to determine when, and to what extent, a private-capacity interest is present. While interests that are quantifiable in financial terms (e.g., the prospect

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[6] Susan Rose-Ackerman, "Corruption and Conflicts of Interest" in Jean-Bernard Auby, Emmanuel Breen & Thomas Perroud, eds, *Corruption and Conflicts of Interest: A Comparative Law Approach* (Edward Elgar, 2014) 3 at 6.

[7] *Conflict of Interest Act*, SC 2006, c 9, s 7.

[8] This scenario would be captured under the notion of "conflict of interest" outlined in section 4 of the *Conflict of Interest Act*, which provides that "a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests *or those of his or her relatives or friends* or to improperly further another person's private interests" [emphasis added].

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of personally gaining a significant amount of money as a result of a project approval being made) are relatively clear-cut, more abstract interests may be more difficult to identify and measure. Furthermore, it can be difficult to distinguish between a private interest and an interest stemming from one's membership in a broader class of persons. For example, if a Member of Parliament who happens to be a veteran is voting on a bill that would increase the benefits provided to veterans, should that Member of Parliament abstain from voting due to the presence of a private interest? Differing approaches to this question are addressed in the comparative section of this chapter. Finally, there may be cases in which the presence of private-capacity interests is simply unavoidable. For example, a municipal public official in a very small, tight-knit community will inevitably find him or herself having to make decisions in a public capacity that inevitably directly affect his or her private interests. Does this mean we should relax the definition of what constitutes a "private interest" in order to account for the practical realities of public decision making in this context?

The third element in the OECD's definition of "conflict of interest" is engaged where a private interest has been identified; it asks whether a given private interest *could* improperly influence the performance of official duties and responsibilities. It is important to note that the wording of the definition captures not only *actual* conflicts of interest, but also *potential* conflicts of interest. This element presents some interpretive difficulty for two main reasons. First, it requires that we determine what constitutes the proper performance of an official's duties and responsibilities in the public interest. Although in some circumstances this determination will be black and white, there will be many cases in which the official finds him or herself in a grey area. Second, it requires that we make an assessment as to whether the private interest *could* influence the proper performance of those duties and responsibilities. This task may be considered speculative in certain circumstances where the potential influence of the private interest is not easily ascertained.

Generally speaking, these interpretive problems have been dealt with through the use of explicit pro-hibitions and aspirational, norm-generating provisions in legislation, policy instruments, codes of conduct and guidelines. Indeed, scholars have argued that in contrast to the increasingly subjective nature of the "interest" element, the conceptualization of a "conflict" has shifted from being understood as purely subjective to something that can be objectively ascertained, at least in law, through analysis based on a set of indicia.[9]

Although most states now explicitly prohibit public officials from engaging in decision making where a conflict of interest exists or may reasonably be perceived to exist, there are still certain situations that may be problematic from a conflict of interest perspective, but are not explicitly addressed by legislation. General purposive clauses that highlight the importance of maintaining public confidence in government institutions will ideally encourage public officials to recuse themselves from exercising their capacities in potential conflict situations. However, as with defining a "private interest," determining when an official is, or reasonably appears to be, in a conflict of interest can be difficult. This issue is compounded by the additional need to craft laws and policies capturing improper influence

[9] Susan Rose-Ackerman (2014) 3 at 6.

resulting from the private interests of friends or family of a public official. Defining who falls within the scope of "family" or "friends" is no easy task, and reasonable people may disagree over how broadly these terms should be understood.

Another aspect of conflicts of interest that has become particularly relevant in today's highly technical and sophisticated systems of government is the "revolving door" phenomenon. This describes a situation in which a public official leaves government and subsequently takes on private employment in a sector that her or she may have overseen, or had privileged information about, in his or her capacity as a public official.[10] Several concerns arise in this context, though two are particularly noteworthy:

- First, there are ethical concerns that public office holders might be receiving lucrative private-sector opportunities in exchange for having conferred benefits on the private-sector employer. Such an exchange constitutes a characteristic example of the abuse of public office for private gain. This was a favourite technique of one of the United States' most prominent and later most infamous lobbyists, Jack Abramoff.[11] The prospect of gaining highly remunerative private-sector employment in the future may therefore distort the office holder's decision making in ways that harm the public interest.
- Second, there are ethical concerns that former public office holders may be disclosing inside information about the inner workings of the government to private firms after their tenure. A related concern is that the former public office holders may use their knowledge concerning sensitive government information acquired during his or her tenure to their own advantage in the private sector.

Despite these concerns, it remains a common practice for former politicians or public servants after leaving office to seek out and succeed in finding private employment with companies that commonly interact with the government. To respond to the concerns arising in this context, many jurisdictions have enacted legislation mandating a "cooling off" period between government work and certain types of private work.[12] Although the revolving door phenomenon has important ethical implications for both the public and the private sector, a

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[10] Daniel I Gordon, "Protecting the Integrity of the U.S. Federal Procurement System: Conflict of Interest Rules and Aspects of the System That Help Reduce Corruption" in Auby, Breen & Perroud, eds, (2014) 39 at 48-49.

[11] For a brief account, see Chapter 1, Section 8. If you google Jack Abramoff, you will find movies, documentaries, books and articles describing the man and his lobbying methods.

[12] For example, Canada's *Conflict of Interest Act* stipulates that, for a one-year "cooling off" period following their last day in office, certain public office holders must not accept an offer of employment with an entity with which the office holder had "direct and significant official dealings" during the period of one year immediately before the officer holder's last day in office: *Conflict of Interest Act*, SC 2006, c 9, ss 35(1), 36(1).

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discussion of current legal regimes and con-temporary issues around "cooling-off" periods is beyond the scope of this chapter.[13]

Finally, it is worth highlighting the key concerns associated with conflicts of interest in the public sphere. A proper understanding of the reasons why conflicts of interest are harmful and why they ought to be avoided will serve as a foundation for the discussion to follow. In this respect, Canadian courts have had occasion to issue pronouncements on the concept of conflicts of interest and the key concerns arising from such conflicts. As stated by the Ontario High Court of Justice in the 1979 case of *Moll v Fisher*:

> [All conflict of interest rules are] based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well meaning men and women may be impaired where their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose.[14]

The core concerns over conflicts of interest were concisely summarized by Commissioner Madam Justice Denise Bellamy in her 2005 report on the *Toronto Computer Leasing Inquiry and Toronto External Contracts Inquiry*:[15]

> The driving consideration behind conflict of interest rules is the public good. In this context, a conflict of interest is essentially a conflict between public and private interests. … The core concern in a conflict is the presumption that bias and a lack of impartial judgment will lead a decision-maker in public service to prefer his or her own personal interests over the public good.
>
> …
>
> Conflict of interest should be considered in its broadest possible sense. It is about much more than money. Obviously, a conflict of interest exists when a decision-maker in public service has a personal financial interest in a decision. But conflicts of interest extend to any interest, loyalty, concern, emotion or other feature of a situation tending to make the individual's judgment less reliable than it would normally be.
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> …

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[13] For more on the "revolving door" phenomenon as well as contemporary debates on the issue, see Wentong Zheng, "The Revolving Door" (2015) 90:3 Notre Dame L Rev 1265.

[14] *Moll v Fisher* (1979), 23 OR (2d) 609 at para 6, 96 DLR (3d) 506 (H Ct J (Div Ct)).

[15] Madam Justice Denise Bellamy, *Toronto Computer Leasing Inquiry and Toronto External Contracts Inquiry*, vol 2 (*Good Government*) (City of Toronto, 2005) at 38-40, online: <www1.toronto.ca/inquiry/inquiry_site/report/pdf/TCLI_TECI_Report_Good_Government.pdf>.

> Public perceptions of the ethics of public servants are critically important. If the public perceives, even wrongly, that public servants are unethical, democratic institutions will suffer from the erosion of public confidence.

In *Democracy Watch v Campbell*, the Canadian Federal Court of Appeal further addressed the concept of conflicts of interest and the key concerns associated with such conflicts:

> The common element in the various definitions of conflict of interest is … the presence of competing loyalties … the idea of conflict of interest is intimately bound to the problem of divided loyalties or conflicting obligations … Any conflict of interest impairs public confidence in government decision-making. Beyond that, the rule against conflicts of interest is a rule against the possibility that a public office holder may prefer his or her private interests to the public interest.[16]

Thus, the primary concern with conflicts of interest is that public officials, who are tasked with exercising their duties and responsibilities in furtherance of the public interest, should not be placed in a position where their private interests might interfere with the fair and impartial judgment rightly expected of them. In order to uphold public confidence in the government, the public must reasonably be satisfied that public decision makers are exercising their duties with undivided loyalty to the public interest. It is this concept—undivided loyalty to the public—that makes conflicts of interest problematic and demands that policy makers construct a robust regime aimed at preventing and managing such conflicts.

2.2 Enforcement Mechanisms: Historical Foundations and Contemporary Tensions

The legal mechanisms used to stem corruption developed in conjunction with the shifting values and needs of modern society. With few exceptions, most Western societies of the 17th century would have simply accepted the idea that leaders in power would use their office for personal gain. With the spread of democratic ideals and the need for a well-organized and efficient civil service with the coming of the industrial era, the notion that leaders and public servants should not act in their own personal interest, but solely in the public interest, began to gain wider acceptance.[17] With time, conflict of interest situations came to be understood as a form of corruption.

Even with a growing recognition of the problems created by corruption, conflict of interest situations were primarily dealt with by criminal sanctions only after an action had been

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[16] *Democracy Watch v Campbell*, 2009 FCA 79 at paras 40-51, [2010] 2 FCR 139.

[17] Tim Lankester, "Conflict of Interest: A Historical and Comparative Perspective" in Asian Development Bank & OECD, *Managing Conflict of Interest: Frameworks, Tools and Instruments for Preventing, Detecting, and Managing Conflict of Interest* (2008) 11 at 11, online: <https://www.oecd.org/site/adboecdanti-corruptioninitiative/40838870.pdf>.

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undertaken by an official in a conflict of interest position. The focus tended to be on deterrence through *ex-post* criminal sanction rather than prevention through *ex-ante* compliance mechanisms. In the US, for example, conflicts of interest were dealt with primarily through criminal law until the early 1960s, when the Kennedy administration instituted a code of conduct for officials in the executive branch as part of a general trend towards the creation and use of preventative and aspirational laws and policies relating to corruption.[18]

Today, most states have mechanisms that operate *ex-ante* to prevent conflicts from arising, such as financial disclosure requirements, as well as mechanisms that operate *ex-post* to punish and deter, such as criminal sanctions and regulatory penalties. However, all countries that implement legislation to prevent conflicts of interest in the public realm are faced with the need to create a regime that operates effectively but is not so prohibitive that it deters citizens from entering the public service. This is an issue that is widely recognized within academic literature on public corruption, and has even been explicitly acknowledged through purposive provisions in conflict of interest legislation.[19]

Within the broad class of preventative mechanisms, Mattarella has identified three major processes by which conflicts of interest can be addressed.[20] The first is complete removal, consisting of either removal of the individual from public office or removal of the private interest (which can occur through arms-length transactions or by placing assets in a blind trust). The second involves requiring the public official to recuse him- or herself from taking action (such as debating, advocating, or voting) on matters that bear upon a private interest of the official. Finally, the third is simple exhibition, entailing the disclosure of privately held interests. It can help to conceptualize these mechanisms as existing on a spectrum, with complete removal and simple disclosure occupying opposite ends of the spectrum and recusal falling somewhere in the middle.

The strictest response, that of removal, would in theory be the most effective at curbing corruption, assuming individuals are more likely to respond to stronger disincentives. However, this mechanism is the most prohibitive in terms of attracting citizenry to positions in government. Conversely, while simple disclosure would likely be inadequate to deal with many forms of conflicts of interest, this mechanism would make a position in government more attractive to citizens who might otherwise remain in the private sector. While recusal provides a satisfactory middle ground in many cases, it becomes impractical at higher levels of public office where public officials enjoy broader discretionary powers. Senior officials

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[18] Jane S Ley, "Managing Conflict of Interest in the Executive Branch: The Experience of the United States" in OECD, (2003), 231 at 233.

[19] See e.g. Rose-Ackerman (2014) 3; *Conflict of Interest Act*, SC 2006, c 9, s 3(d) (stating that one of the purposes of the *Act* is to "encourage experienced and competent persons to seek and accept public office"); OECD (2003) at 40, (noting that over 1,000 public officials in Romania quit after new conflict of interest laws were enacted).

[20] Bernardo Giorgio Mattarella, "The Conflicts of Interests of Public Officers: Rules, Checks and Penalties" in Auby, Breen & Perroud, eds, (2014) at 30.

who make discretionary decisions on a wide range of issues could be rendered incapable of performing their duties if they were continually required to recuse themselves.

In practice, most States aim to strike a balance between the need to avoid conflicts of interest and the need to attract high-quality candidates by applying different preventative mechanisms in different circumstances and to different levels of seniority. In cases where the influence of a private interest is questionable or remote, the use of criminal law or recusal requirements can be counterproductive. Instead, a State may rely on disclosure requirements in order to create transparency and thereby bring greater public scrutiny to bear on the actions of a given official. However, the precise balance which ought to be struck in any given situation is subject to debate.

Another important aspect of effective enforcement of conflict of interest rules is the delegation of authority to investigate and remedy conflicts of interest. Investigating potential conflicts of interest can require the compulsion of testimony and the gathering of evidence, as well as a significant amount of human and financial capital. As such, the scope of authority and the budget granted to the relevant bodies and officials can drastically alter the effectiveness of regimes that seek to minimize conflicts of interest in the public sphere. A State may have robust legislation, but without a powerful and well-funded enforcement entity, the system as a whole will not be effective. The comparative section of this chapter provides greater detail on enforcement bodies in the US, UK, and Canada.

In addition to preventative mechanisms such as disclosure and recusal requirements, criminal sanctions operate to punish corrupt practices *ex-post* and provide a degree of *ex-ante* prevention through deterrence. Criminal sanctions tend to apply to actions taken in a conflict of interest situation, rather than to the mere existence of the conflictual relationship itself. The close connection between conflicts of interest and offences such as bribery, fraud, and misuse of public office demonstrates that criminal sanctions are very much a part of managing, preventing, and sanctioning conflicts of interest.

2.3 Political Culture and Conflicts of Interest

Legislation and policy do not exist in a vacuum. Culture can have a profound effect on how a given legislative regime is interpreted and, more importantly, on how closely public officials actually adhere to certain laws and rules. Political culture is a highly complex concept, but, broadly defined, it consists of a set of shared political attitudes, values, and standards. One of the four core principles that inform the OECD guidelines on managing conflicts of interest is "engendering an organizational culture which is intolerant of conflict

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of interest."[21] Similarly, UNCAC recognizes the need to "foster a culture of rejection of corruption."[22]

Research suggests that anti-corruption measures are more effective where political actors share a common political culture. Indeed, some researchers have argued that cultural values and "informal expectations" may be more influential than formal laws or policies.[23] Although the dynamic nature of culture makes defining a given political culture a challenging exercise, Skelcher and Snape suggest that determining the commonality of views in three specific areas can help predict the effectiveness of a given conflict of interest regime. These three questions are:

1. To what extent do the individuals the regime is supposed to govern share similar attitudes and values?
2. Do said individuals have a shared understanding of the problems the regime is designed to address? and
3. Do these individuals have a shared understanding of how these problems can be addressed and resolved?[24]

Although the Skelcher and Snape study focused on government at the local level, the effect of culture in governing conflicts of interest and corruption is just as significant at the national level. This is demonstrated by the importance many states place on training, educating, and consulting with public officials on conflicts of interest.[25] Indeed, a formal conflict of interest regime would be of little use if public officials had widely differing interpretations of a given rule or widely divergent views on what is acceptable behaviour. Laws and regulations can help foster a shared understanding of conflicts of interest, but it is important to remember the significant role that cultural predispositions have on the effectiveness of conflict of interest management.

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[21] OECD (2003) at 27.

[22] *United Nations Convention against Corruption*, UNODC, GA Res 58/4, Annex, A/AC.261/L.5 (2003), Preamble.

[23] Richard Mulgan & John Wanna, "Developing Cultures of Integrity in the Public and Private Sectors" in Adam Graycar & Russell G Smith, eds, *Handbook of Global Research and Practice in Corruption* (Edward Elgar, 2011) 416 at 416.

[24] Chris Skelcher & Stephanie Snape, "Ethics and Local Councilors: Modernising Standards of Conduct" cited in Pelizzo & Stapenhurst, (2014) at 79.

[25] There is a significant amount of education and training provided to government officials in Canada, the US and the UK. For Canada, see Office of the Conflict of Interest and Ethics Commissioner, online: <ciec-ccie.parl.gc.ca/> (especially the "Information for …" section). For the US, see United States Office of Government Ethics, "Education", online: <https://www.oge.gov/web/oge.nsf/Education/>. For the UK, see UK Parliament, Parliamentary Commissioner for Standards, "Publications", online: <www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/parliamentary-commissioner-for-standards/publications/>.

3. A COMPARISON OF INTERNATIONAL STANDARDS AND NATIONAL REGIMES IN THE US, THE UK, AND CANADA

Based on the information presented above, one can see that conflicts of interest have a very localized dimension. Differences in the structure of government and political culture require conflict of interest regimes to be tailored to the needs of different states, different levels of government, and different bodies within the same level of government. The remainder of this chapter provides an overview of international conflict of interest standards and guidelines, followed by a comparative analysis of conflict of interest regimes at the federal level in three comparator States: the US, UK, and Canada. Within the national regime comparative section, the analysis is organized on the basis of three major aspects of conflict of interest regimes: (1) general structure of laws, (2) general structure and powers of authorities, and (3) interpretation and compliance mechanisms.

3.1 International Law, Standards and Guidelines

An increased understanding of the global impact that conflict of interest issues bring to bear on economic development and ethical governance has resulted in myriad international organizations taking steps to study, monitor and provide guidance on effectively managing conflicts of interest. Two of the most widely recognized of these bodies are the OECD and the UN, although numerous other international and regional bodies also provide conflict of interest guidance to states. [26] In addition, non-governmental organizations such as Transparency International play a significant role in monitoring and evaluating the effectiveness of anti-corruption regimes.

3.1.1 UNCAC

A number of UNCAC's provisions relate directly to conflicts of interest. The provisions that deal most explicitly with conflicts of interest can be found in Articles 7 and 8.[27] Article 7 focuses on the establishment and maintenance of systems relating to public officials and specifically mentions the promotion of education and training programs for the ethical

[26] The UNODC has compiled a number of international instruments in its *Compendium of International Legal Instruments on Corruption*, 2nd ed (2005), online: <https://www.unodc.org/documents/corruption/publications_compendium_e.pdf>. For an interesting study on ethical standards compliance and monitoring within international bodies themselves, see Elisa D'Alterio "'Global Integrity': National Administrations versus Global Regimes" in Auby, Breen & Perroud, eds, (2014), 198. D'Alterio concludes that international bodies such as the UN and the IMF generally "practice what they preach" when it comes to internal ethics compliance.

[27] UN General Assembly, *United Nations Convention against Corruption*, 31 October 2003, UN Doc A/58/422 (entered into force 14 December 2005), Arts 7-8, online: <https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf>.

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performance of official functions.[28] Article 8, entitled "Codes of Conduct for Public Officials," encourages the promotion of ethical behaviour and the implementation of codes of conduct, as well as the establishment of disclosure requirements, complaints processes, and disciplinary measures for breaches of codes of conduct.[29]

With respect to Articles 7 and 8, the discussion in the *Legislative Guide* to UNCAC is relatively brief, but suggests avoiding a "top-down" approach to creating codes of conduct. Instead, the guide suggests a process of consultation with public officials in order to achieve wider understanding of the code among officials.[30] In addition, the "private interests" to be disclosed under Article 8, paragraph 5 (outside activities, employment, assets, substantial gifts, and benefits) constitute a minimum disclosure requirement.[31]

3.1.2 OECD Conflict of Interest Guidelines

As noted above, the OECD published a set of conflict of interest guidelines as well as reports from several member States entitled *Managing Conflict of Interest in the Public Service*.[32] The OECD guidelines promote the "desirability of establishing and maintaining a set of core principles, policy frameworks, institutional strategies and practical management tools for managing conflict-of-interest matters in the public service."[33] The OECD explicitly recognizes the need to tailor conflict of interest polices to the specific "political, administrative and legal context" of each State, and as such, the guidelines largely function as generalized minimum standards for States to follow.[34]

There are a number of suggestions in the OECD guidelines worth noting. In terms of specific legislative initiatives, the guidelines highlight the importance of drafting legislation or policies with clear definitions, specific examples of conflicts of interest, and, at a more general level, an emphasis on the overall aim of a given law or policy.[35] The guidelines also suggest coordinating and integrating conflict of interest policies and laws into a "coherent institutional framework," such that laws and policies are consistent with each other and enforcement functions are centralized.

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[28] *Ibid*, Art 7, para 1(d).
[29] *Ibid*, Art 8, paras 1-6.
[30] United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd revised ed (United Nations, 2012) at 32, para 91, online: <https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf>.
[31] *Ibid* at 33, para 96.
[32] OECD (2003).
[33] *Ibid* at 38.
[34] *Ibid*.
[35] *Ibid* at 28-29.

On a more operational level, the OECD guidelines emphasize the importance of disclosure of private interests and indicate that it is appropriate to place the responsibility of disclosure on the public officials themselves. Ideally, disclosure should occur upon the assumption of a role in government or the public service. Once established, disclosure should recur annually, as well as on an ongoing basis as new potential sources of conflict emerge. It is imperative that the disclosed information be detailed enough to allow for educated judgements on the potential for conflict.[36] The guidelines note that private interest disclosure does not necessarily have to be made public. Internal and limited-access disclosure may satisfy policy objectives, particularly where the public official occupies a more junior position.[37] The guidelines also note the need for institutional ability to gather and assess such information as a corollary to disclosure requirements.[38]

In addition to disclosure requirements, the OECD guidelines suggest an array of options for managing and resolving conflicts of interest. These include direct mechanisms such as recusal, divestment of interests, placing investments into genuinely blind trusts, restricting access to confidential information and resignation options.[39] The guidelines note that in order to achieve transparency one must clearly identify and record conflicts and how they are resolved or managed in decision making, and suggests the establishment of effective complaint-handling mechanisms.

The OECD also explicitly recognizes the importance of culture with respect to defining conflict of interest. As such, the guidelines suggest open consultation between persons who are governed by the rules and those who enforce them in order to develop a more homogenous culture. Part and parcel of developing a unified culture is the wide publication of conflict of interest rules, the provision of assistance with identifying conflicts and guidance with respect to managing them.[40]

3.2 General Structure of National Conflict of Interest Regimes: Statutes, Policies and Guidelines

Just as every State has its own unique governmental structure, so too does each State have its own unique structure for monitoring and preventing conflicts of interest. Over the past ten years, most States have seen considerable growth in the number of legislative provisions, policies, commissions, committees and offices related to conflicts of interest in public office. Indeed, in the US there are over 5,000 ethics employees in the executive branch alone, and each federal agency has its own code of ethics with unique regulations.[41] The scope of this section is therefore largely limited to laws and regulations directed at elected officials in the

[36] *Ibid* at 28-30.
[37] *Ibid* at 29.
[38] *Ibid*.
[39] *Ibid* at 30.
[40] *Ibid* at 32, 35, 36.
[41] See United States Office of Government Ethics, "About", online: <https://www.oge.gov/web/oge.nsf/About+OGE/>.

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executive and legislative branches, as well as senior government officials, either in Cabinet positions or within the highest levels of the civil service. The US, UK and Canada are similar to the extent that their legislative bodies have both a lower and an upper house.

3.2.1 US

In the US, the House of Representatives is the body most analogous to Canada and the UK's lower house. Members of the House of Representatives are governed by the *Rules of the House of Representatives* (the *Rules*), which are similar to Canada's *Standing Orders of the House of Commons*. There are provisions that relate to conflicts of interest throughout the *Rules*, but the main chapters pertaining to ethics are chapters XXIII to XXVI, which contain a code of conduct, financial disclosure requirements and limitations on accepting gifts and outside funds. The *Rules* are supplemented by the lengthy *House Ethics Manual*, which provides greater detail on the *Rules* and presents examples from the House's precedents. In contrast to Canada and the UK, the most senior officials in the US federal government (particularly secretaries that make up the Cabinet) do not concurrently sit in the House of Representatives and are therefore not subject to concurrent conflict of interest jurisdiction like many ministers in Canada and the UK.

In the US, the executive branch is governed by a multiplicity of criminal and civil statutes, as well as codes of conduct and executive orders. The most significant of these include the *Ethics in Government Act* (which covers financial disclosure for high-ranking officials) and the *Standards of Ethical Conduct for Employees of the Executive Branch* (the *Standards*).[42] The *Ethics in Government Act* is incorporated into the rules of both the House of Representatives and the Senate. The *Standards* apply, in varying degrees, to all employees in the executive branch (over four million people), including senior cabinet officials, such as the Secretary of Agriculture.[43] The disparate sources of law that govern conflicts of interest in the US can be overwhelming. However, despite some technical language, the *Standards* contain a vast array of interpretive aids and examples that would likely provide sufficient guidance to an official

[42] *Ethics in Government Act of 1978*, Pub L No 95-521, 92 Stat 1824 (codified as amended in various sections of Titles 2, 5, 18, and 28 of the United States Code); *Standards of Ethical Conduct for Employees of the Executive Branch*, Codified in 5 CFR Part 2635 as amended at 81 FR 48687 (effective 25 August 2016), online: <https://www.oge.gov/Web/oge.nsf/0/076ABBBFC3B026A785257F14006929A2/$FILE/SOC as of 81 FR 48687.pdf>.

[43] *Standards of Ethical Conduct for Employees of the Executive Branch*, Codified in 5 CFR Part 2635, as amended at 81 FR 48687, at § 2635.102(h), online: <https://www.oge.gov/Web/oge.nsf/0/076ABBBFC3B026A785257F14006929A2/$FILE/SOC as of 81 FR 48687.pdf>.

before a statute is violated. In addition, the US has very detailed ethics manuals for both the House and the Senate.[44]

The upper house, the US Senate, is subject to a separate code called the *Senate Official Code of Conduct*. However, US senators are also subject to ethics-related rules found in the *Rules of the Senate*, which, as mentioned above, incorporate statutes that mandate requirements such as financial disclosure.[45]

3.2.2 UK

Britain's lower house is governed by the very brief *Code of Conduct for Members of Parliament*, which applies to all members of Parliament.[46] The UK's code for MPs is supplemented by an official guide that provides greater detail on the rules and requirements in the code.[47] As members of Parliament, the prime minister and most Cabinet ministers in the UK are subject to the code for MPs. In both Canada and the UK, these codes forbid making decisions in conflict of interest positions and set out financial disclosure requirements (which are detailed further in the "Compliance Mechanisms" section below).

MPs in the UK who are also ministers are subject to the overlapping jurisdiction of the *Ministerial Code*.[48] The UK's *Ministerial Code* is a creation of the Cabinet, much like Canada's *Federal Accountability Act*. However, the *Ministerial Code* contains far more substantive conflict of interest provisions (such as financial disclosure requirements) that are covered in Canada in the *Conflict of Interest Act*. Another major difference is that Canada's *Conflict of Interest Act* applies to ministers as well as to many other public officials. Conversely, in the UK, ministerial and parliamentary staff are subject to the *Civil Service Code*. As such, the UK's

[44] US House of Representatives, Committee on Standards of Official Conduct, *House Ethics Manual* (2008) 110th Congress, 2nd Session, online: <ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf>; US Senate, Select Committee on Ethics, *Senate Ethics Manual* (2003) 108th Congress, 1st Session, online: <www.ethics.senate.gov/downloads/pdffiles/manual.pdf>.
[45] US Senate, Committee on Rules and Administration, *Rules of the Senate*, chapters XXXIV to XXXIX, online: <www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome>.
[46] UK House of Commons, *Code of Conduct for Members of Parliament* (adopted 17 March 2015), online: <www.publications.parliament.uk/pa/cm201516/cmcode/1076/107601.htm>.
[47] UK House of Commons, *Guide to the Rules Relating to the Conduct of Members* (approved 17 March 2015), online: <www.publications.parliament.uk/pa/cm201516/cmcode/1076/107601.htm>.
[48] UK, Cabinet Office, *Ministerial Code* (December 2016), online: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/579752/ministerial_code_december_2016.pdf>.

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conflict of interest regime is based on more disparate sources, particularly with regard to senior civil servants.[49]

The UK's upper house, the House of Lords, is governed by the *House of Lords Code of Conduct*.

3.2.3 Canada

In Canada, the *Conflict of Interest Code for Members of Parliament* applies to all 338 elected members of the largest and most significant legislative organ in Canada, the House of Commons.[50] This code is an appendix to the *Standing Orders of the House of Commons*, which essentially operates as a rule book for proceedings in the lower house. The most senior officials in Canada's executive branch, the prime minister and most Cabinet ministers, are elected officials who occupy positions in the House of Commons. As such, these ministers are also subject to the requirements set out in the code.

With respect to Canada's executive branch, the prime minister and all other ministers of the Crown are subject to the *Conflict of Interest Act*. The Act has the most significant scope of all Canadian conflict of interest laws in terms of application to senior public officials, with approximately 3,000 public office holders being subject to at least some of its provisions.[51] This includes public office holders such as ministerial advisors and staff, officers and staff of the House and Senate, judges, and Governor-in-Council appointees (such as the heads of Crown corporations).

Like many other States, the Canadian government often issues a policy guideline for ministers and their staff, in addition to the legislative rules. The current policy guideline of the Trudeau government, issued November 27, 2015, is entitled *Open and Accountable Government*.[52] Although conflicts of interest are not the central focus of the guidelines, they are nonetheless addressed through substantive as well as aspirational provisions.

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[49] See also UK, Cabinet Office, *Code of Conduct for Special Advisers* (December 2016), online: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/579768/code-of-conduct-special-advisers-dec-2016.pdf>. The *Code of Conduct for Special Advisers*, in conjunction with the UK *Civil Service Code* (online: <https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code>) imposes additional rules on temporary ministerial advisers in the UK. Canada's most analogous advisors are subject only to the *Conflict of Interest Act*.

[50] *Conflict of Interest Code for Members of the House of Commons*, being appendix I of *Standing Orders of the House of Commons*, online: <www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm>.

[51] See Office of the Conflict of Interest and Ethics Commissioner, "Information for Members of the House of Commons", online: <ciec-ccie.parl.gc.ca/EN/InformationFor/Pages/MembersOfTheHouseOfCommons.aspx>.

[52] Privy Counsel Office, *Open and Accountable Government* (2015), online: <pm.gc.ca/sites/pm/files/docs/OAG_2015_English.pdf>.

Canada's 105 senators are subject to a separate regime entitled the *Ethics and Conflict of Interest Code for Senators*.[53]

3.3 General Structure of National Conflict of Interest Regimes: Bodies of Authority

As mentioned in the first section, a major aspect of any conflict of interest regime is the structure and delegation of authority to oversee and prevent conflicts of interest, as well as to provide education and guidance to officials with respect to the ethical performance of their duties. As such, this section details the main authorities in the US, UK, and Canada regarding conflict of interest prevention. Generally speaking, prevention and enforcement of ethical standards are overseen by a combination of independent offices (i.e., created by government, but staffed by private citizens), government offices, and parliamentary committees in the upper and lower houses. As such, these entities are the main focus of this section. It does not contain significant detail about the relevant enforcement agencies that take charge of matters when a criminal violation is alleged.

3.3.1 US

The structure of conflict of interest oversight in the US operates through delegation and diffusion of authority over ethics-related matters, particularly in the immense executive branch. The main body overseeing the executive branch is the US Office of Government Ethics (OGE). The OGE's role is purely a preventative one, as it has no authority to hear or investigate complaints. As such, the OGE's role is focused around interpreting and advising on various ethics laws, especially the *Standards of Ethical Conduct for Employees of the Executive Branch*, which governs all employees of the executive branch including the most senior officers in the executive branch, but not the president and vice president.[54] The OGE is headed by a director, but each federal agency has a designated agency ethics official (DAEO) who is responsible for oversight of ethics in a given agency and is vested with a number of powers under the *Ethics in Government Act.* A DAEO is empowered, for example, to advise individuals within his or her agency or to waive financial disclosure requirements for a part-time employee.[55]

Complaint hearings and investigations into federal agencies are handled by the Inspector General (IG) for the relevant agency. The IGs are members of an independent body called

[53] Canada, Office of the Senate Ethics Officer, *Ethics and Conflict of Interest Code for Senators* (adopted 16 June 2014), online: <sen.parl.gc.ca/seo-cse/PDF/CodeJune2014.pdf>.
[54] See generally 5 USC App § 402. For a compilation of federal ethics statutes in the US, see US Office of Government Ethics, *Compilation of Federal Ethics Laws* (current to end of 113th Congress), online: <https://www.oge.gov/web/oge.nsf/All Statutes/0BC1FF0EB760D84A85257E96006A9256/$FILE/Compilation of Federal Ethics Laws (2015).pdf?open>.
[55] *Ethics in Government Act*, 5 USC App § 101(i).

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the Council of Inspectors General on Integrity and Efficiency, which plays a part in prevention as well as enforcement of ethics violations. The head of a federal agency has very little power over its respective IG; however, there are exceptions to this autonomy in some of the most significant agencies in the US.[56] IGs wield a considerable amount of investigative authority, and the IGs' role in advising Congress and reviewing legislation overlaps in part with the role of the OGE.[57]

Generally speaking, punitive measures for violations of the *Standards of Ethical Conduct for Employees of the Executive Branch* are determined by the relevant agency, although the director of the OGE does have the ability to recommend a particular penalty for a violation of the employee code.[58] The sheer scope of the OGE's jurisdiction and the unique nature of each of the vast number of federal agencies would likely make significant centralization of authority impractical, hence the considerable delegation of powers and the reliance on IGs to investigate complaints.

Conflict of interest matters in the House of Representatives are primarily overseen by two bodies. The first is the independent investigatory Office of Congressional Ethics (OCE). The OCE is the primary body charged with hearing and investigating complaints relating to any alleged violation of "law, rule, regulation or other standard of conduct" by any member, officer, or employee of the House. The OCE was created in 2008 following a string of bribery and corruption scandals.[59] The OCE's powers include the power to compel witnesses and obtain evidence. Members of the OCE vote on whether to continue an investigation after an initial stage, and subsequently vote on whether to refer the matter to the Committee on Ethics.[60] The second is the House Committee on Ethics (HCE), which is charged with providing advice to members, officers, and staff of the lower house; collecting financial disclosure and outside employment information; and in some cases performing

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[56] The heads of seven very powerful agencies (including the Departments of Defense, Treasury, Justice, and Homeland Security) can prevent the initiation of an investigation by an IG where particular matters are concerned, including national security and significant financial information that would have a serious impact on the economy, though the agency head must provide Congress with reasons. See US, Council of the Inspectors General on Integrity and Efficiency, *The Inspectors General* (14 July 2014) at 4, online: <https://www.ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf>.

[57] *Ibid*.

[58] *Standards of Ethical Conduct for Employees of the Executive Branch*, Codified in 5 CFR Part 2635, as amended at 81 FR 48687, at § 2635.106(b), online: <https://www.oge.gov/Web/oge.nsf/0/076ABBBFC3B026A785257F14006929A2/$FILE/SOC as of 81 FR 48687.pdf>.

[59] See Donna Cassata, "House Republicans Vote to Eviscerate Independent Ethics Office", *The Star* (2 January 2016), online: <https://www.thestar.com/news/world/2017/01/02/house-republicans-vote-to-eviscerate-independent-ethics-office.html>.

[60] For a summary of the jurisdiction of the OCE, see US, Office of Congressional Ethics, "FAQ", online: <https://oce.house.gov/learn/faq/>.

investigations.[61] In addition, the HCE drafts the *House Ethics Manual*.[62] Finally, the HCE is responsible for recommending administrative actions for violations of the *Rules of the House of Representatives*; the House then votes on whether to enforce the HCE's recommendation. Even if the HCE dismisses a potential ethics violation as unfounded, it is required to produce a report detailing the alleged wrongdoing; this is said to create an added deterrent to questionable behaviour by lawmakers.[63]

The independence of the OCE, its future role, and its relationship to the HCE are all subject to considerable uncertainty. House Republicans in the US voted on January 2, 2017 to both curtail the powers and remove the independence of the OCE by preventing it from pursuing investigations that might result in criminal charges, and by bringing it under the control of the HCE.[64] The proposal would have resulted in the creation of a new "Office of Congressional Complaint Review," in place of the OCE, that would report to and be overseen by the HCE, which is composed of lawmakers who answer to their own party. The motivating reason behind the proposed change was that some lawmakers viewed the OCE as being overzealous in its investigative efforts.[65] The proposal attracted strong criticism from a range of stakeholders, including Democrat leaders, dissenting Republicans, president-elect Donald Trump, and ethics commentators.[66] Some have accused the HCE of being lax in its approach to investigating member misconduct, and many expressed concern over the fact that the new regime would lack independent oversight. Further, commentators criticized the fact that the new proposed office would lack the ability to take anonymous complaints and the fact that staff would be prohibited from speaking to news media. As a result of this backlash, House Republicans quickly backtracked on January 3, abandoning the proposal. Although the proposal was dropped, the future of the OCE remains uncertain. After their reversal on January 3, House Republicans agreed to ask the HCE to examine the OCE and recommend possible changes by summer 2017 to address the concerns that some members have raised.[67]

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[61] For more information on the jurisdiction of the House Committee on Ethics, see US House Committee on Ethics, "Jurisdiction", online: <ethics.house.gov/jurisdiction>.

[62] *House Ethics Manual* (2008). The most recent manual was created in 2008, when the House Committee on Ethics was still named the Committee on Standards of Official Conduct.

[63] See Eric Lipton, "With No Warning, House Republicans Vote to Gut Independent Ethics Office", *The New York Times* (2 January 2017), online: <www.nytimes.com/2017/01/02/us/politics/with-no-warning-house-republicans-vote-to-hobble-independent-ethics-office.html>.

[64] *Ibid*.

[65] *Ibid*. The comments of House Republican Steve King aptly capture this sentiment: "[The OCE] has damaged or destroyed a lot of political careers in this place, and it's cost members of Congress millions of dollars to defend themselves against anonymous allegations": Eric Lipton & Matt Flegenheimer, "House Republicans, Under Fire, Back Down on Gutting Ethics Office", *The New York Times* (3 January 2017), online: <www.nytimes.com/2017/01/03/us/politics/trump-house-ethics-office.html>

[66] See Lipton & Flegenheimer, *ibid.*

[67] *Ibid*.

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In contrast to the House, there is no independent body that oversees ethics in the US Senate. In the US Senate, it is the Select Committee on Ethics (SCE) that drafts, oversees, and investigates complaints and provides training relating to the *Senate Code of Official Conduct*.[68] The SCE, under the *Ethics in Government Act* and *Senate Code of Official Conduct*, is also tasked with duties and responsibilities respecting financial and private interest disclosure.[69] After an investigation, the Senate as a whole is tasked with determining appropriate sanctions for its members for violations of the code or rules.[70]

3.3.2 UK

The administration of the main conflict of interest regimes in Britain falls on a wider variety of individuals and bodies than, for example, those in Canada. In 1994, following a number of high-profile political scandals, the UK established the independent Committee on Standards in Public Life (CSPL).[71] The CSPL has a broad mandate to examine and advise on concerns related to political ethics across all branches of the UK government, including the civil service. The CSPL does not, however, perform investigations into individual cases. Rather, it serves a broader role, reviewing the overall implementation of codes of conduct and ethical practices across government.[72]

In terms of more direct authority, the Office of the Parliamentary Commissioner for Standards (OPCS) is the independent agency charged with implementing and enforcing the *Code of Conduct for Members of Parliament*. The OPCS's duties include: providing education and guidance to members of Parliament (which includes most Cabinet ministers); maintaining the register of members' financial interests; hearing complaints; and performing investigations, whether based on a complaint or the OPCS's own initiative.[73] The OPCS is overseen by the lower house's Standards and Privileges Committee, to which the OPCS submits its investigations, annual reports, and recommendations for amendments or interpretations of the *Code of Conduct for Members of Parliament*. In 2016, the OPCS began a comprehensive review of the *Code of Conduct for Members of Parliament*. As of April 2017, the

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[68] US Senate, Select Committee on Ethics, *Senate Code of Official Conduct* (March 2015), online: <www.ethics.senate.gov/public/index.cfm/files/serve>.

[69] 5 USC App 4 § 101 et seq. For a summary of the SCE's jurisdiction, see US Senate, Select Committee on Ethics, "Jurisdiction", online: <www.ethics.senate.gov/public/index.cfm/jurisdiction>.

[70] US Constitution, Art I, § 5, cl 2.

[71] See UK, Committee on Standards in Public Life, "Terms of Reference", online: <https://www.gov.uk/government/organisations/the-committee-on-standards-in-public-life/about/terms-of-reference>.

[72] UK, Committee on Standards in Public Life, *Ethics in Practice: Promoting Ethical Conduct in Public Life* (July 2014), Appendix A, online: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336976/2902536_CSPL_EthicsInPractice_acc.pdf>.

[73] For a summary of the OPCS's duties, see UK Parliament, "Parliamentary Commissioner for Standards", online: <www.parliament.uk/pcs>.

Commissioner had completed and sent her proposals for revisions to the Committee on Standards. The new Committee of the next Parliament will decide in the Fall of 2017, or sometime thereafter, how the review should proceed.[74]

The UK's *Ministerial Code* governs the activities of Cabinet ministers and is administered by the Director General of the Propriety and Ethics Team, which exists within the Cabinet. The Director General is charged with overseeing compliance and providing ministers with advice regarding the *Ministerial Code*. The fact that the *Ministerial Code* is drafted and implemented by Cabinet has raised concerns surrounding a lack of impartiality and prompted calls for the creation of an independent body to oversee ministerial ethics.[75] This contrasts significantly with Canada's regime, in which the oversight of ministers ultimately falls within the jurisdiction of an independent commissioner (although the role of internal policing within the Canadian Cabinet by persons such as the party whip should not be understated).

With respect to the civil service, the UK's *Civil Service Code* is overseen by the Civil Service Commission (CSC), an independent parliamentary body that has existed for over a hundred years, but whose existence was only codified in statute as part of a significant constitutional reform in 2010.[76] Although it is the Minister for the Civil Service that creates the code, its administration is overseen by the CSC and there are a number of minimum requirements that must be in the code.[77] The CSC has the authority to hear complaints regarding alleged breaches of the code, as well as the ability to investigate these complaints and make determinations on how a potential conflict of interest would best be resolved.[78]

Authority over conflicts of interest in the UK's House of Lords is rather diffuse. The *House of Lords Code of Conduct* is overseen by the Sub-Committee on Lord's Standards and administered by the House of Lords Commissioner for Standards. This commissioner is appointed to hear and investigate alleged breaches of the *House of Lords Code of Conduct*. While the Commissioner for Standards in the House of Lords can initiate an investigation, it may do so only in "exceptional circumstances" and with the approval of the Sub-Committee on Lord's Conduct.[79] So, generally speaking, a complaint is required before an investigation is initiated. Interestingly, financial disclosure in the UK's upper house is not handled by its Commissioner for Standards as in the lower house. Instead, Lords' interests are collected

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[74] For updates on the process, see UK Parliament, "Code of Conduct and Rules of the House", online: <https://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/parliamentary-commissioner-for-standards/code-of-conduct-and-rules-of-the-house/>.

[75] Robert Rogers & Rhodri Walters, *How Parliament Works*, 6th ed (Routledge, 2006) at 128.

[76] *Constitutional Reform and Governance Act 2010* (UK), c 25, Part 1, s 2(1).

[77] *Ibid*, s 5(1); on minimum requirements, see s 7.

[78] *Ibid*, s 9.

[79] UK, House of Lords, *Code of Conduct for Members of the House of Lords*, 4th ed (May 2015), s 107, online: <https://www.parliament.uk/documents/WIS-news/Code-of-Conduct-for-Members-of-the-House-of-Lords.pdf>.

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and maintained by the separate Lord's Registrar. In addition, the Lord's Registrar provides guidance to Lords regarding the Code, which in the lower house is formally the responsibility of the Parliamentary Commissioner for Standards for Members (although the House's registrar provides day-to-day ethics advice as well).[80]

3.3.3 Canada

At the centre of the Canadian conflict of interest regime is the Office of the Conflict of Interest and Ethics Commissioner. As the name suggests, this office is headed by the Conflict of Interest and Ethics Commissioner, who is an independent parliamentary officer. This office is responsible for implementing, interpreting, and offering guidance on both the *Conflict of Interest Act* and the *Conflict of Interest Code for Members of Parliament*.[81] This authority includes the power to determine what a public official is required to do in order to maintain compliance.[82] In addition to implementation and interpretation of Canada's main conflict of interest legislation, the Commissioner wields considerable power to hear and investigate complaints, and can do so on his/her own initiative.[83] In his/her investigatory capacity, the Commissioner may compel witness testimony and the production of documents with the same power as a court of record in civil proceedings.[84] As part of the Commissioner's implementation duties, the office also handles the collection, storage, and, where required, publication of all disclosure documents required under the relevant statutes and codes.[85]

Canada's Office of the Conflict of Interest and Ethics Commissioner represents a very strong centralization of power with respect to conflict of interest prevention, overseeing conflict of interest prevention in the legislature, the executive branch and senior positions in the public

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[80] *Ibid*, s 24.

[81] See *Conflict of Interest Act*, SC 2006, c 9, s 3(6); *Conflict of Interest Code for Members of the House of Commons*, being appendix I of *Standing Orders of the House of Commons*, s 28(8), online: <www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm>. Under the *Code*, unlike under the *Act*, the Commissioner may make recommendations for interpretations, but the final determination rests with the responsible committee.

[82] *Conflict of Interest Act*, SC 2006, c 9, s 19. In accordance with the recommendations of UNCAC, this provision suggests reaching an agreement through consultation with the official in question, though this is not required.

[83] *Ibid*, ss 44-45; *Conflict of Interest Code for Members of the House of Commons*, being appendix I of *Standing Orders of the House of Commons*, s 27, online: <www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm>.

[84] *Conflict of Interest Act*, SC 2006, c 9, s 48.

[85] *Ibid*, s 51; *Conflict of Interest Code for Members of the House of Commons*, being appendix I of *Standing Orders of the House of Commons*, ss 23-24, online: <www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm>.

service.[86] This is further evidenced by the myriad functions of the office, which include an advisory and educational role, an administrative role, investigative and adjudicative powers, financial disclosure collection, and the ability to impose financial penalties for violations.[87] The commissioner's work is overseen by the House of Commons Standing Committee on Procedures and House Affairs, as well as the Standing Committee on Access to Information, Privacy and Ethics. As such, investigative and annual reports are submitted to these committees when completed.

Conflict of interest prevention in Canada's Senate is overseen by an independent Senate Ethics Officer. The Senate Ethics Officer administers, interprets and applies the *Conflict of Interest Code for Senators*, and also collects and interprets the financial disclosure forms of senators. In addition, the Senate Ethics Officer has the ability to hear and investigate complaints. The Standing Committee on Conflict of Interest for Senators receives reports from the Senate Ethics Officer and makes the ultimate determination with respect to interpretation of the *Conflict of Interest Code for Senators*.[88]

3.4 The Substance and Interpretation of National Conflict of Interest Rules

This section is not a provision-by-provision analysis of each country's legal instruments relating to conflicts of interest. Although specific provisions are analyzed in detail, the broader purpose of this section is to draw out the major themes and values that inform these instruments. Like judicial interpretations, differing approaches to compliance mechanisms, such as financial disclosure or mandated divestiture, can be illustrative when determining how conflict of interest is defined and in understanding where a State perceives the greatest risks. As previously mentioned, all conflict of interest regimes attempt to balance the use of restrictive rules with the need to attract personnel to government service. In addition, there are, generally speaking, two approaches to drafting provisions aimed at preventing and managing conflicts of interest:

- The first is the **principles-based approach** (or the "descriptive" approach), pursuant to which policy makers use general, abstract language to indicate in broad strokes the sorts of values and principles that ought to guide decision

[86] All members of the public service in Canada are governed by the *Value and Ethics Code for the Public Sector* (2003), online: <https://www.tbs-sct.gc.ca/pubs_pol/hrpubs/tb_851/vec-cve-eng.pdf>, which is the relevant code for more junior members of the service. Oversight, investigation, and administration of this code are performed by the Public Service Commission.

[87] Subsection 53(3) of the *Conflict of Interest Act* states that the goal of financial penalties in this context is compliance, not punishment. The maximum is therefore relatively small ($500). There is currently no penalty for failing to provide timely disclosure under the code applicable to MPs, an issue that the Commissioner recommended addressing in her review of the code.

[88] Canada, Office of the Senate Ethics Officer, *Ethics and Conflict of Interest Code for Senators* (adopted 16 June 2014), s 44(1), online: <sen.parl.gc.ca/seo-cse/PDF/CodeJune2014.pdf>. For the mandate of the Senate Ethics Officer, see Office of the Senate Ethics Officer, "About the Office", online: <sen.parl.gc.ca/seo-cse/eng/Office-e.html>.

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makers. For example, a provision stating that public office holders should "act solely in the public interest and demonstrate integrity, honesty, and fairness when exercising their respective duties" would fall into the class of principles-based legislation.

- The second is the **rules-based approach**, pursuant to which policy makers outline specific, concrete situations and types of conduct that ought to be avoided. For example, a provision stating that public office holders "must recuse themselves from voting on a matter in which they stand to make a personal profit of over C$1,000" would fall into the class of rules-based legislation.

Each approach has its own advantages and disadvantages:

- The **principles-based approach** offers flexibility and adaptability; it avoids the need to attempt to envision all possible situations in which an objectionable conflict of interest might arise. Yet, the principles-based approach's flexibility is also its main weakness. Without precise and specific guidance, decision makers may find themselves struggling to determine where the line is between proper and improper conduct. Principles are inherently subjective and require a significant degree of interpretation—who is doing the interpreting can have a significant impact on the ultimate determination. Moreover, whether a given principle has been properly observed is a highly contextual determination, which invites uncertainty and results in a lack of predictability.
- By contrast, the **rules-based approach** clearly distinguishes between acceptable conduct and unacceptable conduct, thereby providing a much higher degree of certainty and predictability. However, rules-based provisions can be both over-inclusive and under-inclusive. On the one hand, rules-based provisions may be over-inclusive in that they may capture situations that fall within the letter, but not the spirit of the rule. For example, a public office holder may happen to breach specific financial interest disclosure requirements by no fault of their own and without having actually been in a conflict of interest. Nonetheless, a sanction would be imposed, resulting in significant adverse consequences for the individual. On the other hand, rules-based provisions may be under-inclusive in that they may fail to capture situations that were meant to be captured when the rule was drafted. For example, a public office holder may have a significant financial interest in a matter that puts him or her in a conflict of interest, but does not meet the monetary threshold for disclosure. Such a situation might be captured by a broader, more abstract principle of guidance, but may "slip through the cracks" under the rules-based approach. Furthermore, over-reliance on rules alone risks turning public decision makers into mere "rule followers" who do not reflect more deeply on whether they are exercising their duties in the public interest.

The challenge for policy makers is to create a conflict of interest regime that balances the flexibility and adaptability of principles-based provisions with the certainty and predictability of rules-based provisions. Each state must determine for itself the appropriate

ratio between these two approaches. Scholars have noted that the US tends to create lengthy, technical codes, whereas European states lean towards more aspirational mandates, with Canada tending to fall somewhere in the middle.[89]

The OECD Guidelines recommend that a conflict of interest regime should include broad descriptive provisions that emphasize the aim and principles of a given policy in a descriptive manner.[90] Such provisions can be helpful in guiding the interpretation of certain provisions where a narrow construction risks failing to capture unethical conduct due to technical compliance. Canada's *Conflict of Interest Code for Members of the House of Commons* (*COIC*) contains a significant number of these provisions. For example, section 1(a) states that part of the purpose of the *COIC* is to "maintain and enhance public confidence and trust" in members.[91] Similarly, the UK's *Code of Conduct for Members of Parliament* (*COC*), which is very principle-based, states that part of the purpose of the *COC* is to "ensure public confidence" in the members.[92] In the US, the *Code of Ethics for US Government Service* is a document consisting of 10 principles to which every office holder and employee must adhere. The first provision states that one must "put loyalty to the highest moral principles and to country above loyalty to Government persons, party or department."[93] Most statutes and branch-specific codes in the US do not contain purposive provisions as extensive as those in Canada and the UK. However, the *House Ethics Manual* does go into considerable detail on the relationship between ethics in politics and public confidence.[94]

The following analysis provides greater clarity with respect to how each State defines "conflicts of interest." Following this, there is further analysis of peripheral provisions that inform the meaning of "conflict of interest" to a significant extent.

3.4.1 Description of Conflict of Interest: US

According to the US *House Ethics Manual*, a "conflict of interest" denotes a situation in which "an official's conduct of his office conflicts with his private economic affairs," with the primary concern being a "risk of impairment of impartial judgement" that arises whenever there is a "temptation to serve personal interests."[95] The *House Ethics Manual* notes that some conflicts of interest are inherent in a representative democracy and that situations between the extremes of a very broad interest on the one hand and clear cases of bribery on the other

[89] Mulgan & Wanna (2011) 416 at 423.
[90] OECD (2003).
[91] *Conflict of Interest Code for Members of the House of Commons*, being appendix I of *Standing Orders of the House of Commons*, s 1(a), online: <www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm>.
[92] *Code of Conduct for Members of Parliament* (adopted 17 March 2015), s 1(c).
[93] US, *Code of Ethics for Government Service*, 34 CFR Part 73, Appendix to Part 73.
[94] *House Ethics Manual* (2008), at 2-16.
[95] *Ibid* at 187.

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will be reviewed on a case-by-case basis.[96] The US *Standards of Ethical Conduct for Employees of the Executive Branch* contain a significant amount of guidance with regard to defining conflict of interest situations. Subpart D deals exclusively with financial interests and states that an employee is prohibited from:

> participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him under this statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest.[97]

A "direct" effect requires a "close causal link" between the action and the effect, and a "predictable" effect requires a "real," not speculative, possibility of effect.[98] Imputed interests in this provision include the interests of an employee's spouse, partner, minor child, or an organization to which the employee belongs or with which the employee has been negotiating employment arrangements. The term "particular matter" encompasses matters that involve "deliberation, decision or action that is focused upon the interests of specific persons" or a small and identifiable class of persons. However, legislation or policy making that is narrowly focused on a specific person or small class may also qualify.[99] The code for federal employees also covers situations in which relationships with individuals or organizations could lead to perceptions of a loss of impartiality, and it also includes a lengthy provision regarding the use of public office for private gain, which extends to the private gains of friends, relatives, and associations to which the employee is connected, including corporations and nonprofit organizations.[100] Overall, the federal employees' code is an extremely robust document that covers a wide range of situations, provides examples, and defines terms in extreme detail. In this sense, the employees' code is very much in line with the OECD's recommendations around providing definitions and examples. However, the document is quite long and dense, risking the possibility of putting technical compliance above broad ethical practice.

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[96] *Ibid* at 250. One example of an inherent conflict of interest would be where an individual who was previously involved in the corn-growing industry is elected, in part due to his or her involvement in the industry, in a riding where corn fields abound. Compelling such an individual to recuse him or herself from matters related to corn growing or to sell his or her farm is viewed as stripping the member of qualities that led constituents to elect the individual in the first place.

[97] *Standards of Ethical Conduct for Employees of the Executive Branch*, codified in 5 CFR Part 2635, as amended at 81 FR 48687, § 2635.402(a), online: <https://www.oge.gov/Web/oge.nsf/0/076ABBBFC3B026A785257F14006929A2/$FILE/SOC as of 81 FR 48687.pdf>.

[98] *Ibid*, § 2635.402(b)(1).

[99] *Ibid*, § 2635.402(b)(3).

[100] *Ibid*, §§ 2635.501, 2635.702.

3.4.2 Description of Conflict of Interest: UK

The UK's *Code of Conduct* (*COC*) governing MPs is quite brief and decidedly more aspirational than its Canadian counterpart. The *COC* proper is just over four pages long. It is supplemented by a guide that provides greater detail on disclosure requirements, but offers very little in the way of interpretive aids. The main conflict of interest provision in the *COC* is found in Part V, section 10. It states:

> Members shall base their conduct on a consideration of the public interest, avoid conflict between personal interest and the public interest and resolve any conflict between the two, at once, and in favour of the public interest.[101]

When compared to the conflict of interest provision that regulates ministers in the UK, this provision is extremely sparse. The *Ministerial Code*, section 7.1 states, "Ministers must ensure that no conflict arises, or could reasonably be perceived to arise, between their public duties and their private interests, financial or otherwise."[102] This is only the first provision of a 25-provision chapter of the *Ministerial Code* that relates in part to conflicts of interest. While it is understandable that Ministers are subject to more stringent rules, the *COC* is greatly lacking in that it uses the term "personal interest," implying that a conflict may not arise in the furtherance of a family member's interests. In addition, it is implicitly focused on actual and not perceived conflicts of interest. However, the *COC* does include the "7 Principles of Public Life," a set of principles created by the Committee on Standards in Public Life (CSPL). The first of these principles, "selflessness," states that public office holders should not act or take decisions "in order to gain financial or other material benefits for themselves, their family, or their friends" and should "take decisions solely in terms of the public interest."[103] These principles are said to be "taken into account" when determinations are made about a breach of the code. While this does appear to expand the scope of section 10, the lack of concreteness leaves much to be desired in the *COC*. This is a matter that the UK's Committee on Standards has explicitly addressed in a review of the *COC*, noting that the CSPL has recommended more specific rules, but at the time of writing there had not been any significant developments in this regard. As of April 2017, the Commissioner had completed and sent her proposals for revisions to the *COC* to the Committee on Standards. The new Committee of the next Parliament will decide how the review should proceed.[104]

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[101] *Code of Conduct for Members of Parliament* (adopted 17 March 2015), s 10.
[102] *Ministerial Code* (December 2016), s 7.1.
[103] *Code of Conduct for Members of Parliament* (adopted 17 March 2015), s 8.
[104] UK Parliament, House of Commons Committee on Standards, *The Standards System in the House of Commons: Sixth Report of Session 2014-15* (4 February 2015) at paras 51-58, online: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmstandards/383/383.pdf>.

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3.4.3 Description of Conflict of Interest: Canada

In Canada, the instrument that deals with conflicts of interest most directly is the *Conflict of Interest Act* (*COIA*). In the *COIA*, "conflict of interest" is defined in section 4. It states that for the purposes of the Act:

> A public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests.[105]

Note that this provision only requires that the exercise of an official power provides the "opportunity" to further a private interest, which effectively covers situations of potential conflicts. This provision is definitional only, however.[106] Section 6(1) is the actual rule-based provision that prohibits public officials from making a decision or participating in making a decision where they "know or reasonably should know" that in doing so they would be in a conflict of interest. "Private interest" is defined only negatively in the *Act*.[107] However, the Commissioner of Conflicts of Interest has provided guidance in this regard, stating that she considers the meaning of "private interest" to be informed in large part, but not exhaustively, by the interests that must be disclosed in part 2 of the *Act* (these requirements are detailed below).[108]

Canada's Commissioner of Conflicts of Interest has given the term "improper" in section 4 broad scope. For example, a 2015 investigation under the *Act* involved a minister who oversaw funding proposals for certain projects. The minister had been informed that one application was deficient, but allowed the application to be amended past the deadline, receive consideration in the later stages of the process despite noticeable flaws and eventually be awarded funds.[109] The Commissioner interpreted the *Act*'s preferential treatment provision in section 7 narrowly and found that because the minister's treatment was not based on the "identity" of the individual who was advocating for the project (it was unclear whether the minister had even met the advocate), the actions were not captured by

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[105] *Conflict of Interest Act*, SC 2006, c 9, s 4.

[106] See Office of the Conflict of Interest and Ethics Commissioner, *The Finley Report* (Ottawa: Office of the Conflict of Interest Commissioner, 2015) at 32, online: <ciec-ccie.parl.gc.ca/Documents/English/Public Reports/Examination Reports/The Finley Report.pdf>.

[107] A "private interest" does not include an interest in a decision or matter "(a) that is of general application; (b) that affects a public office holder as one of a broad class of persons; or (c) that concerns the remuneration or benefits received by virtue of being a public office holder": *Conflict of Interest Act*, SC 2006, c 9, s 2(1).

[108] Office of the Conflict of Interest and Ethics Commissioner, *The Conflict of Interest Act: Five-Year Review* (30 January 2013) at 10, online: <ciec-ccie.parl.gc.ca/Documents/English/Public Reports/Special Publications/Five-Year Review Act.pdf>.

[109] *The Finley Report* (2015) at 2.

that narrow provision. Instead, the minister appears to have been influenced in this decision by other officials. The Commissioner found that the preferential treatment given to the project made the minister's decisions to extend deadlines and eventually award the funds "improper" within the wider net cast by section 4 and therefore a breach of section 6(1).[110]

In Canada's lower house, "conflict of interest" is less rigorously defined, and the code governing the conduct of MPs is decidedly less strict. This is not uncommon, as ministers and senior officials tend to be most at risk of conflict given their oversight and discretion with respect to policy implementation. Generally speaking, at just under 20 pages, Canada's *Conflict of Interest Code* (*COIC*) is not overly technical and contains a largely satisfactory mixture of aspirational as well as substantive provisions. In terms of general principles regarding conflicts of interest, the *COIC* contains provisions stating that MPs are "expected" to "avoid real or apparent" conflicts of interest and "arrange their affairs" as such.[111] Beyond this, there are no substantive provisions that refer directly to conflicts of interest. Instead, most of the rules are based around the language of "furthering private interests." The main substantive conflict of interest provision in Canada's *COIC* is found in section 8. It states:

> When performing parliamentary duties and functions, a Member shall not act in any way to further his or her private interests or those of a member of the Member's family, or to improperly further another person's or entity's private interests.[112]

The *Code* defines the circumstances in which a Member is considered to be furthering private interests. This includes any action that results directly or indirectly in the increase or preservation of assets, reductions in liabilities, or the acquisition of a financial interest.[113] For the purposes of the *COIC*, a family member includes a spouse or common law partner as well as children who are under 18 or who are still dependent on the financial support of their parents. Canada's Commissioner of Conflicts of Interest and Ethics has pointed out that the definition of "family member" is lacking, as it does not cover parents and siblings, and has suggested a revision in this regard to bring the *COIC* more in line with the *COIA*, which includes relatives and friends.[114]

3.4.4 Financial Disclosure and Restraint on Participation: US

As mentioned above, laws that mandate financial disclosure and restraint in participation, as well as limitations on holding certain interests, can be illustrative when it comes to

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[110] *Ibid* at 34-35.
[111] *Conflict of Interest Act*, SC 2006, c 9, s 2(b) and (d).
[112] *Ibid*, s 8.
[113] *Ibid*, s 1.
[114] Office of the Conflict of Interest and Ethics Commissioner, *The 2015 Review of the Conflict of Interest Code for Members of the House of Commons* (19 February 2015) at 2, online: <ciec-ccie.parl.gc.ca/Documents/English/Public Reports/Special Publications/2015 Review of the Code.pdf>.

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determining where a State perceives the greatest risks and how far a State will go in restricting the liberties of its officials and representatives in their private lives.

Recusal from voting and refraining from influencing matters in which an official has a private interest is a hallmark of conflict of interest laws. In the US, the provisions of House Rule III, clause I stipulate that a member must vote on a question put, except where he or she has a "direct personal or pecuniary interest" in the matter at hand.[115] The narrow scope of this clause can be attributed to the heavy importance the House places on members' voting rights. Remarkably, the *House Ethics Manual* states that "historical precedence" suggests there is no authority to deprive a member of his or her right to vote, instead leaving it up to the member to determine what is appropriate. This rule only applies to voting, however, not to other activities that involve advocacy on certain matters such as earmarking funds for entities in which the member has a private interest.[116]

Provisions requiring public officials to refuse gifts or otherwise declare them constitute another major aspect of all conflict of interest regimes. The US, UK and Canada all have broad prohibitions, with specific exceptions, on gifts. When a gift falls into one of the exceptions, each State has a threshold for value above which the gift must be reported. In the US the general threshold for officials and members is $250.[117]

Disclosure of private interests is a central feature of most conflict of interest regimes, and one that is stressed by both the OECD and the UN. As a mechanism of compliance, public financial disclosure allows the public, especially the press, to scrutinize potential conflict of interest situations. In the US, UK and Canada, the relevant laws and policies typically require the disclosure of financial assets and holdings; gifts that have been received; real property holdings that are not the principal residence; outside sources of income; and positions in corporations, non-profits and other organizations.

In the US, the *Ethics in Government Act* mandates broad disclosures of personal interests for members of Congress, the president, the vice-president, and senior-level officials.[118] The US has had serious problems with members of Congress receiving large payments for "personal

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[115] US, *Rules of the House of Representatives*, Ch III, c 1. Guidance on this provision is given in the *House Ethics Manual*, which indicates a very high threshold for an interest to be a "direct personal" one. For instance, a member who was a bar owner was permitted to vote on prohibition. Even where the interest is clearly direct, it may be determined that it is not sufficiently substantial. For instance, a member was found not to have violated the rule when the member voted to authorize the provision of funds to a defence contractor of whom the member owned 1,000 common shares, as the contractor was a large company with over four million outstanding shares. To demonstrate traditional procedure, the *House Ethics Manual* also mentions an instance where there was a very clear financial conflict of interest, yet the Speaker only suggested the member be recused instead of ordering recusal.

[116] US, *Rules of the House of Representatives*, Ch XXIII, c 16 and 17.

[117] *Ethics in Government Act*, 5 USC App § 102.

[118] *Ibid*, § 102(a).

services," and consequently the relevant statute requires disclosure of any sources of income over $200. The relevant Ethics Committee also sets firm caps on how much a member may earn from outside sources (in 2016 this limit was $27,495).[119]

In the US, there is no blanket prohibition that prevents officials from holding or acquiring certain interests.[120] In keeping with the US's general theme of delegation of powers to create context-specific rules, prohibitions on ownership are created within each federal agency. So while there is no blanket prohibition on owning the securities of public companies, an officer or employee of the Securities and Exchange Commission, for example, is subject to extremely prohibitive restrictions on owning such assets. Prohibitions in this context can also extend to bank loans where the recipient of the loan works for a federal agency that insures bank deposits, even though such work would not operate to reduce the loan recipient's liabilities.[121] This approach has the advantage of providing flexibility while narrowing the deterrent effect that restrictions can have. However, this approach could also create complexity and result in confusion, particularly for an employee who moves from one agency to another.

Under the US *Ethics in Government Act*, officials subject to the *Act* are not required to disclose assets held in a "blind trust." However, the US, similarly to Canada, sets out narrow requirements for a trust to be considered blind. This includes restrictions on the level of control an official can exercise over the assets, the information an official can receive from a trustee and the instructions an official can give to a trustee.[122]

3.4.5 Financial Disclosure and Restraint on Participation: UK

The UK's approach to recusal in the lower house is based on general principles with very little in the way of specific prescriptive laws. Similar to the situation in the US and Canada,

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[119] *Ethics in Government Act*, 5 USC App § 102(a)(1)(A). For a discussion of historical issues, see US Senate, Select Committee on Ethics, *Senate Ethics Manual* (2003) 108th Congress, 1st Session, at 64, online: <www.ethics.senate.gov/downloads/pdffiles/manual.pdf>. For "highlights" of the *House Ethics Rules* and 2015 cap figures, see <ethics.house.gov/sites/ethics.house.gov/files/documents/Final Version of the Highlights Overview Booklet 2015.pdf> (as of December 2016 the 2016 "highlights" were not available on the Committee on Ethics' website). The 2016 "Outside Earned Income Pink Sheet" is available online: <ethics.house.gov/sites/ethics.house.gov/files/Outside Earned Income Pink Sheet.pdf>.

[120] *Standards of Ethical Conduct for Employees of the Executive Branch*, Codified in 5 CFR Part 2635, as amended at 81 FR 48687, § 2635.403, online: <https://www.oge.gov/Web/oge.nsf /0/076ABBBFC3B026A785257F14006929A2/$FILE/SOC as of 81 FR 48687.pdf>.

[121] *Ibid*, § 2635.403(c)(1) (see example 2).

[122] *Ethics in Government Act*, 5 USC App § 102(f)(1)(2).

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MPs and ministers in the UK must report allowable gifts once they reach a threshold value. The threshold for MPs is £300, but £140 for ministers.[123]

In the UK, MPs, ministers, and senior officials must disclose private interests under their respective policies and applicable laws. MPs in the UK must also disclose the source and reason for any payment in excess of £100 they receive for employment outside of government.[124]

The *Ministerial Code* in the UK does not have a set of explicitly prohibited financial assets. Rather, it is up to the individual minister, in consultation with the Permanent Secretary of Cabinet, to determine which financial interests may create a conflict of interest.[125] In similar fashion to the analogous code applicable in the US, the *Ministerial Code* provides flexibility and favours a case-by-case approach rather than blanket prohibitions.

The UK's *Ministerial Code* also requires divestment regarding assets that might create a conflict of interest, or alternative arrangements to avoid the conflict.[126] Although not explicitly stated, based on the UK's financial disclosure requirements, which do not require that assets in a blind trust be listed, setting up such a trust would likely be an acceptable alternative to divestment.[127] Direction on what makes a trust "blind" is less detailed than in Canadian law, and members are allowed to give "general direction" to trustees, leaving it unclear whether this includes sector-specific advice or instead limits direction to specifying acceptable risk levels.

3.4.6 Financial Disclosure and Restraint on Participation: Canada

The main recusal provision for Canadian MPs is found in section 13 of the *Conflict of Interest Code*, which explicitly prohibits debate or voting on a matter in which the member has a private interest.[128] For the purposes of this section, a "private interest" is defined as the interests that "can be furthered" under section 3(2).[129] This is somewhat similar to the US approach in that members still have a significant responsibility to remain conscious of the situations in which they must recuse themselves, but Canada's approach to recusal in the

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[123] *Code of Conduct for Members of Parliament* (adopted 17 March 2015), Chapter 1, s 22; *Ministerial Code* (December 2016), s 7.22.
[124] *Code of Conduct for Members of Parliament* (adopted 17 March 2015), Chapter 1, s 6.
[125] *Ministerial Code* (December 2016), s 7.2.
[126] *Ibid*, s 7.7.
[127] *Code of Conduct for Members of Parliament* (adopted 17 March 2015), Chapter 1, s 53(b).
[128] *Conflict of Interest Code for Members of the House of Commons*, being appendix I of *Standing Orders of the House of Commons*, s 13, online: <www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm>.
[129] *Ibid*. Subsection 3(2) includes things such as increasing or preserving the value of an asset, receiving remuneration from a listed source, and acquiring new financial interests. This extends to the Code's narrow definition of family members outlined in s 3(4).

lower house is arguably stricter than the US's approach, particularly with respect to abstention from voting.

The Commissioner of Conflict of Interest and Ethics in Canada has noted that one of the most common subjects of inquiry to her office is gifts.[130] The threshold for reporting gifts is $200 for ministers and officials who are not also MPs and $500 for all MPs, but the Commissioner has recommended making this figure consistent across branches and lowering it considerably (to around $30).[131]

MPs, ministers, and senior officials in Canada are required to disclose private interests. Within 60 days of being elected, and annually during their term, MPs must disclose any assets and liabilities greater than $10,000 and the source and reason for any income in excess of $1,000 that they or their family members receive or expect to receive in the 12 months preceding and following the disclosure statement.[132] The statement must also disclose any trusts that the MP or the MP's family expect to derive a benefit from, as well as any benefits from contracts with the Government of Canada that are received by the MP, the MP's family or a private corporation in which they have an interest.[133] A summary of each MP's statement is available for public inspection.[134] In Canada, there are no blanket rules that prohibit an MP from owning shares in a company, although the Commissioner does have the ability to deem the size of a given holding as so substantial it could affect impartiality.[135] Under the *Conflict of Interest Act*, however, there are very strict rules imposed on ministers, senior officials, and even full-time ministerial staff. The *Act* places a general prohibition on "controlled assets." which are broadly defined as assets that could directly or indirectly be affected by government policies and includes the securities of public companies whether held individually or in a portfolio.[136] It is important to note that this definition refers to an interest being affected by "government policies" rather than specific policies within the given official's purview. This approach suggests a greater focus on wholesale risk mitigation rather than flexibility. As such, Canada's regime might be said to have a greater deterrent effect on recruitment, with the key advantages being greater certainty and avoidance of conflicts of interest.

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[130] *The 2015 Review of the Conflict of Interest Code for Members of the House of Commons* (19 February 2015) at 3.

[131] *Conflict of Interest Code for Members of the House of Commons*, being appendix I of *Standing Orders of the House of Commons*, s 14(3), online: <www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm>; *Conflict of Interest Act*, SC 2006, c 9, s 23; Office of the Conflict of Interest and Ethics Commissioner, *The Conflict of Interest Act: Five-Year Review* (30 January 2013) at 48, online: <ciec-ccie.parl.gc.ca/Documents/English/Public Reports/Special Publications/Five-Year Review Act.pdf>.

[132] *Conflict of Interest Code for Members of the House of Commons*, s 21(1)(a) and (b).

[133] *Ibid*, s 21(1)(b.1) and (c).

[134] *Ibid*, s 23(2).

[135] *Ibid*, s 17.

[136] *Conflict of Interest Act*, SC 2006, c 9, s 20.

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In Canada, section 27 of the *Conflict of Interest Act* requires relevant officials to either divest controlled assets through an arm's length transaction or otherwise place the assets in an acceptable blind trust.[137] There are very strict rules around what makes a blind trust acceptable. These rules require that the official have no power of control or management of the assets, limit the information the official can receive from a trustee and limit the instructions the official can give to the trustee to the narrow category of written instruction regarding risk levels, not sector-specific instruction.[138]

4. CONCLUSION

It is clear that most States and individuals can agree on the general concept of a "conflict of interest." However, as this chapter has sought to demonstrate, the vast range of possible circumstances that could give rise to a conflict of interest make it very difficult to fashion a single definition that provides significant clarity and can apply universally. As such, the space in which a conflict of interest exists is defined largely by a variety of factors such as culture, broad principles and proscriptive rules around disclosure and ownership, with rules that actually include the phrase "conflict of interest" being one factor among many.

In part, this has to do with the nature of conflicts of interest, as the phrase tends to describe a position from which a range of possible actions may be undertaken rather than an action *per se*. As such, prevention of conflicts of interest cannot rely on fact-specific judicial interpretations. While legal interpretations are important, so too are broad statements of principles and mechanisms such as disclosure requirements, which both serve to influence political culture and are illustrative of how a State defines the conceptual space in which real, potential, or perceived conflicts of interest exist.

[137] *Ibid*, s 27.

[138] *Ibid*, s 27(4)(a-k), 27(5).

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CHAPTER 10

REGULATION OF LOBBYING

[*This chapter, subject to some additions and deletions, was written and updated by Jeremy Sapers as a directed research and writing paper under the supervision of Professor Ferguson. Descriptions of UK law and policy in this chapter were added by Madeline Reid and Professor Ferguson.*]

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1. INTRODUCTION

Lobbying is an aspect of the public policy-making process in all democratic countries and is not an inherently corrupt practice.[1] Broadly defined, lobbying occurs when special interest groups engage public officials in an effort to influence decision making. Lobbyists may promote corporate interests or advocate for issues of broader public concern. Access to public officials has become a commodity in most developed nations, and the influence industry commands significant resources. When undertaken ethically and under the administration of a robust, transparent regulatory regime, lobbying can promote political rights and improve government decision making. Legitimate lobbying practices facilitate democratic engagement and provide government officials with specialized knowledge.

Involving private interests in the legislative process risks both fostering relationships that perpetuate undue influence, as well as creating routes of preferential access to public officials. The OECD warns that undue influence in policy making constitutes a "persistent risk" in member countries due to the "unbalanced representation of interests in government advisory groups" and the revolving door between government and the lobbying industry.[2] Where access to decision makers no longer fulfills the public interest, the legitimacy of

[1] OECD, *Lobbyists, Governments and Public Trust, Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying* (OECD, 2014), online: <http://www.oecd.org/gov/lobbyists-governments-and-public-trust-volume-3-9789264214224-en.htm>.

[2] OECD, *Government at a Glance 2015* (OECD, 2015) at 12, online: <http://www.keepeek.com/Digital-Asset-Management/oecd/governance/government-at-a-glance-2015_gov_glance-2015-en#page3>.

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lobbying erodes and corruption can follow. A recent study by the OECD suggests that upwards of 60% of citizens do not have confidence in their national governments.[3] In an era when trust levels in national governments are declining, lobbying must be perceived by the public as legitimate in order to be effective. The legitimacy challenge is exacerbated by the fact that lobbying is generally understood as a practice that advances special interests.[4] Transparency in legislative decision making is closely related to levels of public trust in politicians[5] and addressing concerns about lobbying is therefore a key lever for restoring confidence in government.[6] As a result, it is important that governments develop lobbying policy that promotes transparency, integrity and impartiality in the legislative process.

Policy should reflect modern growth in the lobbying industry globally:[7] both the number of lobbyists and the total amount of money spent on lobbying activities have increased significantly in recent years.[8] This growth has catalyzed social engagement and public concern for greater transparency and oversight. An opaque lobbying process can enable disproportionate access to decision makers and provide unfair advantages for well-funded interests. This inequality suppresses minority interests and stifles public consultation in policy development.[9] The existence of powerful interests—be they corporate, private or government—and the participatory character of democracy ensure that lobbying will remain an entrenched practice. As efforts to engage public officials and influence decision making continue, concomitant regulation must be maintained.

This chapter surveys lobbying in the context of corruption and anticorruption policy development. The majority of the discussion focuses on relationships between individuals and government, and opportunities for corruption that are created when private interests engage government. While public officials are often bound by legislation and ethical codes of conduct, this chapter addresses primarily the regulation of lobbyists. Section 2 provides a brief introduction to terminology used throughout this chapter and a summary discussion of the challenges related to adopting objective definitions for global phenomena such as corruption and lobbying. Section 3 addresses the relationship between lobbying and democratic governance, and suggests that while lobbying is an integral component of democracy, democracy alone does not prevent corruption. Section 4 situates lobbying policy

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[3] *Ibid*.
[4] Joel S. Hellman, Geraint Jones & Daniel Kaufmann, "Seize the State, Seize the Day: State Capture, Corruption and Influence in Transition", Policy Research Working Paper No. 2444 (World Bank, 2000), online: <http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-2444>.
[5] Klaus Schwab, The Global Competitiveness Report 2013-2014 (World Economic Forum, 2013), online: <http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf>.
[6] OECD, (2014).
[7] OECD, *OECD Forum on Transparency and Integrity in Lobbying* (OECD, 2013), online: <http://www.oecd.org/gov/ethics/lobbying-forum.htm>.
[8] OECD, "Fighting Corruption in the Public Sector: Lobbying", online: <http://www.oecd.org/gov/ethics/lobbying.htm>.
[9] OECD, *Lobbyists, Governments and Public Trust, Volume 1: Increasing Transparency Through Legislation* (OECD Publishing, 2009), online: <http://www.oecd.org/publications/lobbyists-governments-and-public-trust-volume-1-9789264073371-en.htm>.

within broader regulatory frameworks, and recommends five basic principles to guide public officials in the development of lobbying policy. Sections 5, 6 and 7 contain a substantive review of lobbying regulatory regimes in the US, the UK and Canada. Finally, Section 8 introduces the regulatory environment in the European Union, contrasting approaches and identifying areas for improvement.

2. TERMINOLOGY

2.1 Defining Lobbying

Although definitions of lobbying abound in academic literature, nongovernmental publications and government directives, there is no global consensus on what constitutes "lobbying" or a "lobbying activity." However, defining these terms is a prerequisite to developing meaningful policy and identifying the scope of acceptable lobbying conduct. The OECD advises that statutory definitions of lobbying must be "robust, comprehensive and sufficiently explicit to prevent loopholes and misinterpretation."[10]

It has been suggested that "the word 'lobbying' has seldom been used the same way twice by those studying the topic."[11] A 2006 survey completed by the OECD found no single definition of lobbying was used across member countries.[12] The Public Relations Institute of Ireland (PRII) suggests a typical and generally useful definition of lobbying:

> the specific efforts to influence public decision making either by pressing for change in policy or seeking to prevent such change. It consists of representations to any public officeholder on any aspect of policy or any measure implementing that policy, or any matter being considered, or which is likely to be considered by a public body.[13]

The European Commission provides another general definition, describing lobbying as "any solicited communication, oral or written, with a public official [intended] to influence legislation, policy or administrative decisions."[14] According to Transparency International

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[10] OECD (2014), at 38.

[11] Frank Baumgartner & Beth Leech, *Basic Interests: The Importance of Groups in Politics and Political Science* (Princeton University Press, 1998) at 33.

[12] OECD Public Governance and Territorial Development Directorate, "Governance Arrangements to Ensure Transparency in Lobbying: A Comparative Overview", internal working document (OECD, 2006).

[13] OECD, *Lobbyists, Governments and Public Trust, Volume 2: Promoting integrity by self-regulation* (OECD, 2012) at 23, online: <http://www.oecd.org/publications/lobbyists-governments-and-public-trust-volume-2-9789264084940-en.htm>.

[14] European Commission, "Green Paper on European Transparency Initiative" (COM, 2006), online: <http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14521_en.htm>.

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(TI), lobbying is "any direct or indirect communication with public officials, political decision makers or representatives for the purposes of influencing public decision-making carried out by or on behalf of any organized group," and includes all activities intended to influence policy and decision making of governmental, bureaucratic or similar institutions.[15] As with corruption, statutory definitions of lobbying must reflect domestic environments.

The broad spectrum of language used to describe lobbying reflects the complexities of the influence industry. Dialogue between citizens and government can manifest directly between interest groups and legislators, or through indirect, grassroots modes of influence intended to affect legislative processes by shifting public opinion.[16] Lobbyists may work on behalf of corporate interests, citizens groups or other organizations advocating for the public interest. A formal distinction can be made between promoters of the general, public interest and lobbying in the corporate, private interest.[17] Individual citizen and collective group access to legislators is a fundamental democratic political right; this right extends to any kind of special interest group, including corporate lobbies. Financial services, energy, chemical and pharmaceutical sectors are among the most commonly represented commercial interests.[18] Public interest groups advocate for trade unions, environmental concerns, industry transparency and regulation, among other civil society interests. Inclusive definitions of 'lobbyist' recognize the following as members of the influence industry: lobbying consultancy firms, in-house lobbyists employed by corporations, lawyers working in public affairs departments for law firms and corporations, think tanks, and expert groups created by government for the purpose of policy development.

Identifying who is a lobbyist and what constitutes lobbying is essential for effective regulation; distinguishing between research, advisory and lobbying efforts ensures that policy is neither under-inclusive nor overbroad.[19] It is generally accepted that broad definitions are preferable because under-inclusive legislation can encourage private interests to exploit unregulated alternatives to engage public officials.[20]

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[15] Dieter Zinnbauer, "Corrupting the rules of the game: from legitimate lobbying to capturing regulations and policies" in Dieter Zinnbauer, Rebecca Dobson & Krina Despota, eds, *Global Corruption Report 2009: Corruption and the Private Sector* (Cambridge University Press, 2009) at 32, online: <https://www.transparency.org/research/gcr/gcr_private_sector/0/>.

[16] Secondary tactics may include reorienting political debate and stimulating industry and grassroots opposition to proposed legislation.

[17] Claude Turmes & Fred Thoma, "An act for Parliament" in Helen Burley et al, eds, *Bursting the Brussels Bubble: the battle to expose corporate lobbying at the heart of the EU* (ALTER-EU, 2010) at 162.

[18] Will Dinan & Erik Wesselius, "Brussels: a lobbying paradise" in Burley et al, eds, (2010) at 23.

[19] Categorizing lobbyists and demarcating regulatory boundaries is a challenging task for policymakers. For example, the meta-category of think tanks includes state funded policy research organizations, politically affiliated bodies and largely independent academic associations and institutions.

[20] For example, think-tanks and law firms have rejected calls to join the lobbyist registries in the EU. These organizations provide alternatives for individuals who want to engage politicians outside of the regulatory regime.

2.2 Terminology in a Comparative Context

Transnational economic, social and political interdependencies have increased dramatically in recent years. Lobbying strategies and practices are evolving lockstep with the global socio-political landscape.[21] General constructions of corruption and lobbying are helpful to identify the boundaries of academic and legal inquiry but do not easily accommodate comparative analysis. This is due in part to discourse variability across social, political and economic lines. Unique legal approaches to corruption and lobbying regulation reflect broader social and institutional differences across jurisdictions. Divergent domestic lobbying practices have resulted in different rules for the same actors in different jurisdictions and inconsistent compliance at the international level.[22] It is therefore important that policy makers develop specific anticorruption policies. Further, the literature must acknowledge that legal (and extra-judicial) practices are the result of, and operate within, broader social structures.

While regional variation persists, globalization has somewhat standardized expectations of conduct and corruption discourse, largely through the proliferation of global corporations. In addition, as discussed in Chapter 1, the wide application of international instruments, such as UNCAC, suggests that there is an agreed 'core of corruption' generally understood as undesirable and inconsistent with principles of good governance and global economic relations. Still, there is no universal definition of corruption and the terminology common to global economic discourse and comparative study may advance ideological and regional preferences. For example, conceptions of corruption in the context of development rhetoric have been criticized as a "disguise [for] political agendas, or… the interests of the powerful."[23] To this extent, corruption is a normative concept, influenced by regional moral, ethical and institutional traditions and practices. It is important that lawmakers recognize corruption discourse as being used and developed "by particular actors [representing] particular sets of practices," and that anticorruption policies should be harmonious with both domestic needs and global expectations.[24]

Historically, corruption and lobbying research has focused on single-country case studies. As discussed in Chapter 1, comparative literature on corruption is scarce due to the secrecy of corruption, the lack of a universal definition and cultural differences across countries. While cultural differences may challenge comparative study and the development of objective definitions, domestic policy must reflect the unique "diversity, capacities and resources of lobbying entities."[25]

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[21] OECD (2014).
[22] *Ibid.*
[23] Elizabeth Harrison, "Corruption" (2007) 17 Development in Practice 672.
[24] *Ibid.*
[25] OECD (2014), at 38.

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3. LOBBYING AND DEMOCRACY

Lobbying is a centuries-old component of governmental decision making.[26] As will be argued in Section 3.1, it is generally considered to be an acceptable and necessary practice in modern democracy and lobbying regulation is widely recognized to be in the best interests of the public and government.[27] When undertaken appropriately, lobbying can "strengthen accountability in government and the participation of citizens in policymaking"[28] by providing a valuable source of dialogue between citizens and public officials.[29] Lobbyists operate as guides, intermediaries and interlocutors, providing services to interest groups by navigating the complexities of modern democratic decision making. Not only do lobbyists provide an important conduit for citizens to communicate with government, they also promulgate valuable and often specialized information that advances informed decision making and sound policy development.

Legitimate lobbying activities therefore improve the quality of public decision making and promote the democratic right to petition government.[30] Unfettered access to public officials, however, presents opportunities for private interests to exercise undue influence. Influence peddling perpetuates corruption and is a major threat to democratic governance founded on equality and popular representation.[31] When the procurement of government favour becomes the province of vested and well-funded interests, lobbying can significantly damage public trust in the integrity of democratic institutions. Without effective regulation, the influence industry can become an "exclusive and elite pursuit."[32] Without adequate oversight and enforcement, regulation is ineffective.

3.1 Democracy as an Indicator of Transparency

Corruption, in the sense of the misuse of public office for private gain, is inherently inconsistent with basic principles of democracy: openness and equality.[33] Democratic processes empower citizens to detect and punish corruption.[34] In order for lobbying to maintain legitimacy and align with democratic principles, it must operate subject to disclosure and transparency requirements. Legitimate lobbying practices democratize the

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[26] OECD Public Governance and Territorial Development Directorate, "Lobbying: Key Policy Issues", internal working document (OECD, 2006).
[27] OECD (2012).
[28] *Ibid* at 14.
[29] Will Dinan & Erik Wesselius, "Brussels: a lobbying paradise" in Burley et al, eds, (2010).
[30] OECD (2014), at 40.
[31] OECD (2012), at 11.
[32] Craig Holman, "Obama & K Street – lobbying reform in the US" in Burley et al, eds, (2010) at 125.
[33] Porta D. Della & A. Pizzorno, "The Business Politicians: Reflections from a Study of Political Corruption" in M. Levi & D. Nelken, eds, *The Corruption of Politics and the Politics of Corruption* (Blackwell, 1996).
[34] Zinnbauer (2009) at 32.

flow of information between voters and public officials and mobilize citizen engagement in the legislative process. Dialogue is an essential component of effective democratic governance, and lobbying is an "important element of the democratic discussion and decision-making process."[35]

While theoretically consistent, the relationship between ethical lobbying practices and democracy is imperfect. As expected, according to Transparency International's Corruption Perceptions Index, the least corrupt nations are, almost without exception, democratic.[36] However, corruption has been found to persist despite democratization, economic liberalization and the adoption of transnational laws and domestic enforcement designed to eliminate it.[37] Corruption levels in democratic states are moderated by the state's degree of poverty, national culture and perceptions towards corruption,[38] and strength of key social institutions.[39]

Various studies indicate an association between economic underdevelopment and corruption regardless of whether a state is democratic or non-democratic; however, the types of corruption may vary depending on governance types. Countries with more economic opportunities than political ones, such as China, experience different types of corruption than countries with more political opportunities than economic ones, like India. These disparities engender different relationships between citizens and government. Economic problems encourage patronage. Patronage in turn encourages personal relationships with individual decision makers, rather than broad affiliations with political parties.[40] Where there is restricted individual economic freedom, economic success depends less on market forces and more on the ability to influence decision makers.[41] In contrast, systems that feature limited political access tend to centralize transactions among small groups of local government actors. These officials are typically appointed bureaucrats who do not rely on personal followings.

Strong social ties between corporations and government increase the likelihood of corruption.[42] Robust disclosure and transparency rules are often resisted by political leaders

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[35] *Ibid.*

[36] Transparency International, "Corruption Perceptions Index: 2017", online: <https://www.transparency.org/news/feature/corruption_perceptions_index_2017>.

[37] Wayne Sandholtz & William Koetzle, "Accounting for Corruption: Economic Structure, Democracy and Trade" (2000) 44 International Studies Quarterly 31 at 32.

[38] R Fisman, "Estimating the Value of Political Connections" (2000) 91 American Economic Review.

[39] A Curervo-Cazurra, "The Effectiveness of Laws against Bribery Abroad" (2008) 39 J of Int'l Bus Studies.

[40] Yan Sun & Michael Johnston, "Does Democracy Check Corruption? Insights from China and India" (2009) Comparative Politics 1.

[41] Wayne Sandholtz & William Koetzle, "Accounting for Corruption: Economic Structure, Democracy and Trade" (2000) 44 International Studies Quarterly 31.

[42] Jamie D Collins, Klaus Uhlenbruck & Peter Rodriguez, "Why Firms Engage in Corruption: A Top Management Perspective" (2009) 87 Journal of Business Ethics 89.

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out of self-interest.[43] Further, enforcement faces significant challenges because these political-private relations often operate behind closed doors. Increased transparency through disclosure would subject these interactions to scrutiny and reduce opportunities for corruption.

Transparency International has documented a number of immediate measures that can be adopted to reduce the risk of interest groups exerting undue influence on public policy development:

- regulations on lobbying;
- regulations on the movement of individuals between the administration and the private sector (revolving door);
- regulations on conflict of interest;
- regulations on political finance;
- regulation on private sector competition;
- rules on transparent decision making and access to information; and
- civil society and media oversight.

4. REGULATORY SCHEMES

4.1 Lobbying and the Broader Regulatory Framework

Most regulatory regimes distinguish unscrupulous lobbying activity from criminal conduct. Distinct statutory instruments address lobbying as opposed to criminal conduct, such as bribery, government fraud and extortion. In addition to criminal law, other areas of law and practice work alongside lobbying rules to create a broad regulatory regime aimed at promoting government integrity. These include election campaign and party funding rules (see Chapter 13), government procurement rules (see Chapter 11), conflict of interest rules (see Chapter 9), whistleblower protection (see Chapter 12) and access to government information infrastructure.

4.2 Principles of Lobbying Regulation

Public authorities have the primary responsibility to establish standards of conduct for public officials who may be targeted by lobbying and to enact legislation that regulates the lobbying industry.[44] Authorities must not only ensure that they act in accordance with these obligations, but also that the lobbyists they engage operate ethically and legally and adhere

[43] Craig Holman, "Obama & K Street – lobbying reform in the US" in Burley et al., eds, (2010) at 125.
[44] OECD (2009).

to relevant principles, rules and procedures. This dual responsibility reflects the role of public officials in promoting impartiality, integrity and transparency in government.

Robust regulation and ethical standards are necessary to maintain integrity in the decision-making process and, consequently, public confidence in government institutions. If lobbyist registration and disclosure are not mandatory, transparency is compromised and lobbying activities risk undermining public trust in government. As discussed above, undisclosed relationships with and disproportionate access to public officials can lead to corruption.[45] Lobbying commands the mobilization of significant private resources; the application of these resources may enable unfettered access to public officials that can lead to powerful private interests gaining influence at the expense of the public interest.[46]

Corporate lobbies have significantly greater resources at their disposal compared to public interest groups. Without effective regulation, financial disparity provides well-funded lobby groups privileged access to decision makers. Deep pockets and preferential access allow corporate lobbies to engage comprehensive and prolonged lobbying efforts that are difficult for public interest groups to match.[47] These inequalities undermine democratic decision making because those with greater resources become more capable of influencing policy.[48] In the interest of generating confidence in government, lobbying rules, policies and practices should level the playing field by promoting integrity, fairness in public policy making, openness and inclusiveness, reliability, and responsiveness.[49] Effective regulation will leverage citizen engagement,[50] access to information and principles of open government.[51]

States face a number of choices when developing standards and procedures for lobbying, such as:

- Definition of lobbyist;
- Definition of lobbying;
- Regulatory scheme (voluntary/mandatory/self-regulated); and
- Enforcement mechanisms.

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[45] Hellman, Jones & Kaufmann (2000).
[46] OECD, *OECD Forum on Transparency and Integrity in Lobbying* (OECD, 2013), online: <http://www.oecd.org/gov/ethics/lobbying-forum.htm>.
[47] Anne Therese Gullberg, "Strategy counts, resources decide: Lobbying European Union climate policy" in Burley et al, eds, (2010) 29.
[48] Will Dinan & Erik Wesselius, "Brussels: a lobbying paradise" in Burley et al, eds, (2010) 23.
[49] OECD (2014).
[50] Lobbying is one of many tools that can promote inclusive decision making. For an example of an innovative project, see Canada's "Open Government Initiative": Government of Canada (2011), Open Government Initiative, online: <http://open.gc.ca/open-ouvert/aop-apgo-eng.asp>; Government of Canada, Consulting with Canadians, online: <www.consultingcanadians.gc.ca/>; Treasury Board of Canada, Government-Wide Forward Regulatory Plans, online: <http://www.tbs-sct.gc.ca/hgw-cgf/priorities-priorites/rtrap-parfa/gwfrp-ppreg-eng.asp>.
[51] OECD, "Open government" in OECD, *Modernising Government: The Way Forward* (OECD, 2009) 29.

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There is no single appropriate approach to regulation. A review of experiences in North America and Europe suggests that effective regulation results from an incremental process of political learning and reflects domestic cultural, political and constitutional norms.[52] Policies from one jurisdiction cannot be uncritically transplanted to another. Nevertheless, while approaches to regulation may vary, effective policies contain many common elements.

In 2010, the OECD released the Recommendation of the Council on Principles for Transparency and Integrity in Lobbying. These principles are intended to guide executive and legislative decision makers in the development of regulatory and policy options that meet public expectations for transparency and integrity in lobbying. Adherence to the OECD principles will strengthen public confidence in government and contribute to stronger and fairer economies by promoting accountability. The OECD principles are:

1. Standards and rules that adequately address public concerns and conform to the socio-political, legal and administrative context;
2. Scope of legislation or regulation that suitably defines the actors and activities covered;
3. Standards and procedures for disclosing information on key aspects of lobbying such as its intent, beneficiaries and targets;
4. Enforceable standards of conduct for fostering a culture of integrity in lobbying;
5. Enhancing effective regulation by putting in place a coherent spectrum of strategies and practices for securing compliance.

These principles do not suggest a "one size fits all" approach to regulation. Instead, they provide the fundamental building blocks from which legislators can develop meaningful policy tailored to political, legal and cultural circumstances. The following section elaborates on these principles.

4.2.1 Standards Consistent with Socio-Political, Legal and Administrative Context

Legislation and policy must consider constitutional traditions and rights, including the expectations of civil society regarding access to government and participation in the decision-making process. Across many countries, social expectations and codified rights vary widely, affecting the manner in which citizens petition government, seek interest representation and develop social relationships with government.[53] Effective standards reflect a country's democratic and constitutional traditions and interact with wider legal and administrative frameworks (including codes of conduct for public officials, rules on election campaign financing, provisions providing protection for whistleblowers, access to

[52] OECD (2009).
[53] *Ibid*.

information laws and conflict of interest rules).[54] The regulatory framework and its constituent parts should foster integrity, transparency, accountability and accessibility in government.[55]

Public concern surrounding integrity in the lobby industry may arise for various reasons. Understanding public concern allows legislators to appropriately define the parameters of policy development and respond meaningfully to the impetus for regulation. The OECD has identified three primary social concerns: (1) accessibility to decision makers; (2) integrity of government decision making; and (3) conduct in lobbying. Each of these concerns demands unique policy solutions. Considering the root causes of public concern will help identify the most appropriate regulatory response and measures for achieving compliance.

4.2.2 Clearly Defined Scope of Policy on Lobbying

The efficacy of lobbying regulation depends largely on how lobbying is defined and who is considered a lobbyist. Policy should consider the different types of entities and individuals that may engage public officials and the theatres where lobbying activities may occur. Regulation should reflect the complexities of modern legislative decision making and the need to promote fairness among all stakeholders. Regulations should primarily target individuals or organizations who receive remuneration for lobbying activities.[56] However, varying levels of public concern may demand a more encapsulating definition. According to the OECD, "where transparency and integrity are the principle goals of legislation, effectiveness is best achieved if definitions are broad and inclusive" and capture formal and informal lobbying in traditional and modern theatres of lobby activity.[57] Inclusive policies promote equal access to decision makers and address public concern over integrity in the lobby industry.

Policy should balance the public's interest in transparency and integrity with the government's interest in soliciting outside expertise. Broad definitions and rigorous disclosure requirements risk deterring informed members of the public from approaching government.[58] Regulations overburdened by excessive disclosure and reporting requirements will encourage non-compliance and consequently fail to meet their objectives.[59] Lobbyists may be hesitant to meet registration requirements out of a concern

[54] *Ibid*. For more information on lobbying and conflict of interest, see: M Malone, "Regulation of Lobbyists in Developed Countries: Current Rules and Practices" Report (2004) at 3, online: <http://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/LocalGovernment/Administration/FileDownLoad%2C2048%2Cen.pdf>.
[55] OECD (2009).
[56] OECD (2014).
[57] OECD (2009).
[58] J. Greenwood, "Regulation of Interest Representation in the European Union (EU): Research Guide to US and International Interest Groups" (Praeger Publishers, 2004) 379.
[59] John Warhurst, "Locating the Target: Regulating Lobbying in Australia" (1998) 51:4 Parliamentary Affairs at 538.

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that disclosure will provide competitors with proprietary intelligence and indications of their work.[60] As a result, lobbyists may be encouraged to obscure disclosures or avoid compliance all together. Lawmakers must balance the risks of mandating specific information disclosures with the challenges of accepting only summary descriptions of lobbyists' objectives.

Legislation that provides broad definitions of lobbyists and lobbying may include exclusory provisions that exempt specific actors or activities from disclosure requirements.[61] For example, legislation may exempt representatives of other governments acting in their official capacity, or communications that are undertaken within the public realm. Compliance nonetheless relies on definitions and exclusions that are unambiguous and clearly understood by lobbyists and public officials.

4.2.3 Robust Standards and Procedures for Information Collection and Disclosure

Standards for transparency, accountability and integrity in lobbying are the foundation for the appropriate conduct of public officials and lobbyists. Transparency "enable[s] the public to know who is lobbying for what, in order to allow it to take suitable precautions to protect its interest."[62] Enhancing transparency is the primary objective of lobbying regulation and effective disclosure is the surest method to promote accountability. Regulations and practices that mandate disclosure of information related to communications between public officials and lobbyists empower citizens to exercise their right of public scrutiny.[63] Because transparency enhances the perceived and actual integrity of government, policy must not only target lobbyists but also public officials who make decisions and may be susceptible to bribery and other forms of corruption.[64]

Disclosure rules determine the type of information that must be shared, the nature of registration and reporting, and the manner in which information is communicated to the public. Sparse information will render regulations meaningless, while excessive data may bury meaningful information and encourage non-compliance.[65] At a minimum, lobbyists should identify their clients, beneficiaries and objectives. Requirements must be harmonized with existing norms and laws related to confidential and privileged information; legitimate expectations of openness must be balanced against privacy rights and economic interests in

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[60] Greenwood, (2004) 379.
[61] A.P. Pross, "The Rise of the Lobbying Issue in Canada" in *Commercial Lobbyists: Politics for Profit in Britain* (University of Aberdeen Press, 1991).
[62] Frederick M. Hermann, "Lobbying in New Jersey, 2006", paper presented at the Nineteenth Annual Meeting of the Northeastern Regional Conference on Lobbying in Philadelphia, Pennsylvania, New Jersey Election Law Enforcement Commission, August 2006.
[63] OECD (2009).
[64] Grant Jordan, "Towards Regulation in the UK: From 'General Good Sense' to 'Formalised Rules'" (1998) 51:4 Parliamentary Affairs 524.
[65] OECD (2009).

protecting proprietary information. Regulations that avoid excessive demands and address privacy interests will facilitate disclosure of pertinent but parsimonious information.[66] Disclosure requirements should solicit lobbyists to identify the intent of their lobbying activity, their employer and beneficiaries and the individuals, offices and institutions targeted by their lobbying.[67] It is important that disclosure is timely and updates are made periodically. Information should be readily available and technology should be utilized to encourage compliance and facilitate public access. Electronic filing should be used to improve the convenience, flexibility, accessibility and comparability of lobbyist data.

4.2.4 Standards of Conduct that Foster a Culture of Integrity

Lobbying requires the participation of both government and interest groups. As 'it takes two to lobby,' lobbyists and public officials share the responsibility of maintaining the integrity of regulatory schemes. Self-regulation through professional codes may be sufficient to inculcate a culture of professional ethics in the lobby industry; however, the OECD suggests that voluntary codes are ineffective.[68] Codes of conduct are intended to promote principles of behaviour harmonious with those of good governance – honesty, transparency and professionalism. Without sufficient measures and resources to enforce rules and apply sanctions, self-regulation may fall short of meeting its objectives. Social concern surrounding the conduct of lobbyists may require government intervention through the codification and enforcement of professional standards.

There are three types of codes of conduct that may affect lobbyist operations: professional codes or self-regulation; employment and post-employment codes for current and former public office holders; and, statutory or institutional codes. Together, these instruments help provide the social license and public support that is necessary for lobbyists to operate.

Professional codes are usually created by lobbyists themselves. They promote ethical standards from within, and are often developed and implemented on an ad hoc basis. Because enforcement is limited, the OECD has concluded that professional codes are largely ineffective.[69] Employment and post-employment codes proscribe the conduct of public officials in their interactions with lobbyists. They often apply during and following an official's term in public office.

These rules and procedures reflect broader democratic principles and promote public confidence in government decision making. Public officials should ensure their engagement with lobbyists avoids preferential treatment, conforms to legal requirements of information

[66] A possible solution to managing information overload is for regulations to define information requirements according to type of lobbyist. This option may increase legislative complexity but ultimately improve the quality and accessibility of data.
[67] OECD (2009).
[68] OECD (2012).
[69] In Europe, however, some public affairs organisations have introduced reprimands and expulsions into the voluntary codes.

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disclosure, enhances transparency and avoids conflicts of interest. Meeting these obligations may require "revolving door" provisions for public officials leaving office. Former public officials equipped with knowledge and access to current decision makers are a valuable commodity for lobbyists. They may maintain favour with former staff and therefore retain the capacity to informally influence decision making. "Revolving door" provisions mandate "cooling-off" periods during which former public officials must not lobby their former organizations. "Reverse revolving door" provisions prevent former lobbyists from influencing policy reform from the inside. Together, these restrictions minimize the transfer of confidential information, ensure lobbyists and government operate at arm's length and maintain public trust in government.

4.2.5 Mechanisms that Encourage Compliance

It is widely recognized that compliance is greatest where regulators utilize a gamut of enforcement strategies.[70] Soft measures and incentive-based tools including communication outreach, education programs and access to government buildings should be used together with more coercive sanctions to promote compliance. Communication strategies can be used to raise awareness of expected standards and mobilize conformity among key actors. Education programs, primarily targeting lobbyists and public officials, increase comprehension of rules and policies. Periodic courses complement existing professional curriculums, such as ethics training. These undertakings support formal reporting requirements and encourage compliance. Incentives can be used strategically to encourage compliance. For example, registered lobbyists may be granted access to automatic alert systems for consultation and release of government documents. Traditional sanctions include administrative fines and the removal of lobbyists from registries. Regulators may also develop innovative strategies based on individual experiences and compliance histories. These strategies include public reporting of improprieties by lobbyists.

To maximize their effect, sanctions must be proportionate and timely. Regulatory authorities must operate with sufficient independence and resources to ensure meaningful, objective enforcement. This requires that regulators be insulated from political pressure and delegated sufficient discretion to initiate investigations and allocate resources.

5. COMPARATIVE SUMMARY

For more than a century, the US was the only jurisdiction to formally regulate lobbyists.[71] Before the early 2000s, only three other countries had implemented lobbying regulation:

[70] OECD (2012).

[71] OECD (2009). However, provisions against bribery, fraud and other forms of corruption and influence peddling were more common.

Australia, Canada, and Germany.[72] Globalization[73] has since led to the adoption of lobbying policy across cultures and continents: Poland, Hungary, Israel, France, Mexico, Slovenia, Austria, Italy, the Netherlands, Chile, the UK, and the EU now boast established regulatory regimes.[74] Addressing the relationship between civil society and government is "increasingly regarded as a desirable and necessary development in the interests of good government."[75]

Global economic and political relationships have transferred methods of lobbying between countries and regions; indeed, many lobbying firms and public interest groups are themselves multinational organizations.[76] However, lobbying standards and rules cannot be borrowed from one jurisdiction and adopted in another without careful consideration. Effective policy must reflect the domestic socio-political, legal and administrative environment. States possess varying degrees of regulatory competency and experience, making "political-learning"[77] an essential requirement for the development of effective regulation.[78] While globalization has normalized lobbying techniques, culturally specific lobbying strategies continue to reflect longstanding, localized social relationships between citizens and government.

Domestic approaches to lobbying regulation reflect regional value systems, political structures and legislative objectives. For example, constitutional documents prescribe some limits to lobby regulation in Canada and the US. In order to maintain confidence in government, lawmakers must preserve traditional modes of representation and access to

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[72] S. Clark, *Regulation of Lobbying in Foreign Countries* (Law Library of Congress, 1991).

[73] In OECD (2009), the OECD identifies two challenges to lobbying regulation as a result of globalization. First, the rise of transnational corporations has meant that foreign interests now wish to influence decision-making processes abroad. Second, international social movement groups have mobilized public expectations for democratic participation in social policy making.

[74] OECD (2014) at 40.

[75] Malone (2004) at 3.

[76] Interest groups and stakeholders affected by legislative and policy change transcend international borders. This global element has taken on particular significance with the rise of multinational corporations, some of which generate annual revenues that dwarf the GDP of entire countries. Trade policy is developed with the economic best interests of the home country in mind. In the EU, corporate lobbies were integral in the development and implementation of the Global Europe trade strategy. This trade agenda intends to create open markets in developing countries and has the potential to significantly alter the economies of non-EU nations. Subsequent trade deals with South Africa have resulted in a nearly 50 percent increase in European imports, undercutting local producers, triggering unemployment and exacerbating South Africa's trade deficit. When the balance of power hangs heavily in favour of corporate lobbies, policy development may succumb to business interests at the expense of domestic and global public interests. For more information, see: European Commission, *Global Europe: Competing in the world* (2006).

[77] In this context, political learning refers to the process whereby lawmakers draft legislation in response to acute incidents, such as corruption scandals. For more information, see Section 4, where it is suggested that lobbying policy should be forward-thinking rather than reactionary.

[78] OECD (2009).

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public officials.[79] This is increasingly difficult when international trade and governance structures demand globally normalized standards. Nonetheless, effective regulation will be tailored to accommodate the political culture, governmental system, social partnerships and norms of the society in which it operates.[80]

Unlike the experience of the European Union, corporate lobbies in the US, UK, and Canada rarely participate directly in policy making and remain on the periphery of the legislative process. In the EU, lobbyists commonly hold positions on internal working groups and legislative consultative bodies.[81] It is not uncommon for industry to participate in expert groups directly involved in policy development.[82]

The political and economic systems in the US, and to a lesser extent, Canada and the UK, facilitate easy entry into the lobby industry; motivated and well-resourced individuals should find few barriers. Because it is reasonable for individuals to pay third parties to promote their interests, lobbying undertakings often involve an element of compensation. The flexible and capitalist-driven North American systems necessitate regulation and transparency. The American legislative process endows individual lawmakers with significant influence over legislation. This creates an environment in which lobbyists often target individual public officials, rather than political parties or levels of government. This is particularly the case where the executive branch is the primary source of legislative change, as it is in Canada, the UK and the EU.[83] On the other hand, in many European countries, corporatist systems have historically played a significant role in policy development. Lobbying evolved alongside pre-existing relationships between industry and government, and corporate interests therefore continue to enjoy a high level of integration within European policy-making processes.[84] As such, the impetus for lobbyist registration is less clear for corporate groups, because corporate participation is historically a common and accepted practice.[85]

6. REGULATORY FRAMEWORK AND CONTEXT FOR LOBBYING

In Canada and the US, lobbying regulation also exists in varying degrees at the provincial or state and municipal levels.[86] In the UK, rules and requirements for lobbyists and public

[79] *Ibid.*
[80] *Ibid.*
[81] C. Thomas, ed, *Research Guide to US and International Interest Groups* (Praeger Publishers, 2004) 379.
[82] OECD (2009).
[83] OECD (2009).
[84] K. Ronit & V. Schneider, "The Strange Case of Regulating Lobbying in Germany" (1998) 51:4 Parliamentary Affairs 559.
[85] Clarke (1991).
[86] At the provincial level, Alberta, British Columbia, Saskatchewan, New Brunswick, Newfoundland and Labrador, Nova Scotia, Manitoba, Ontario, and Quebec have lobbying registration regimes. At the municipal level, Ottawa and Toronto have implemented lobbying registries.

officials vary between the House of Commons, House of Lords and devolved Assemblies and Parliaments in Wales, Northern Ireland, and Scotland. It should be noted that while lobbying schemes below the federal government level are an important source of regulation for the industry, they are outside the scope of this chapter.

6.1 US: Framework and Context

6.1.1 Governance Structure

The US has a republican system of government. At the national level, individual state governments send representatives to the legislative branch (Congress) composed of the House of Representatives and Senate. The President leads the executive branch of the federal government. Power is broadly diffused in the US, and there are many decision-making intervals that present the opportunity for lobbyists to engage public officials.

6.1.2 Regulatory Framework

Lobbying in the US is protected by the first amendment to the Constitution, which states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[87] The *Lobbying Disclosure Act* (*LDA*) took effect in 1996 and constitutes the legal framework governing federal lobbying registration and reporting. In 2007, the *Honest Leadership and Open Government Act* (*HLOGA*)[88] was enacted and amended the *LDA*. The *HLOGA* modified the thresholds and definitions of lobbying activities, changed the frequency of reporting for registered lobbyists and lobbying firms and added additional disclosure requirements.[89] In 2009, a Presidential Executive Order further enhanced lobbying regulation.[90] Filings are made jointly to the Secretary of the Senate and Clerk of the House of Representatives. These officials have the authority to provide guidance and assistance on the registration and reporting requirements of the *LDA*, and, where necessary, verify and inquire to ensure the accuracy, completeness and timeliness of registrations and reports.[91]

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[87] US Const amend 1, § 1.

[88] *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, 121 STAT 735, online: <http://www.fec.gov/law/feca/s1legislation.pdf>.

[89] The Congressional Research Service found the impact of the *HLOGA* on the registration, termination, and disclosure of lobbyists and lobbying firms is mixed. For more information, see: Jacob R. Straus, *Lobbying Registration and Disclosure: The Impact of the HLOGA* (Congressional Research Service, 2011), online: <https://www.fas.org/sgp/crs/misc/R40245.pdf>.

[90] US Presidential Documents, *Ethics Commitments by Executive Branch Personnel*, Exec Order No 13490, (CFR, 2009), online: < https://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1719.pdf>.

[91] *Lobbying Disclosure Act*, Pub L No 104-65, 109 STAT 691 (1995), online: <http://lobbyingdisclosure.house.gov/lda.html>.

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6.1.3 Overview

In 2008, a record US$3.28 billion was spent on federal lobbying in the US.[92] In 2009, that record was surpassed by an annual turnover of over US$3.47 billion.[93] At that time, there were over 15,000 registered lobbyists in Washington, DC, which has the highest density of lobbyists in the world.[94] The US scored 75 on the 2017 TI-CPI and was ranked 16th out of 180 countries surveyed.

6.2 UK: Framework and Context

6.2.1 Governance Structure

The political system in the UK is known as the "Westminster model." The UK Parliament is comprised of a lower chamber, the House of Commons, and an upper chamber, the House of Lords. The House of Commons is made up of 630 elected Members of Parliament. The party with the most MPs forms the Government and its leader becomes the Prime Minister. The House of Lords is made up of unelected representatives, who can be hereditary peers, bishops, experts or those appointed by the Queen. Cabinet Ministers are appointed from the members of both chambers to head various departments. Bills can be introduced in either chamber by Ministers or MPs and must be approved by both chambers, except financial bills, which need only the approval of the House of Commons. In addition to the House of Lords and House of Commons, in 1997-98, the UK devolved powers to three nations, creating Legislative Assemblies in Wales and Northern Ireland, and a Parliament in Scotland.

6.2.2 Regulatory Framework

Until 2014, the UK depended solely on self-regulation by lobbying professionals to regulate lobbyist conduct. Three professional associations continue to guide self-regulation: the Chartered Institute of Public Relations (CIPR), the Public Relations Consultants Association (PRCA) and the Association of Professional Political Consultants (APPC). Members of the CIPR are individuals, while members of the APPC and the PRCA are organizations. All three associations require members to adhere to a code of conduct.[95] The CIPR also runs a universal register for all UK lobbyists.

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[92] OECD (2009).

[93] "Lobbying Spending Database", (OpenSecrets), online: <https://www.opensecrets.org/lobby/methodology.php>.

[94] Transparency International, *Lobbying in Europe: Hidden Influence, Privileged Access* (Transparency International, 2015), online: <https://www.transparency.org/whatwedo/publication/lobbying_in_europe>.

[95] Transparency International UK, *Lifting the Lid on Lobbying: The Hidden Exercise of Power and Influence in the UK* (February 2015) at 28, online: <http://www.transparency.org.uk/publications/liftthelid/>.

In a 2009 inquiry, the Public Administration Select Committee deemed the self-regulatory regime inadequate.[96] In 2010, the government began proactively publishing information on Ministers' meetings with lobbyists, but these disclosures do not include who lobbyists represent. In order to fill this gap and supplement the self-regulatory regime, the *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (*TLA*) was enacted in January 2014.[97] The *TLA* requires consultant lobbyists to disclose the names of clients through the Register of Consultant Lobbyists, which was launched in March 2015.[98] To date, 145 organizations and lobbyists have registered under the *TLA*. The Registrar is independent of government and the lobbying industry. The goal of the *TLA* is to balance openness with the freedom of lobbyists to represent others and the encouragement of public engagement with policy making.[99]

In 2016, the *Lobbying (Transparency) Bill*, a private members' bill, was introduced in the House of Lords.[100] The proposed legislation would repeal and replace the current lobbyist regime under the *TLA*.[101] The bill broadens the scope of the register to include more in-house lobbyists and expands disclosure requirements for lobbyists.[102] The bill also proposes that the Registrar issue a mandatory code of conduct to replace the current voluntary codes of conduct in the UK.[103] To date, the bill has not yet been debated in the House of Commons.

The UK also regulates the lobbying activities of Members of Parliament (MPs). Although a tradition of representation of special interests by MPs exists in the UK and many MPs hold paid consultancies related to their roles as parliamentarians, scandals involving lobbying led

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Katy Budge & Marina Kaur-Channing, "United Kingdom: Developing lobbying regulation in an open government context" in OECD (2014) at 217.

[97] *Ibid*.

[98] Office of the Registrar of Consultant Lobbyists, online: <https://registerofconsultantlobbyists.force.com/CLR_Search>.

[99] Katy Budge & Marina Kaur-Channing, "United Kingdom: Developing lobbying regulation in an open government context" in OECD (2014) at 217.

[100] Bill 75, *Lobbying (Transparency) Bill* [HL], 2016-2017 series, 2016.

[101] *Ibid*, s. 24.

[102] UK, HL, *Parliamentary Debates*, vol 774, cols 1257–1258 (9 September 2016) (Lord Brooke of Alverthorpe). In the debate, Lord Brooke pointed out problems with the current register: "The current register has been in operation for 18 months, and it has failed abysmally. Three-quarters of the industry working in-house are exempt; of the consultant lobbyists covered, just 136 firms are signed up, a long way from the 700-plus registrants that the Government anticipated when pushing the Bill through. In the last quarter, one-third of the UK's registrants are effectively blank submissions, with no clients having met the very high bar that triggers registration. There is no requirement in current law to provide details of whom they have met in government, nor whom they are seeking to influence. It is little wonder that in the past six months the register has been viewed by the public a total of 363 times, which is an average of just two people visiting the website a day."

[103] Bill 75, *Lobbying (Transparency) Bill* [HL], 2016-2017 series, 2016.

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to debates over consultancies and eventually to regulation.[104] The Resolution of 15 July, 1947, as amended in 1995 and 2002, provides that:

> No Member of the House shall, in consideration of any remuneration, fee, payment, reward or benefit in kind, direct or indirect, which the Member or any member of his or her family has received, is receiving, or expects to receive—
>
> (i) advocate or initiate any cause or matter on behalf or any outside body or individual, or
>
> (ii) urge any other Member of either House of Parliament, including Ministers, to do so,
>
> by means of any speech, Question, Motion, introduction of a Bill or amendment to a Motion or Bill, or any approach, whether oral or in writing, to Ministers or servants of the Crown.

The code of conduct for MPs also prohibits paid advocacy in any House proceedings and lays out principles to follow relating to integrity, honesty, etc.[105] The House of Lords has a register for "peers consultancies and similar financial interests in lobbying for clients" and peers are not allowed to vote or speak on behalf of consultancy clients if clients have a direct interest in lobbying.[106] Staff of MPs and journalists are also subject to controls due to their access to Westminster and resultant ability to exert influence.[107]

6.2.3 Overview

The lobbying industry in the UK employs approximately 4000 lobbyists and is worth £2 billion, making it the third largest lobbying industry in the world.[108] However, caution should be used when quantifying the lobbying industry in the UK. As Transparency International UK notes, "[d]ue to lack of reporting and data, there is no comprehensive information on the scale or nature of lobbying activity in the UK."[109]

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[104] OECD (2009) at 74.

[105] *Code of Conduct for Members of Parliament*, prepared pursuant to the Resolution of the House of 19 July 1995, online: <http://www.publications.parliament.uk/pa/cm201516/cmcode/1076/107602.htm>.

[106] Nicholls et al, *Corruption and Misuse of Public Office*, 2nd ed (Oxford University Press, 2011) at 364, para 10.54.

[107] OECD (2009) at 74.

[108] Transparency International UK, *Lifting the Lid on Lobbying: The Hidden Exercise of Power and Influence in the UK* (February 2015) at 11, online: <http://www.transparency.org.uk/publications/liftthelid/>.

[109] *Ibid.* Although numbers of ministerial meetings can provide some measurement, TI UK points out that lobbying can also be informal and take place outside of formal government meetings, such as during political party conferences. Lobbying may also target civil servants who are not required to disclose lobbying activity and meetings.

Lobbying can occur anytime throughout the legislative process, as well as during drafting of a bill and after enactment when secondary regulation is created. Aside from Ministers, both MPs and peers are targeted by lobbyists, since both can influence policy by asking Ministers questions and tabling, scrutinizing and voting on bills. Parliamentary staff, who mainly draft positions on policies and bills, may also be targeted, along with the personal staff of Cabinet Ministers. Members of the civil service may also be subject to lobbying due to their role in drafting bills and secondary regulation.[110]

The UK's 2017 Transparency International CPI score was 82 and the UK ranked tied for eighth out of 180 countries in terms of the amount of perceived corruption.

6.3 Canada: Framework and Context

6.3.1 Governance Structure

Canada is a federal country with ten provinces and three territories. The Parliament of Canada has two lawmaking bodies: elected members of Parliament in the lower chamber, or the House of Commons, and appointed Senators in the upper chamber, or the Senate. The leader of the party with the majority of seats in the House of Commons appoints a core executive of (usually elected) public officials called the Cabinet. The Cabinet has the greatest lawmaking power subject to the ultimate approval of Parliament. The legislative process is highly centralized and lobbying activities therefore focus on a relatively small number of key actors.

6.3.2 Regulatory Framework

The Canadian Constitution embraces the rule of law, democracy and respect for democratic institutions.[111] Lobbying regulation must promote these principles, and lobbying undertakings must not compromise the democratic process.[112] In 2006, the *Federal Accountability Act* (*FAA*) received Royal Assent and amended the *Lobbyists Registration Act (LRA)*. Following the enactment of the *FAA*, the *Lobbying Act* (*LA*) was enacted in 2008 to provide comprehensive lobbying regulation at the federal level in Canada.[113] The *LA* mandates basic registration requirements for individuals paid to communicate with federal public office holders and is supplemented by the *Lobbyists' Code of Conduct* (*LCC*). Following

[110] *Ibid.*

[111] Canadian *Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, C 11.

[112] The Canadian Bar Association, *Lobbyists' Code of Conduct Consultation* (Canadian Bar Association, 2014), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/vwapj/CBA_-_submission_-_2014-01-30.pdf/$FILE/CBA_-_submission_-_2014-01-30.pdf>.

[113] On 12 December 2006, Bill C-2, the *Federal Accountability Act* (FAA), received Royal Asset. Under the *FAA*, the *Lobbyists Registration Act* was renamed the *Lobbying Act*.

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extensive consultation, the current version of the *LCC* came into force on December 1, 2015.[114] The purpose of the *LCC* is to promote transparency and integrity in government decision making by adopting mandatory ethical standards for lobbyists.[115] The Commissioner of Lobbying is an independent Officer of Parliament under the *LA* and has a mandate to develop and ensure compliance with the *LCC* and maintain the Registry of Lobbyists.[116]

6.3.3 Overview

In 2008, lobbying employed over 5,000 registered lobbyists in Canada.[117] In 2013-2014, there were over 8,500 active lobbyists listed in the Registry of Lobbyists.[118] Most registrants are consultant lobbyists, followed by in-house lobbyists for organizations and in-house lobbyists for corporations. Consultant lobbyists must file one return per client and it is therefore not uncommon for consultants to have multiple active registrations. The House of Commons is the most common target of lobbying undertakings, followed by Industry Canada and Foreign Affairs, Trade and Development Canada. The Prime Minister's Office was the sixth most contacted government institution in 2013-2014. The first budget for the Office of the Commissioner of Lobbying was CAD$467,000 in 1989.[119] As of 2013-14, commensurate with an expanded mandate, the budget has grown to CAD$4.7 million.[120] Canada scored 82 on the 2017 TI-CPI and was ranked tied for eighth out of 180 countries surveyed.

7. MAIN ELEMENTS OF LOBBYING REGULATION

Each country's laws and policies must define the activities that constitute lobbying and the actors involved in lobbying undertakings. Theatres of lobbying may be limited to formal engagements such as consultative committees, or extend to include informal discussions and meetings. Generally, two classes of actors are targeted by regulation: public officials and lobbyists. Government officials captured by legislation are usually identified expressly in

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[114] Officer of the Commissioner of Lobbying of Canada, *The Lobbyists' Code of Conduct* (Office of the Commissioner of Lobbying of Canada, 2015), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00013.html>.

[115] Office of the Commissioner of Lobbying, Annual Report 2013-14, (Office of the Commissioner of Lobbying, 2014), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00918.html>.

[116] Under s. 68 of the *Federal Accountability Act*, the Government must consult with Parliament before appointing the Commissioner of Lobbying. This process promotes autonomy of the Office and minimizes partisanship.

[117] OECD (2009).

[118] Office of the Commissioner of Lobbying, Annual Report 2013-14, [OCL Annual Report],(Office of the Commissioner of Lobbying, 2014), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00918.html>.

[119] Then called the Office of the Registrar of Lobbyists.

[120] OCL Annual Report

the statute that governs their conduct. Lobbyists are usually defined according to their conduct or engagement with government officials.

7.1 Definition of Government Officials

7.1.1 US

The *LDA* defines Public Officials (POs), Executive Branch Officials (EBOs) and Legislative Branch Officials (LBOs). POs are any elected or appointed officials, or an employee of a federal, state or local unit of government.[121] EBOs include: the President; the Vice-President; officers and employees of the Executive Office of the President; any official serving in an Executive Level I-V position; any members of the uniformed services serving at grade 0-7 or above; and Schedule C employees.[122] LBOs include: members of Congress; elected officers of either the House or the Senate; employees or any other individual functioning in the capacity of an employee who works for a Member, committee, leadership staff of either the Senate or House; a joint committee of Congress; a working group or caucus organized to provide services to Members; and any other Legislative Branch employee serving in a position described under section 10(1) of the *Ethics in Government Act (EGA), 1978*.[123]

7.1.2 UK

The *TLA* disclosure requirements only apply when lobbyists communicate on behalf of a client with "a Minister of the Crown or permanent secretaries," or an equivalent listed in the *TLA*.[124] The communication must be made while the official holds the post in order to trigger the legislation. A Minister of the Crown is defined in section 2(6) as a "holder of an office in the government, and includes the Treasury." Equivalents to permanent secretaries include, for example, the Director of Public Prosecutions and the Chief Executive of Her Majesty's Revenue and Customs. TI UK criticizes this narrow definition, which excludes communications with parliamentarians, Assembly members and less senior civil servants.[125]

7.1.3 Canada

The *LA* has broad application and distinguishes between public office holders (POHs) and designated public office holders (DPOHs). POHs refer to virtually all persons occupying an

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[121] *Lobbying Disclosure Act*, Pub L No 104-65, § 3(15), 109 STAT 691 (1995), online: <http://lobbyingdisclosure.house.gov/lda.html>.
[122] *Ibid*, § 3(3), 109 STAT 691 (1995), online: <http://lobbyingdisclosure.house.gov/lda.html>.
[123] *Lobbying Disclosure Act*, Pub L No 104-65, § 3(4), 109 STAT 691 (1995), online: <http://lobbyingdisclosure.house.gov/lda.html>.
[124] *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (UK), c. 4, s. 2(3).
[125] Transparency International UK, *How open is the UK government? UK open governance scorecard results* (March 2015) at 17, online: <http://www.transparency.org.uk/publications/uk-open-governance-scorecard-results-excel/>.

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elected or appointed position in the federal government, including members of the House of Commons, the Senate and their staff.[126] DPOHs include key decision makers within government, senior public officials, senators and certain staff of the Leader of the Official Opposition.[127] DPOHs are subject to post-employment, or revolving door, limitations and lobbyists have particular disclosure requirements for undertakings with DPOHs.

7.2 Definition of Lobbyist

Lobbying is no longer restricted to firm or consultancy lobbyists. Lobbyist ranks now include employees of corporations engaged in government relations, employees of public interest organizations, lawyers, think tanks and governments from other jurisdictions.

7.2.1 US

The *LDA* defines a "lobbyist" as:

> any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client or a six month period.[128]

7.2.2 UK

The *TLA* only applies to "consultant lobbyists," which are defined as individuals who make communications with senior decision makers about the workings of Government in exchange for payment.[129] Only lobbyists registered under the *Value Added Tax Act 1994* are within the scope of the definition, which excludes smaller businesses. Further exclusions are discussed below.

7.2.3 Canada

The *LA* identifies three types of lobbyists:

- consultant lobbyists are individuals who lobby on behalf of clients and must register;

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[126] *Lobbying Act*, RSC 1985, c. 44, s. 2(1).
[127] *Ibid*; *Designated Public Office Holder Regulations*, SOR/2008-117, Schedule 1.
[128] *Lobbying Disclosure Act*, Pub L No 104-65, § 3(10), 109 STAT 691.
[129] Office of the Registrar of Consultant Lobbyists, *Guidance on the requirements for registration* (November 2015) at 9, online: <http://registrarofconsultantlobbyists.org.uk/wp-content/uploads/2015/12/20151111Guidance-on-the-requirement-for-registration1.pdf>.

- in-house lobbyists (corporate) are senior office holders of corporations who carry on commercial activities for financial gain and must register when one or more employees lobby and lobby undertakings constitute 20% of more of their duties;
- in-house lobbyists (organizations) are senior officers of organizations that pursue non-profit objectives and must register when one or more employees lobby and lobby undertakings constitute 20% or more of their duties.[130]

7.3 Definition of Lobbying Activity

7.3.1 US

Under the *LDA*, "lobbying activities" include:

> lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts and co-ordination with the lobbying activities of others. [131]

"Lobbying contacts" are "oral or written communications" with executive or legislative branch officials.[132] Unlike in Canada,[133] grass-roots activities that do not directly target public officials do not require registration.[134]

7.3.2 UK

"Consultant lobbying" in the *TLA* is defined as follows in the Registrar's guidance:

> Organisations and individuals are considered to be carrying out the business of consultant lobbying if they fulfil the following criteria:

[130] Library of Parliament, "Background Paper: The Federal Lobbying System: The Lobbying Act and the Lobbyists' Code of Conduct" (Ottawa, 2011), online: <http://www.parl.gc.ca/content/lop/researchpublications/2011-73-e.htm>. The unique requirements for in-house lobbyists ensure that responsibility for the actions of lobbyists rest at the highest levels of corporate management.
[131] *Lobbying Disclosure Act*, Pub L No 104-65, § 3(7), 109 STAT 691.
[132] *Lobbying Disclosure Act*, Pub L No 104-65, § 3(8), 109 STAT 691.
[133] *Lobbying Act*, RSC 1985, c. 44, s. 5(2)(j)
[134] There is one exception. The *LDA*, § 15, permits organizations that are required to file under § 6033(b)(8) of the *Internal Revenue Code* to use tax law definitions of lobbying in lieu of *LDA* definitions. Tax law definitions include grass-roots lobbying.

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> They have made direct oral, written or electronic communications personally to:
>
> a Minister of the Crown, Permanent Secretary (or equivalents) currently in post, referred to as "Government Representatives."
>
> relating to:
>
> - The development, adoption or modification of any proposal of the Government to make or amend primary or subordinate legislation;
> - The development, adoption or modification of any other policy of the Government;
> - The taking of any steps by the Government in relation to any contract, grant, financial assistance, licence or authorisation; or
> - The exercise of any other function of Government.
>
> This communication is made in the course of a business and in return for payment on behalf of a client, or payment is received with the expectation that the communication will be made at a later date. [135]
>
> They are registered under the *Value Added Tax Act 1994*.

TI UK has criticized the ambiguity surrounding "direct contact" with a Minister or Permanent Secretary.[136] The Registrar's guidance states that "[m]aking communications personally means communicating directly with a Government Representative by name or by title, using oral, written or electronic communication. An example would be writing an email to a Minister of the Crown in which the email is addressed to the Minister specifically."[137] Communications with a government department, special adviser, administrator or a private secretary are not covered by the *Act*. It is irrelevant whether the government official or lobbyist initiates communication.[138]

The CIPR's voluntary and universal UK Lobbying Register defines "lobbying services" as:

> activities which are carried out in the course of a business for the purpose of:
>
> a) influencing government, or
> b) advising others how to influence government.

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[135] Office of the Registrar of Consultant Lobbyists, *Guidance on the requirements for registration* (November 2015) at 9, online: <http://registrarofconsultantlobbyists.org.uk/wp-content/uploads/2015/12/20151111Guidance-on-the-requirement-for-registration1.pdf>.
[136] Transparency International UK, *Lifting the Lid on Lobbying: The Hidden Exercise of Power and Influence in the UK* (February 2015) at 31, online: <http://www.transparency.org.uk/publications/liftthelid/>.
[137] *Ibid* at 9.
[138] *Ibid*.

7.3.3 Canada

The *LA* designates certain activities as lobbying only when carried out for compensation.[139] Activities that must be reported include communicating with a POH in respect of:[140]

- the development of any legislative proposal by the Government of Canada or by a member of the Senate or House of Commons;
- the introduction of any Bill or resolution in either House of Parliament of the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament;
- the making or amendment of any regulation as defined in subsection 2(1) of the *Statutory Instruments Act*;
- the development or amendment of any policy or program of the Government of Canada;
- the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada; and
- the awarding of any contract by or on behalf of Her Majesty in right of Canada.

Individuals must also file a return if they undertake to arrange a meeting between a POH and any other person.[141]

The Canadian experience demonstrates the importance of precise vocabulary in achieving regulatory compliance. Legislation preceding the *LA* defined lobbyist activity as communication with public office holders "in an attempt to influence." Enforcement was stymied by the evidentiary burdens of establishing that an "attempt to influence" had occurred. As a result, the *LA* instead describes lobbying activities as communications "in respect of" legislation and policies.[142]

7.4 Exclusions from the Definitions of Lobbyist and Lobbying Activities

Exclusions provide greater certainty in the application of laws and must therefore be clearly defined and unambiguous. Exclusory provisions identify either classes of actors or specific activities that are exempt from registration and disclosure requirements. Activities commonly excluded include those that involve a pre-existing element of public disclosure, such as appearances before legislative committees or com-missions, and other activities of an inherently public nature.

[139] *Lobbying Act*, RSC 1985, c. 44 s. 5(1).
[140] *Lobbying Act*, RSC 1985, c. 44 s. 5(a)(i-vi).
[141] *Lobbying Act*, RSC 1985, c. 44 s. 5(b).
[142] *Lobbying Act*, RSC 1985, c. 44 s. 5(1)(a).

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7.4.1 US

The *LDA*'s definition of "lobbying contact" excludes communications that are:[143]

- made by a public official acting in his or her capacity as a public official;
- made by a media representative, if the purpose of the communication is to gather and disseminate news and information to the public;
- made in materials that are available to the public through a medium of mass communication;
- made on behalf of a foreign government, country or political party and disclosed under the *Foreign Agents Registration Act*;
- administrative requests for meetings, etc., that do not attempt to influence a covered official;
- made during participation in an advisory committee subject to the *Federal Advisory Committee Act*;
- testimony given before a committee, subcommittee, or task force of Congress;
- information provided in writing in response to a request for specific information from a covered official;
- communications that are compelled by statute, such as those required by subpoena;
- impossible to report without disclosing information that is not permitted to be disclosed by law;
- made to an official in an agency regarding a) criminal or civil inquiries, investigations or proceedings or b) filings that the government is required to keep confidential, if the agency is responsible for the proceedings or filings;
- made on the record in a public proceeding;
- petitions to agencies that are intended to be on the public record;
- made on behalf of an individual that only relates to that individual's personal matters, unless the communication is made to a covered executive branch official, or a legislative branch official in the case of communications regarding legislation for the relief of the individual;
- disclosures protected under the *Whistle Blower Protection Act*, the *Inspector General Act* or other statutes;
- made by churches and religious orders that are exempt from filing federal income tax returns;
- made by officials of self-regulatory organizations registered with the Securities Exchange Commission or the Commodities Future Trading Commission; or

[143] *Lobbying Disclosure Act*, Pub L No 104-65, § 3(8)(B), 109 STAT 694-695.

- made by the SEC or Commodities Future Trading Commission in relation to their regulatory responsibilities under statute.

If an individual's communications fall into the above exceptions, they will not be considered a lobbyist under the *LDA* and will not be required to register. The definition of "lobbyist" also excludes individuals whose lobbying activities constitute less than 20% of the time spent working for a particular client over a six-month period, although that individual may still fit the description of a lobbyist in relation to other clients. Finally, even if an individual meets the definition of "lobbyist," they are not required to register if the total income from their lobbying activities on behalf of a particular client does not exceed $5000, or if their total expenses for lobbying activities do not exceed $20,000 within six months.

7.4.2 UK

The *TLA* lists a number of exclusions from its definition of consultant lobbyists. The Registrar's guidance summarizes these exclusions as follows:

- Individuals and organisations not registered under the *Value Added Tax Act 1994*;
- Individuals making communications in the course of their employer's business (only the employer is required to be registered);
- Officials or employees of governments of countries other than the United Kingdom;
- International organisations as defined by section 1 of the *International Organisations Act 1968* such as the United Nations;
- 'In-house' lobbyists defined as those who are lobbying on behalf of their own organisation;
- Organisations that carry on a business which is mainly non-lobbying and communicate with Ministers in a way that is incidental to the main course of their business; and
- Organisations that represent a particular class or body of people and whose income is derived wholly from those people, and where the lobbying is incidental to their general activity.[144]

The last exemption listed would apply, for example, to a workers' group lobbying on behalf of its own members. Charities are also excluded unless they receive payment from another person for lobbying on that person's behalf.[145] The definition of "consultancy lobbying" has been heavily criticized for its narrow scope by groups such as TI UK. Particularly contentious are the exclusions of in-house lobbyists and those whose business is not primarily comprised

[144] Office of the Registrar of Consultant Lobbyists, *Guidance on the requirements for registration* (November 2015) at 13, online: <http://registrarofconsultantlobbyists.org.uk/wp-content/uploads/2015/12/20151111Guidance-on-the-requirement-for-registration1.pdf>.
[145] *Ibid*.

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of lobbying. TI UK argues that the *TLA*'s inadequate scope "will prevent it from regulating the majority of lobbying that occurs."[146] The APPC, one of the UK's self-regulating professional associations, estimates that the *TLA* will capture only 1% of all lobbying activity in the UK.[147] The CIPR agrees that the definitions are too narrow and is launching a new universal voluntary register in July 2015, which will be open to all lobbyists and bind them under a code of conduct.[148] The current Registrar has also noted that the law is "very narrowly drafted."[149] By contrast, some commentators view the *TLA*'s minimal scope as "proportionate" to the problem and important for promoting healthy lobbying.[150]

7.4.3 Canada

Canada's exclusions reflect its constitutional and social environment. Exclusions for representatives of provincial governments[151] reflect Canadian federalism, and exclusions for Aboriginal councils and governments[152] reflect Canada's colonial history and constitutional protection of Aboriginal rights. The following communications are also exempt from the *LA*'s application:[153]

- submissions to Parliamentary committees that are a matter of public record;
- communications on behalf of an individual or group to a POH about the enforcement, interpretation or application of a statute by that POH in relation to that individual or group; and
- requests for information submitted to a POH.

7.5 Disclosure Requirements

Disclosure must satisfy the transparency objectives of regulation. Policy should require lobbyists to provide information that facilitates public scrutiny of their activity and provides public officials with sufficient knowledge to balance the competing interests of lobbyists and the public at large. As discussed, meaningful disclosure must be concise. Satisfying the public interest in transparency may necessitate disclosure of the beneficiaries of lobbyists' efforts. The OECD has provided guidance for minimum requirements of disclosure rules:

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[146] Transparency International UK, *How open is the UK government? UK open governance scorecard results* (March 2015) at 17, online: <http://www.transparency.org.uk/publications/uk-open-governance-scorecard-results-excel/>.

[147] *Ibid.*

[148] See the CIPR website for more information at: <http://www.cipr.co.uk/content/resources/policy/lobbying-regulation>.

[149] Tom Moseley, "Lobbying register will have few applicants, registrar predicts", *BBC News* (24 February 2015), online: <http://www.bbc.com/news/uk-politics-31151820>.

[150] Katy Budge & Marina Kaur-Channing, "United Kingdom: Developing lobbying regulation in an open government context" in OECD (2014) at 217.

[151] *Lobbying Act*, RSC 1985, c. 44 s. 4(1).

[152] *Ibid.*

[153] *Lobbying Act*, RSC 1985, c. 44 s. 4(2).

information must be relevant to legislative goals of transparency, integrity and efficacy; demands must result in information that is pertinent, yet parsimonious; and technology must be utilized to create accessible information infrastructure.[154] Identifying the direct beneficiaries of lobbying is much simpler for corporate interest lobbyists compared to public interest lobbyists. Nonetheless, policy should favour transparency from all lobbyists[155] and require disclosure of clients, lobbying objectives and how the undertaking is funded.[156] Ultimately, the usefulness of disclosure requirements depends on the manner in which information is to be used and collected.[157] Under the relevant statutory instruments in Canada, the US and UK, disclosure is mandatory.[158]

7.5.1 Content

Lobbyists must be required to disclose all relevant information in a manner conducive to public reporting. Legislation that intends to uncover who is behind lobbying often provides financial thresholds for reporting.[159] Expenditures may provide a useful metric by which the public can comprehend the stakes involved and public officials can identify disparities in access between public interests and well-funded lobby groups.[160] The *LDA* applies earnings thresholds that trigger registration requirements and estimates of income and expenditures. The prevailing view in Canada is that the complexities of analyzing and monitoring financial disclosure outweigh the public benefit achieved through transparency.[161] There have been calls in Europe to strengthen disclosure requirements surrounding financial information.[162] Financial disclosure is viewed as necessary for overall lobbying transparency, the identification of lobbyists and beneficiaries and the prevention of misleading and unethical lobbying.[163] However, financial regulations are difficult to assess[164] and exhaustive regulations may frustrate compliance and overburden regulators.[165]

Requiring registrants to disclose the targets of lobbying efforts advances the public interest in transparency. In order to define "lobbying activities" with sufficient precision and

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[154] OECD (2009).
[155] *Ibid.*
[156] European Commission, "Green Paper of the European Transparency Initiative" (2006) at 194, online: <http://ec.europa.eu/archives/transparency/eti/index_en.htm>.
[157] For example, information that may be used in criminal prosecutions may be subject to more rigorous disclosure and data retention rules.
[158] In the EU, registration is voluntary but attaches mandatory disclosure obligations.
[159] OECD (2009).
[160] John Chenier, ed., 1 *The Lobby Monitor* (Ottawa: 2003) at 13.
[161] Standing Committee on Elections, Privileges and Procedure. "First Report to the House", Minutes of Proceedings and Evidence (Ottawa: 1985-86) at 4.
[162] Rachel Tansey & Vicky Cann, "New and Improved? Why the EU Lobby register still fails to deliver" (ALTER-EU, 2015).
[163] *Ibid.*
[164] OECD (2009).
[165] OECD (2006).

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delineate the theatres of lobbying captured under regulation, policy should identify the decision-making points where lobbyists commonly attempt to exert influence.

7.5.1.1 US

In the US, lobbyists must report any oral or written communication to a "covered executive branch official or a covered legislative branch official" made on behalf of a client.[166] Lobbyists must also identify the Houses of Congress and federal agencies contacted on behalf of clients.[167]

Lobbying firms must file separate registrations for each client if total income from that client for lobbying activities is equal to or greater than US$2,500 during a quarterly period.[168] Organizations employing in-house lobbyists must file a single registration if total expenses for lobbying activities are equal to or greater than US$10,000 during a quarterly period.[169] Registrants must disclose:

- the name, address, business telephone number, and principal place of business of the registrant and a general description of its business or activities;
- the name, address and principal place of business of the registrant's client and a general description of its business or activities;
- the name, address and principal place of business of any organization, other than the client, that contributes more than US$10,000 toward the lobbying activities of the registrant in a semi-annual period and in whole or in major part plans, supervises, or controls such lobbying activities;
- a statement on the general issue areas the registrant expects to engage in lobbying activities on behalf of the client;
- the names of the registrant's employees who have acted or who will act as a lobbyist on behalf of the client and whether those employees have been a covered executive or legislative branch official in the past twenty years;
- whether the client is a State or local government or a department, agency, special purpose district, or other instrumentality controlled by one or more State or local governments; and
- details of their relationship with foreign entities, including the name, address, principal place of business, amount of contribution exceeding US$5000 to lobbying activities, and approximate percentage of ownership in the client of any foreign entity.[170]

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[166] *Lobbying Disclosure Act*, Pub L No 104-65, § 14, 109 STAT 691.
[167] *Lobbying Disclosure Act*, Pub L No 104-65, §§ 3(8)(a); 5(b)(2)(b), 109 STAT 691.
[168] *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, § 201(b)(5)(A), 121 STAT 735.
[169] *Ibid*, Pub L No 110-81, § 201(b)(5)(B), 121 STAT 735. Notably, registration is not required for pro bono clients since the monetary thresholds would not be met.
[170] *Lobbying Disclosure Act*, Pub L No 104-65, § 4(b)(1-4), 109 STAT 691; *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, § 202, 121 STAT 735.

The *HLOGA* amended the *LDA* to require semi-annual disclosure of campaign and presidential library contributions. These reports are due within 30 days of the end of the semi-annual reporting period.[171] The *LDA* is unique in its financial disclosure requirements; Canada's *LA* does not adequately address transparency concerns related to campaign financing.

7.5.1.2 UK

The disclosure requirements under the *TLA* are minimal. As noted above, registration requirements under the *TLA* are only triggered when a lobbyist or lobbying firm fits the narrow definition of "consultant lobbyist." Registrants submit quarterly returns disclosing clients for whom they have made communications amounting to consultant lobbying in the previous three months. Individual communications and the number of communications on behalf of particular clients are not disclosed.[172] Upon registration, lobbyists and lobbying firms must also disclose contact information, the name of any parent company, alternative trading names and the names of directors or partners. Finally, consultant lobbyists must declare whether they follow a code of conduct and where to find that code of conduct. Lobbyists are not required to disclose whom they are lobbying or the subject matter of their advocacy.

The APPC and PRCA maintain their own publicly available disclosure registries with client identities. The APPC also requires disclosure of the identities of lobbying entities, lobbyists and staff.[173] In July 2015, the CIPR launched the UK Lobbying Register (UKLR). Any lobbyists, including in-house lobbyists and non-CIPR members, may register. The register is accessible to the public for free online.[174]

Outside of legislative requirements, UK government departments proactively disclose quarterly data on lobbyist meetings of government ministers and permanent secretaries and

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[171] *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, § 203, 121 STAT 735. According to the Congressional Research Service: "Items reported under this provision include funds donated to pay the cost of an event to honor or recognize a covered legislative branch official or covered executive branch official; to an entity that is named for a covered legislative branch official, or to a person or entity in recognition of such official; to an entity established, financed, maintained, or controlled by a covered legislative branch official, or to an entity designated by such official; or to pay the costs of a meeting, retreat, conference, or other similar event held by, or in the name of, one or more covered legislative branch officials or covered executive branch officials."

[172] Office of the Registrar of Consultant Lobbyists, *Guidance on the requirements for registration* (November 2015) at 6, online: <http://registrarofconsultantlobbyists.org.uk/wp-content/uploads/2015/12/20151111Guidance-on-the-requirement-for-registration1.pdf>.

[173] Association of Professional Political Consultants Register, online: <http://www.appc.org.uk/members/register/>.

[174] UK Lobbying Register, online: <http://www.lobbying-register.uk/>.

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have done so since 2010. Data is available online.[175] The Cabinet Office monitors compliance with disclosure requirements and makes reports to Parliament on each department every six months, producing some pressure to comply.[176] However, TI UK argues that "data quality and depth of information is very poor" because disclosure of data is often delayed, only formal meetings are disclosed and information on the subject matter of meetings is scarce.[177] Parliamentarians, Assembly members, less senior civil servants, local government officials and public agencies are not required to publish any information on meetings.[178] These gaps have led TI UK to conclude that"[t]he level of transparency over lobbying meetings with legislators and the civil service is negligible to non-existent."[179]

In terms of lobbying by UK legislators, the Resolution of 6 November, 1947, as amended in 1995 and 2002, requires MPs to disclose any consultancies or undertakings which might involve remuneration for the provision of advice on lobbying. MPs are not prohibited from entering into agreements to provide services in their parliamentary capacity, but must register these agreements. The House of Lords also has a register for peers' consultancies or other financial interests in lobbying for clients.[180] MPs' support staff must register any gainful occupation that might be advantaged due to their access to Parliament, and journalists must report any other paid employment that is relevant to their privileged access to Parliament.[181]

Finally, All-Party Parliamentary Groups in the UK, which meet to discuss certain issue areas, must register the names of officers of the group, benefits received by the group and the source of those benefits.[182] These disclosure requirements respond to the ability of lobby groups to gain access to all-party groups and improperly influence the MPs involved through financing and provision of hospitality.[183]

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[175] For an example, see data on ministerial gifts, hospitality and meetings for the Department of Business, Innovation and Skills, online: <http://data.gov.uk/dataset/disclosure-ministerial-hospitality-received-department-for-business>.

[176] Transparency International UK, *Lifting the Lid on Lobbying: The Hidden Exercise of Power and Influence in the UK* (February 2015) at 53, online: <http://www.transparency.org.uk/publications/liftthelid/>.

[177] *Ibid* at 52.

[178] *Ibid* at 22.

[179] *Ibid* at 52.

[180] Nicholls et al, *Corruption and Misuse of Public Office*, 2nd ed (Oxford University Press, 2011) at 364, para 14.28.

[181] OECD (2009) at 75-76.

[182] *Ibid*.

[183] *Ibid*.

7.5.1.3 Canada

Canada's reporting requirements are expansive, requiring lobbyists to identify communication or intent to communicate with "any department or other governmental institution."[184]

Under the *LA*, all three categories of lobbyists must disclose:

- the name and business address of the individual and, if applicable, the name and business address of the firm where the individual is engaged in business;
- the name and business address of the client and the name and business address of any person or organization that, to the knowledge of the individual, controls or directs the activities of the client and has a direct interest in the outcome of the individuals activities on behalf of the client;
- where the client is a corporation, the name and business address of each subsidiary of the corporation that, to the knowledge of the individual, has a direct interest in the outcome of the individual's activities on behalf of the client;
- where the client is a corporation that is a subsidiary of any other corporation, the name and business address of that other corporation;
- where the client is a coalition, the name and business address of each corporation or organization that is a member of the coalition;
- where the client is funded in whole or in part by a government or government agency, the name of the government or agency and the amount of funding received;
- particulars to identify the subject-matter in respect of which the individual undertakes to communicate with a public office holder or to arrange a meeting, and any other information respecting the subject-matter that is prescribed;
- particulars to identify any relevant legislative proposal, bill, resolution, regulation, policy, program, grant, contribution, financial benefit or contract;
- if the individual is a former public office holder, a description of the offices held, which of those offices, if any, qualified the individual as a designated public office holder and the date on which the individual last ceased to hold such a designated public office;
- the name of any department or other governmental institution in which any public office holder with whom the individual communicates in respect of a matter regulated by the *LA* or expects to communicate or with whom a meeting is, or is to be, arranged, is employed or serves; and
- if the individual undertakes to communicate with a public office holder in respect of any matter regulated by the *LA*, particulars to identify any communication technique that the individual uses or expects to use in connection with the

[184] *Lobbying Act*, RSC 1985, c. 44, s. 5(2).

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> communication with the public office holder, including any appeals to members of the public through the mass media or by direct communication that seek to persuade those members of the public to communicate directly with a public office holder in an attempt to place pressure on the public office holder to endorse a particular opinion (grass-roots communication); [185]

The *Lobbyists Registration Regulations* provide the form and manner in which lobbyists must file returns under the *LA*.[186]

7.5.2 Timing

Unambiguous and strict reporting deadlines are as important as the content of reporting. In order to provide the public with meaningful information and the opportunity to mobilize counter-lobby initiatives, disclosure must be made and updated in a timely fashion.

7.5.2.1 US

The *LDA* requires registration within 20 days of either: (1) the date that the employee/lobbyist was retained to make more than one lobbying contact (and meets the 20% of time threshold); or, (2) the date the employee/lobbyist makes a second lobbying contact (and meets the 20% of time threshold). Communications with executive branch officials and Congressional support staff "serving in the position of a confidential, policy-determining, policy-making or policy-advocating character" qualify as lobbying contacts.[187] Following initial disclosure, reports must be updated semi-annually thereafter.[188]

7.5.2.2 UK

Under the *TLA*, any organization that intends to engage in consultancy lobbying must apply to join the Register before doing so.[189] Registrants must submit a return listing clients for the pre-registration quarter.[190] Lists of client names are updated quarterly and registrants must submit returns within two weeks of the end of each quarter.

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[185] *Lobbying Act*, RSC 1985, c. 44, s. 5(2)(a-k).
[186] *Lobbyist Registration Regulations*, SOR/2008-116.
[187] Committee on the Judiciary Report: The Lobbying Disclosure Act of 1995 (US House of Representatives, 1995) Report 104.
[188] *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, § 201(a)(1)(A-D), 121 STAT 735.
[189] Office of the Registrar of Consultant Lobbyists, *Guidance on the requirements for registration* (November 2015) at 5, online: <http://registrarofconsultantlobbyists.org.uk/wp-content/uploads/2015/12/20151111Guidance-on-the-requirement-for-registration1.pdf>.
[190] *Ibid* at 6.

7.5.2.3 Canada

In Canada, initial reporting is required within ten days of entering into a lobbying undertaking,[191] and communications with senior public officer holders must be updated monthly thereafter.[192] These communications include telephone calls, in-person meetings and video conferences.[193] Oral communication with a designated public office holder that is initiated by someone other than the public office holder and arranged in advance must be reported. However, communications that are initiated by the public office holder do not generally require reporting.[194]

7.5.3 Procedures for Collection and Disclosure

As mentioned, lobbying regulation has proliferated incrementally around the world. A consequence of this sporadic development is the creation and adoption of specific requirements and separate registries for certain industries and different levels of government. Responding to modern demands for transparency, it is important that reporting and disclosure mechanisms maximize efficiency while encouraging compliance and facilitating access to information.

One way to promote compliance and improve accessibility is to utilize electronic filing and reporting. There are many benefits to electronic filing: lobbyists can submit information remotely; forms can solicit quantifiable information amenable to data analysis; data store costs are reduced and archival and retrieval simplified; and, electronic filing facilitates the use of the internet to decentralize information and improve public access.[195] Policies regarding electronic filing should respect established rules and norms regarding the publication of private and privileged information, mitigate the risks of information overload and balance incentives for compliance with risks of disclosing proprietary corporate intelligence.

7.5.3.1 US

All documents required by the *LDA* must be filed electronically.[196] The Secretary of the Senate and Clerk of the House of Representatives are required to maintain all registrations and reports filed under the *LDA* and make them accessible to the public over the internet, free of charge and in "a searchable, sortable and downloadable manner."[197]

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[191] *Lobbying Act*, RSC 1985, c. 44, s. 5(1.1).
[192] *Lobbying Act*, RSC 1985, c. 44, s. 5(3).
[193] Office of the Commissioner of Lobbying, Annual Report 2013-14, (Office of the Commissioner of Lobbying, 2014), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00918.html>.
[194] *Ibid*.
[195] OECD (2009).
[196] *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, § 205 121 STAT 735.
[197] *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, § 209(a)(3), 121 STAT 735.

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7.5.3.2 UK

Applications to join the UK Register can be completed online or on paper. The Register is available online and searchable by lobbyist and client name. Client lists from previous quarters are available.

7.5.3.3 Canada

In Canada, the Registry of Lobbyists is the *LA*'s core instrument of transparency.[198] Lobbyists may file their returns electronically and the application process is provided in both official Canadian languages (English and French). To encourage electronic return, online filings are offered free of charge while paper returns are subject to a processing fee. Over 99% of all transactions are filed electronically.[199] Information collected under the *LA* is a matter of public record accessible over the internet. Anyone may search the database and generate reports from their personal computer. There were over 175,000 user searches of the Registry database in 2013-14.[200]

7.6 Codes of Conduct

Lobbying involves two principal parties: government and interest groups. Because 'it takes two to lobby,' lobbyists share responsibility with public officials for maintaining the integrity of lobby regulatory schemes. As noted in Section 4.2.4, there are three types of codes. The Canadian system provides an example of a statutory code. The UK and the US provide examples of professional codes or self-regulation. Meaningful lobbying policy requires oversight of the conduct of public officials that is commensurate with regulation of lobbyists' behaviour. Many jurisdictions, including Canada, the US and the EU, have developed codes of conduct that apply to public officials in their interactions with lobbyists.[201]

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[198] Office of the Commissioner of Lobbying, "The Registry of Lobbyists", (Office of the Commissioner of Lobbying, 2015), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00950.html>.
[199] *Ibid*.
[200] Office of the Commissioner of Lobbying, Annual Report 2013-14 (Office of the Commissioner of Lobbying, 2014), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00918.html>.
[201] For public officials in Canada, see: Values and Ethics Code for the Public Sector, 2011, online: <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25049&section=HTML>. For public officials in the US, see: United Sates Office of Government Ethics, Employee Standards of Conduct, online: <https://www.oge.gov/Web/oge.nsf/Resources/Standards+of+Ethical+Conduct+for+Employees+of+the+Executive+Branch>; Rules of the House of Representatives, 2015, online: <http://clerk.house.gov/legislative/house-rules.pdf>; Standing Rules of the Senate, 2015, online: <http://www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome>. For public officials in the EU see: European Parliament Code of Conduct for Members, online: <http://www.europarl.europa.eu/atyourservice/en/20150201PVL00050/Ethics-andtransparency>.

7.6.1 US

Various professional associations for lobbyists in the US require their members to abide by codes of ethics. Members of the Public Relations Society of America must pledge to abide by the Society's Code of Ethics, which lists professional values, such as honesty, independence and fairness, and provisions of conduct.[202] For example, the Code requires members to reveal causes and sponsors for interests represented, disclose financial interests in a client's organization and disclose potential conflicts of interest. The Code also includes examples of improper conduct. The Code is supplemented by Ethical Standards Advisories, which provide guidance on specific timely issues (e.g., "The Ethical Use of Interns"). The National Institute for Lobbying and Ethics (NILE) also requires members to abide by a Code of Ethics.[203] The Code endorsed by the NILE is more general and emphasizes principles like honesty, integrity and avoiding conflicts of interest.

7.6.2 UK

The UK relies on professional associations to provide codes of conduct for lobbyists. Each of the three associations for UK lobbyists has its own code to which members must adhere. The CIPR's code is fairly general and consists of best practices, not prohibitions.[204] Principles such as integrity, honesty and competency are emphasized. The CIPR's code does not prohibit the exchange of gifts or compensation between lobbyists and public officials or the employment of public officials, and also does not provide for client identity disclosure.[205] The APPC code of conduct is more potent and prohibits lobbyists from providing financial inducements and employment to public officials.[206] It also requires registration of clients and lobbying staff on its own registry. The PRCA's code is aimed specifically at lobbyists and requires public disclosure of clients' names.[207] Like the APPC, the PRCA code prohibits members from hiring MPs, peers or Assembly members.[208] The UKLR requires registrants to abide by either the APPC or CIPR codes of conduct.

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[202] Public Relations Society of America, *PRSA Member Code of Ethics*, online: <http://www.prsa.org/AboutPRSA/Ethics/CodeEnglish/#.Vafp4_lViko>.

[203] The National Institute for Lobbying and Ethics has, for the time being, adopted the Code of Ethics used by the now defunct Association of Government Relations Professionals. The code can be found online at: <https://lobbyinginstitute.com/professional-association/about/code-of-ethics/>.

[204] Chartered Institute of Public Relations, "Professionalism and ethics", online: <http://www.cipr.co.uk/content/about-us/our-organisation/code-conduct>.

[205] OECD (2012) at 44.

[206] Association of Professional Political Consultants, "APPC Code of Conduct" (November 2014), online: <http://www.appc.org.uk/code-of-conduct/appc-code-of-conduct/>.

[207] Public Relations and Communications Association, "Professional Charter and Codes of Conduct" (2017), online: <https://www.prca.org.uk/about-us/pr-standards/professional-charter-and-codes-conduct>.

[208] Transparency International UK, *Lifting the Lid on Lobbying: The Hidden Exercise of Power and Influence in the UK* (February 2015) at 28, online: <http://www.transparency.org.uk/publications/liftthelid/>.

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7.6.3 Canada

The first *LCC* came into force in 1997. The new *LCC* was published in the *Canada Gazette* and came into force on December 1, 2015.[209] The recent amendments were enacted to ensure that the *LCC* was consistent with the *LA.* As with the *LA,* the objective of the *LCC* is to ensure transparency of communications between lobbyists and government. It is for this reason that the new *LCC* does not contain provisions that regulate the interactions between lobbyists and their clients. The new *LCC* also mandates respect for Canada's democratic institutions and enhanced rules regarding conflict of interest, preferential access, political activities and the provision of gifts. Under the *LA*, the Commissioner of Lobbying is required to develop a lobbyists' code of conduct[210] and has authority to "conduct an investigation if he or she has reason to believe … that an investigation is necessary to ensure compliance with the Act or Code."[211] Canada is the only jurisdiction to legislate a mandatory code of conduct for lobbyists and the *LCC* is a statutory component of the lobbyist regulation regime.[212] The purpose of the *LCC* is to "assure the Canadian public that lobbying is done ethically and with the highest standards with a view to conserving and enhancing public confidence and trust in the integrity, objectivity and impartiality of decision-making."[213] Breaches of the *Code* are subject to the Commissioner's Reports on Investigation to Parliament, but the Commissioner does not have the authority to impose charges or sanctions under the *LA*.[214] The Commissioner's investigative authority extends beyond registered lobbyists and applies to all individuals who are engaged in lobbying activity that is subject to registration.[215]

The Canadian Code is structured around three guiding principles: respect for democratic institutions; openness, integrity, and honesty; and professionalism. These principles animate a series of related rules:

> **Transparency**
>
> *Identity and purpose*
>
> 1. Lobbyists shall, when making a representation to a public office holder, disclose the identity of the person or organization on whose behalf the representation is made, as well as the reasons for the approach.

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[209] *Lobbyists' Code of Conduct* (2015), online <https://lobbycanada.gc.ca/eic/site/012.nsf/vwapj/LobbyistsCodeofConduct2015_En.pdf/%24FILE/LobbyistsCodeofConduct2015_En.pdf>.
[210] *Lobbying Act*, RSC 1985, c. 44 s. 10.4(1).
[211] *Lobbying Act*, RSC 1985, c. 44 s. 10.2(1).
[212] OECD (2009).
[213] Office of the Commissioner of Lobbying, Annual Report 2013-14 (Office of the Commissioner of Lobbying, 2014), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00918.html>.
[214] *Makhija v Canada* (*Attorney General*), 2010 FCA 342 at paras 7, 18, 414 NR 158.
[215] Office of the Commissioner of Lobbying, Annual Report 2013-14 (Office of the Commissioner of Lobbying, 2014), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00918.html>.

Accurate information

2. Lobbyists shall provide information that is accurate and factual to public office holders. Moreover, lobbyists shall not knowingly mislead anyone and shall use proper care to avoid doing so inadvertently.

Duty to Disclose

3. Lobbyists shall inform each client of their obligations as a lobbyist under the *Lobbying Act* and the *Lobbyists' Code of Conduct.*
4. The responsible officer (the most senior paid employee) of an organization or corporation shall ensure that employees who lobby on the organization's or corporation's behalf are informed of their obligations under the *Lobbying Act* and the *Lobbyists' Code of Conduct.*

Use of Information

5. A lobbyist shall use and disclose information received from a public office holder only in the manner consistent with the purpose for which it was shared. If a lobbyist obtains a government document they should not have, they shall neither use nor disclose it.

Conflict of Interest

6. A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest.

In particular:

Preferential access

7. A lobbyist shall not arrange for another person a meeting with a public office holder when the lobbyist and public office holder share a relationship that could reasonably be seen to create a sense of obligations.
8. A lobbyist shall not lobby a public office holder with whom they share a relationship that could reasonably be seen to create a sense of obligation.

Political activities

9. When a lobbyist undertakes political activities on behalf of a person which could reasonably be seen to create a sense of obligation, they may not lobby that person for a specified period if that person is or becomes a public office holder. If that person is an elected official, the lobbyist shall also not lobby staff in their office(s).

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Gifts

10. To avoid the creation of a sense of obligation, a lobbyist shall not provide or promise a gift, favour, or other benefit to a public office holder, whom they are lobbying or will lobby, which the public officer holder is not allowed to accept.

7.7 Compliance and Enforcement

Sanctions are an essential component of lobbying regulation but are rarely severe enough to constitute a true deterrent.[216] Enforcement must be impartial, predictable and timely in order to be effective. Regulatory authorities must operate at arm's length from government, be sufficiently resourced and be endowed with sufficient powers to investigate infractions and enforce policy. Lax enforcement of regulation can lead to a "culture of entitlement" in government decision making.[217] Where illicit lobbying practices and corruption have become normalized or are viewed as a cost of doing business, sanctions must be paired with educational initiatives to facilitate the slow process of developing a culture of integrity. Different systems of government will generate fewer or greater opportunities for lobbying; opportunities for corruption will be correspondingly few or abundant. For example, the openness of the American legislative process fosters not only a competitive advocacy environment but also increased opportunities for illegitimate lobbying practices. It is important that legislators routinely look for evidence that those who lobby are authorized to do so.[218]

In order for regulations to effectively limit corrupt practices, regulators must have the authority to investigate contraventions and apply sanctions. Sanctions may take the form of fines, imprisonment or the removal of privileges such as access to public officials. The separation between regulatory and criminal law regimes will often require regulatory authorities to hand off investigations when criminal activity is uncovered. The implications of this relationship are two-fold. Disclosure requirements must provide regulatory bodies with adequate information to assist law enforcement agencies in their investigations. In turn, law enforcement agencies must follow through with investigations and ensure that corruption offences are not overtaken by more urgent priorities.

[216] OECD (2014).
[217] Commission of Inquiry into the Sponsorship Program and Advertising Activities, Reports (Ottawa, 2005-2006) in "The Lobbyists Registration Act, its Application and Effectiveness" (2006) 2 Restoring Accountability: Research Studies 163.
[218] OECD (2009).

7.7.1 Sanctions

7.7.1.1 US

The *HLOGA* instituted a prohibition of gifts or travel by registered lobbyists to members of Congress and Congressional employees.[219] The Secretary of the Senate and Clerk of the House of Representatives are responsible for verifying the accuracy, completeness and timeliness of registration and reports.[220] They must notify any lobbyist in writing that may be in non-compliance.[221] If the lobbyist or lobbying firm fails to provide an appropriate response, the United States Attorney for the District of Columbia must be alerted within 60 days of the original notice.[222] The aggregate number of registrants cited for non-compliance is publically available online.[223] Any individual who fails to remedy a defective filing within 60 days of notice, or otherwise fails to comply with the *LDA*, may be subject to a fine not exceeding US$200,000.[224] Any individual who knowingly and corruptly violates the *LDA* may be subject to a period of incarceration not exceeding five years.[225]

The Public Relations Society of America and the National Institute for Lobbying and Ethics have no enforcement mechanisms for their codes of ethics. Both will revoke membership if an individual is convicted of an offense involving lobbying activities. The Society justifies its lack of internal enforcement and punishment by pointing out the expense and difficulty of enforcement in the past. Instead, the Society now focuses on promoting and inspiring ethical values through its Code of Ethics and professional development programs.

7.7.1.2 UK

Under the *TLA*, lobbyists commit an offence if they engage in consultancy lobbying without joining the registry or while their entry in the register is incomplete or inaccurate.[226] Failing to submit complete, accurate quarterly returns on time is also an offence.[227] If convicted of an offence under the *Act*, offenders are liable for a fine. The Registrar may also impose civil penalties for conduct amounting to an offence, in which case no due diligence defence is

[219] *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, § 206, 121 STAT 735.
[220] *Lobbying Disclosure Act*, Pub L No 104-65, § 6(2), 109 STAT 691.
[221] *Lobbying Disclosure Act*, Pub L No 104-65, § 6(7), 109 STAT 691.
[222] *Lobbying Disclosure Act*, Pub L No 104-65, § 6(8), 109 STAT 691.
[223] *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, § 210, 121 STAT 735.
[224] *Ibid*, Pub L No 110-81, § 211(a)(2), 121 STAT 735.
[225] *Ibid*, Pub L No 110-81, § 211(b), 121 STAT 735.
[226] *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (UK), c. 4, s. 12(1) and (2).
[227] *Ibid* at s. 12(3).

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available.[228] Civil penalties may not exceed £7500.[229] TI UK has criticized this sanction as lacking in deterrent power.[230]

The three professional associations for lobbyists in the UK can investigate complaints and impose sanctions for member violations of their codes of conduct. Approximately four formal complaints and 20-30 informal complaints are received each year by the CIPR, with most resolved through confidential conciliation agreements.[231] If conciliation is unsuccessful, a Complaints Committee takes over, or a Disciplinary Committee for particularly egregious conduct. Committee members are drawn from outside the public relations industry and committees can request information and call witnesses. From 2007-2012, the CIPR's Complaints Committee dealt with only one lobbying-related hearing, and the Disciplinary Committee conducted only two hearings between 2002 and 2012.[232] Potential sanctions include reprimands, an order to repay fees for work involved in the complaint, an order to pay the CIPR's costs for the complaint process, or expulsion from the CIPR.[233] The APPC's professional practices panel investigates complaints and can call witnesses and evidence and conduct disciplinary hearings. Investigations are rare and sanctions are similar to those available for breaches of the CIPR code of conduct. The scarcity of complaints and toothless nature of the available sanctions contributed to the finding that self-regulation in the UK was inadequate following the 2009 Public Administration Select Committee inquiry.[234]

7.7.1.3 Canada

The *LA* contains various penalties and sanctions. It is an offence to fail to file a required return or knowingly make a false or misleading statement in a return.[235] Authorities may proceed summarily or by indictment. On summary conviction, contraventions may be subject to a fine not exceeding CAD$50,000 or imprisonment for a term not exceeding six months.[236] On proceedings by way of indictment, contraventions may be subject to a fine not exceeding CAD$200,000 or imprisonment for a term not exceeding two years.[237] Individuals

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[228] *Ibid* at s. 14.
[229] *Ibid* at s. 16.
[230] Transparency International UK, *Lifting the Lid on Lobbying: The Hidden Exercise of Power and Influence in the UK* (February 2015) at 32, online: <http://www.transparency.org.uk/publications/liftthelid/>
[231] OECD (2012) at 44.
[232] *Ibid*.
[233] Chartered Institute of Public Relations, "Complaints", online: <http://www.cipr.co.uk/content/membership-groups/complaints>.
[234] Katy Budge & Marina Kaur-Channing, "United Kingdom: Developing lobbying regulation in an open government context" in OECD, *Lobbyists, Governments and Public Trust, Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying* (OECD, 2014) at 217, online: <http://www.oecd.org/gov/lobbyists-governments-and-public-trust-volume-3-9789264214224-en.htm>.
[235] *Lobbying Act*, RSC 1985, c. 44 s. 14(1).
[236] *Ibid* at s. 14(1)(a).
[237] *Ibid* at s. 14(1)(b).

convicted of an offence under the *LA* may be prohibited from lobbying for up to two years.[238] The first conviction under the *LA* was in 2013-14.[239] In total, the Commissioner of Lobbying has referred 14 cases to police for investigation and as of March 31, 2016 three court cases were pending.[240] As discussed, the *LCC* allows broad discretion for the Commissioner to investigate unscrupulous activity. This investigative authority extends beyond individuals who have registered and applies to all parties who undertake lobbying activity. Violations are subsequently reported to Parliament, encouraging compliance through the specter of 'naming and shaming' unscrupulous lobbyists.

7.7.2 Education Programs

Education programs are less expensive than monitoring, investigating and prosecuting misconduct, and the OECD suggests that they may also be more effective.[241] These initiatives promote the legitimate role of lobbying in government decision making and alert public officials and lobbyists to registration requirements and codes of conduct. Professional and industry associations may mandate ethics training as a condition of membership.

7.7.2.1 US

As in the UK, professional associations like the Public Relations Society of America provide ethical training to lobbyist members. At the state level, lobbyists in Louisiana are required under statute to complete yearly training on the Louisiana Code of Governmental Ethics.[242]

7.7.2.2 UK

In the UK, there is no mandatory ethics or integrity training for lobbyists or public officials. Resistance to such training exists among public officials, partly due to potential exposure to ridicule for spending public money on the development of ethical behaviour.[243] However, TI UK recommends the institution of mandatory training.[244] The UK's three professional associations provide training and education for lobbyists. The CIPR holds voluntary education events and classes and also runs industry-recognized certificate and diploma

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[238] *Ibid* at s. 14.01.

[239] Office of the Commissioner of Lobbying, Annual Report 2013-14, (Office of the Commissioner of Lobbying, 2014), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00918.html>.

[240] Office of the Commissioner of Lobbying, Annual Report 2015-16 (Office of the Commissioner of Lobbying, 2016), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/vwapj/OCL-AR15-16.pdf/%24FILE/OCL-AR15-16.pdf>.

[241] "Management Representation Statement", Report on Plans and Priorities (Office of the Registrar of Lobbyists, 2007).

[242] R.S. 42:1170(4)(a) and (b).

[243] Transparency International UK, *Lifting the Lid on Lobbying: The Hidden Exercise of Power and Influence in the UK* (February 2015) at 22, online: <http://www.transparency.org.uk/publications/liftthelid/>.

[244] *Ibid* at 7.

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programs that incorporate ethical training. The APPC conducts three voluntary training sessions per year focused on the code of conduct.[245]

7.7.2.3 Canada

In Canada, the Office of the Commissioner of Lobbying provides training sessions to help lobbyists understand the requirements and functioning of the reporting system. Each registrant in Canada is also assigned a Registration Advisor who provides guidance and individual support to lobbyists. As a matter of policy, the Office contacts every new registrant to introduce them to their Registration Advisor and inform them of their obligations. The Office also meets regularly with federal public officials and management teams in federal departments and agencies.

7.7.3 Revolving Door

The 'revolving door' between the political world and the lobbying world threatens the integrity of lobbyists and public confidence in government.[246] Revolving door provisions are intended to limit pre- and post-employment conflicts of interest.[247] The OECD defines conflict of interest as "a conflict between the public duty and private interests of a public official, in which the public official has private interests which could improperly influence the performance of their official duties and responsibilities."[248] If former lobbyists are free to assume public sector roles, there is a risk of regulatory and institutional capture. If former public officials are free to assume positions as lobbyists, they may gain preferential access to current decision makers. To prevent potential conflicts of interest, revolving door provisions must prescribe adequate "cooling-off" periods. These periods prohibit public officials from negotiating future lobbying jobs while in office or undertaking roles in the influence industry and lobbyists from assuming public sector roles until the proscribed duration has expired.

7.7.3.1 US

The *LDA* contains limited revolving door provisions. Under the *LDA*, individuals who have aided a foreign entity in any trade negotiation or dispute with the US are ineligible for appointment as United States Trade Representative or Deputy United States Trade Representative.[249] As amended by the *HLOGA*, the *United States Code* (*USC*) provides

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[245] OECD (2012) at 44.

[246] Transparency International UK, (February 2015) at 48-52.

[247] In the OECD's report *Government at a Glance 2015* (2015), the under-regulation of pre-public employment in most member countries is criticized. Only 7 OECD countries impose restrictions on public officials who have worked in the private sector, worked for suppliers to government, lobbied government or negotiated public contracts on behalf of private companies prior to public employment. By contrast, 22 OECD countries impose rules or procedures for post-public employment.

[248] OECD, *Guidelines for Managing Conflicts of Interest in the Public Service* (OECD, 2003) at 10.

[249] *Lobbying Disclosure Act*, Pub L No 104-65, § 21(b)(3), 109 STAT 691.

extensive post-employment restrictions for past public officials. Generally, the *USC* prohibits any person who is a former officer or employee of the executive branch of the US from communicating or appearing before a current public official, with intent to influence that public official on matters in which the former public official participated substantially and personally, for a period of two years.[250] Notably, the *USC*, as amended by the *HLOGA*, allows former lawmakers to assume lobbying activities provided they do not personally contact current legislators. The *USC* prohibitions were reinforced by a 2009 Presidential Executive Order that requires all executive agency appointees to sign an ethics pledge.[251] This pledge contains four revolving door prohibitions:

- **All Appointees Entering Government**. I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.
- **Lobbyists Entering Government.** If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 2, I will not for a period of 2 years after the date of my appointment:
  - (a) participate in any particular matter on which I lobbied within the 2 years before the date of my appointment;
  - (b) participate in the specific issue area in which that particular matter falls; or
  - (c) seek or accept employment with any executive agency that I lobbied within the 2 years before the date of my appointment.
- **Appointees Leaving Government.** If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment.
- **Appointees Leaving Government to Lobby.** In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

The Executive Order is remarkable for two reasons. First, former public officials are prohibited from lobbying not only their former department or agencies, but the entire Executive Branch of government. Second, 'reverse' revolving door provisions restrict, for the first time, the ability of lobbyists entering the public service from helping former clients. Legislation in neither Canada nor the EU contains similar 'reverse' revolving door provisions.

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[250] *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, § 101, 121 STAT 735.

[251] Executive orders have no jurisdiction over the legislative branch. They remain effective only as long as the issuing President remains in office. The 2009 Executive Order will expire with the end of the Obama Administration.

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7.7.3.2 UK

In the UK, revolving door regulation applies to all Crown servants for two years after the last day of paid service. Senior officials are subject to an automatic cooling-off period of three months for all outside employment, which can be extended to two years or waived in certain situations. Senior officials are also prohibited from lobbying the government for two years after they leave their posts. In some situations, more junior officials will also require authorization to take new appointments in the two-year period after leaving their posts, including when potential employment involves lobbying the government. The Advisory Committee on Business Appointments implements the rules and provides advice.[252] TI UK argues that this regime is inadequate, stating:[253]

> Senior civil servants and ministers are required to consult the Advisory Committee on Business Appointments (ACoBA) before taking up appointments. ACoBA can impose waiting periods on individuals, so that they cannot take up appointments until a certain period after leaving office, and can advise that appointments should only be taken on condition that the individual will not engage in lobbying former colleagues. However, the Committee is only an advisory body. There is nothing to stop individuals from ignoring its advice.
>
> A series of high-profile scandals suggest that the ACoBA regime is not working. In March 2010, Channel 4's Dispatches documentary showed secret recordings of several MPs and former Ministers offering their influence and contacts to journalists posing as representatives of a potential corporate employer, interested in hiring them for lobbying work. One former Cabinet Minister, Stephen Byers, said "I'm a bit like a sort of cab for hire" and offered examples of how he had used his influence and contacts in the past. [endnotes omitted]

7.7.3.3 Canada

In Canada, DPOHs are subject to the *LA*'s five-year prohibition on lobbying after they leave office.[254] This period begins when the DPOH ceases to carry out the functions of their employment. Anyone who violates the five-year cooling-off period commits an offence and is liable on summary conviction to a fine not exceeding CAD$50,000.

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[252] Alliance for Lobbying Transparency and Ethics Regulation, *Blocking the revolving door: Why we need to stop EU officials becoming lobbyists* (ALTER-EU, November 2011) at 27, online: <http://www.alter-eu.org/sites/default/files/AlterEU_revolving_doors_report.pdf>.

[253] Transparency International UK, *Fixing the Revolving Door between Government and Business* (2012) at 3, online: <http://www.transparency.org/files/content/pressrelease/20110517_UK_Revolving_Door_EN.pdf>.

[254] *Lobbying Act*, RSC 1985, c. 44 s. 10.1(1). Former public officials may apply to the Commissioner for an exemption from the five-year post-employment ban. The Commissioner will consider whether granting the exemption would be in keeping with the purpose of the *LA*.

8. COMPARISON WITH LOBBYING REGULATION IN EUROPEAN UNION INSTITUTIONS

Brussels boasts the second-highest density of lobbyists in the world, second only to Washington, DC.[255] Lobbying regulation for EU institutions is distinct from that of the US, UK and Canada. The Transparency Register (TR) for lobbyist disclosures is a joint initiative of the European Parliament (EP) and European Commission (EC). It was launched in 2011 under Article 27 of the *Interinstitutional Agreement on the Transparency Register* (*IIA*).[256] Registrants must comply with the Code of Conduct for Interest Representatives (CCIR), which is codified in Annex III of the *IIA*. The European Council is not a party to the *IIA* and the TR does not extend to lobbying undertakings with the Council.

Unlike the registers in the US, UK and Canada, registration with the TR is voluntary but incentivized. The TR is an example of an institutional register, meaning it provides registrants with access to government institutions.[257] Registrants gain access to EC and EP premises, as well as other advantages such as opportunities to participate as speakers in committee hearings.[258] In order to be eligible to register, individuals and entities must meet the activity-based definition of lobbying in the *IIA*, which includes any "activities ... carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions."[259] This definition of lobbying includes communications with a broader range of government officials than the US, UK and Canada. The *IIA* provides specific examples of lobbying activities, such as organizing events to which Members, officials or staff of EU institutions are invited. However, like the UK's *TLA*, the TR has been criticized for under-inclusiveness, as registration can be avoided by conducting meetings away from EU premises and strategically not including lobbyists in expert groups.[260] Also, just as formal meetings are emphasized in the *TLA*, the EU's TR focuses on formal engagement with EU institutions, such as appearances before parliamentary and administrative committees, rather than informal communications.

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[255] Transparency International (2015).

[256] EC, *Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation* [EC Agreement, (2014)] OJ, L277/11, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014Q0919(01)&from=en>.

[257] Markus Krajewski, *Legal Framework for a Mandatory EU Lobby Register and Regulations* (Vienna Chamber of Labour, 2011), online: <http://www.foeeurope.org/sites/default/files/news/foee_legal_framework_mandatory_eu_lobby_register.pdf>.

[258] EC Agreement, (2014), OJ, L277/11 at 15.

[259] *Ibid* at 12.

[260] OECD (2009).

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After registration, registrants will be considered lobbyists and will be bound by the CCIR. Registrants are also required to self-identify as a certain type of lobbyist or entity, such as in-house lobbyists, think tanks or NGOs.

Registration imports mandatory annual disclosure requirements. Along with general contact and company information, lobbyists must disclose information on their lobbying activities and costs, including their lobbying objectives, fields of interest and targeted policies and legislative proposals. The Register also provides information on specific activities in which the registrant engages, such as the registrant's EU initiatives or participation in EU structures and platforms like expert groups. Unlike the registers in the US, UK and Canada, the clients of lobbying firms are not disclosed. The Register is available online in a searchable database.[261]

Violations are punished by removal from the Register and resultant loss of incentives. Serious violations and noncompliance with the CCIR can be punished by removal for up to two years. Unlike the regimes in the US, UK and Canada, since registration is voluntary, failure to comply is not an offence and is not punishable by fines or incarceration.

9. CONCLUSION

Lobbying regulation is often enacted in the wake of political scandal. Public decision making and confidence in government stand to benefit from policy that is forward-looking and proactive, rather than reactionary.[262] The American approach sets a high standard for disclosure, and the Canadian regime is commendable. More stringent financial disclosure requirements would enhance the integrity of the Canadian regime. The UK's lobbying legislation would benefit from a broader definition of lobbying activity and more demanding and detailed disclosure requirements. Transparency in the EU would be greatly improved with the adoption of a mandatory registry; mandatory disclosure is the single most effective way to ensure standards of behaviour in lobbying, reduce corruption and promote confidence in public office. If a mandatory registry is adopted, the European Council should be a signatory.

The effectiveness of a lobbying regulatory regime demands that stakeholders are aware of responsibilities and obligations, and that enforcement mechanisms are objective and robust. American pluralism has produced a unique community of civil society watchdog groups that monitor lobby activity generally and in specific policy fields. These groups promote competency and understanding of lobbying regulations. Similar groups exist in Canada and the EU; however, in these jurisdictions the government has a greater responsibility to undertake education and awareness initiatives.

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[261] Official Website of the European Union, "Transparency Register", (January 2017), online: <http://ec.europa.eu/transparencyregister/public/consultation/listlobbyists.do?locale=en&reset=>.
[262] OECD (2014).

Lobbying remains an important component of democracy and will surely continue to operate as a mechanism for citizens to communicate with public officials and governments to acquire information from special interest groups. As jurisdictions such as Canada, the US, the UK and the EU continue to improve upon their regulatory regimes, globalization will cause expectations to develop amongst diplomatic and economic partners. While nations with fledgling lobbying policy can benefit from lessons learned in other regions, lawmakers must be mindful of domestic requirements and traditional relationships between government, commercial interests and the public at large. Nonetheless, in order for lobbying to maintain public legitimacy and promote principles of good governance, regulation must have clearly defined application and standards for information collection and disclosure that encourage compliance, and should integrate harmoniously within the broader regulatory and legal regime.

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CHAPTER 11

CORRUPTION AND PUBLIC PROCUREMENT

[*This chapter was first prepared in part by Mollie Deyong as a directed research and writing paper on corruption in Canada's MASH sector under Professor Ferguson's supervision. Professor Ferguson then expanded the chapter with the research and writing assistance of Erin Halma. Connor Bildfell made extensive revisions in 2017.*]

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1. INTRODUCTION

Transparency International (TI) defines public procurement as "the acquisition by a government department or any government-owned institution of goods or services."[1] Although large-scale items and projects, such as armaments or infrastructure buildings, are the most obvious examples of public procurement, the term also refers to the acquisition of supplies and services including school supplies (such as textbooks), hospital supplies (such as bed sheets) and financial or legal services.[2]

This chapter introduces the vast topic of corruption in public procurement.[3] After setting out the contextual backdrop—including the negative effects and prevalence of corruption in public procurement—the chapter will explore how public procurement works and which industries suffer from the highest levels of procurement corruption, along with the key elements of effective procurement systems. It will conclude with a discussion on international legal instruments and standards for regulating procurement, as well as private and public law governing the public procurement process in the US, UK and Canada.

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[1] Susanne Kühn & Laura B Sherman, *Curbing Corruption in Public Procurement: A Practical Guide* (Transparency International, 2014) at 4, online: <www.acec.ca/source/2014/november/pdf/2014_AntiCorruption_PublicProcurement_Guide_EN.pdf>.

[2] *Ibid.*

[3] As referenced by Graham Steele at footnote 124 of his LLM thesis, *Quebec's Bill 1: A Case Study in Anti-Corruption Legislation and the Barriers to Evidence-Based Law-Making* (Dalhousie University Schulich School of Law, 2015), online: <dalspace.library.dal.ca/handle/10222/56272>, the most recent version of the *Bibliography on Public Procurement Law and Regulation* (Public Procurement Research Group, University of Nottingham, online: <https://www.nottingham.ac.uk/pprg/documentsarchive/bibliography-at-nov-2012.pdf>) amounts to 343 pages.

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For convenience, many examples of corruption and methods for reducing corruption tend to be drawn from the most prevalent area of public procurement corruption: the construction industry. This should not be taken as an indication that procurement corruption and its prevention are identical in all public procurement sectors. For example, military defence procurement is typically governed by a process separate from the general government procurement regime.[4] The absence of a full discussion of other sectors and procurement regimes is primarily a product of the limited space that can be dedicated to the subject of procurement corruption in this book.

1.1 Adverse Consequences of Corruption in Public Procurement

The World Bank makes a distinction between two broad categories of corruption:

(1) **state capture**, which refers to actions by individuals, groups, or organizations to influence public policy formation by illegally transferring private benefits to public officials (i.e., efforts by private actors to shape the institutional environment in which they operate); and

(2) **administrative corruption**, which refers to the use of the same type of corruption and bribes by the same actors to interfere with the proper implementation of laws, rules, and regulations.[5]

Examples of public procurement corruption can be found in either category. Corruption in the nature of "state capture," for example, may involve attempts by private firms to influence the broader project appraisal, design, and budgeting process by making illicit campaign contributions. "Administrative corruption" could include, for example, a bidder's attempt to bribe an administrative decision maker in order to secure a lucrative public procurement contract. A further example would be the giving of a bribe by a contractor to a government engineer or inspector to "ease up" on his or her inspection of substandard goods or services provided by the contractor. Although such actions may be seen by the parties involved as relatively harmless, the reality is that the effects of corruption in public procurement, no matter how "small" the act, can be devastating.

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[4] Martin Auger, *Defence Procurement Organizations: A Global Comparison* (Library of Parliament, 2014), online: <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2014-82-e.html>.

[5] Elizabeth Anderson, "Municipal 'Best Practices': Preventing Fraud, Bribery and Corruption" (Vancouver, BC: International Centre for Criminal Law Reform and Criminal Justice Policy, 2013) at 2, online: <icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/Municipal Best Practices - Preventing Fraud, Bribery and Corruption FINAL.pdf>. See also Joel S Hellman, Geraint Jones & Daniel Kaufmann, "Seize the State, Seize the Day: An Empirical Analysis of State Capture and Corruption in Transition" (Paper prepared for the ABCDE 2000 Conference, Washington, DC, 18–20 April 2000), online: <siteresources.worldbank.org/INTABCDEWASHINGTON2000/Resources/hellman.pdf>.

Corruption in public procurement can have many detrimental effects. For instance, corruption often increases the cost and lowers the quality of goods or services acquired while reducing the likelihood that the goods or services purchased will meet the public's needs.[6] The OECD estimates that corruption drains off between 20 and 25% of national procurement budgets.[7] Furthermore, corruption in public procurement may adversely shape a country's economy as corrupt officials allocate budgets based on the bribes they can solicit rather than the needs of the country.[8] This often results in the approval of large-scale infrastructure projects because these projects provide many opportunities for corruption through frequent delays and the various levels of government approvals required. When public infrastructure projects are tainted by corruption, project owners, funders, employees, construction firms and suppliers, government officials, and the public suffer.[9]

Corruption in public procurement can be profoundly harmful to a country's economy. The Padma Bridge corruption scandal in Bangladesh led the World Bank to cancel a US$1.2 billion loan to build the bridge. Even if the government of Bangladesh is able to secure other financing for the project in the future, the delay to this project has caused significant physical and economic harms. The proposed bridge project is crucial to increasing economic activity in Bangladesh.[10] The bridge was intended to facilitate the transportation of goods and passengers in a timely and cost-effective manner. Currently, in the absence of the bridge, transport across the Padma River requires an inefficient and dangerous trip by boat or barge.

Corruption in public procurement can also be detrimental to the environment. In the Philippines, a contract for a US$2 billion nuclear power plant was controversially awarded to Westinghouse, who later admitted to having paid US$17 million in commissions to a

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[6] Kühn & Sherman (2014) at 4, online: <www.acec.ca/source/2014/november/pdf/2014_AntiCorruption_PublicProcurement_Guide_EN.pdf>. Kühn and Sherman provide a number of examples of the detrimental effects of corruption in public procurement. According to estimates by Transparency International, corruption can add as much as 50% to a project's costs: Transparency International, "Public Procurement", online: <www.transparency.org/topic/detail/public_procurement>.

[7] OECD, *Implementing the OECD Principles for Integrity in Public Procurement: Progress Since 2008* (2013), online: <www.oecd-ilibrary.org/governance/implementing-the-oecd-principles-for-integrity-in-public-procurement_9789264201385-en>.

[8] Paul Collier & Anke Hoeffler, "The Economic Costs of Corruption in Infrastructure" in Diana Rodriguez, Gerard Waite & Toby Wolfe, eds, *Global Corruption Report 2005* (Pluto Press in association with Transparency International, 2005) 12 at 13, online: <www.transparency.org/whatwedo/publication/global_corruption_report_2005_corruption_in_construction_and_post_conflict>.

[9] *Ibid* at 6. For an example of the complex web of different parties that can be involved in procurement projects, see Global Infrastructure Anti-Corruption Centre, "Why Corruption Occurs" (1 May 2008), online: <www.giaccentre.org/why_corruption_occurs.php>.

[10] World Bank, Press Release, "World Bank to Finalize Padma Bridge Financing" (19 December 2010), online: < http://www.worldbank.org/en/news/press-release/2010/12/19/world-bank-to-finalize-padma-bridge-financing>.

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friend of Ferdinand Marcos, the Filipino dictator.[11] The contract was initially denied, but Marcos reversed the decision. Westinghouse claimed these commissions were not a bribe. The nuclear reactor sits on a fault line, and if an earthquake occurs while the nuclear reactor is operational, there is a major risk of nuclear contamination. The power plant has not been operational or produced any electricity since its completion in the 1980s. This project was a massive misuse of public funds and would be a health and environmental nightmare if operational.

Corruption in public procurement is suspected of increasing deaths and injuries in earthquakes. In the past 15 years, there have been approximately 156,000 earthquake-related deaths and 584,000 injuries.[12] Many of these deaths and injuries were the result of building collapses caused by substandard building practices.[13] In southern Italy, a maternity wing of a six-story hospital collapsed and almost no occupants survived.[14] Investigation into the incident found that although the planning for the hospital was designed to code and included adequate materials to prevent the collapse, the building had not been built to code.[15] The builders' disregard for building regulations and the inspectors' failure to properly control and inspect the building resulted in a preventable catastrophe and many preventable deaths.

Finally, corruption in public procurement can lead to an erosion of public confidence in government institutions. As Managing Director of TI, Cobus de Swardt writes:

> When the products that citizens ultimately pay for are dangerous, inappropriate or costly there will be an inevitable loss of public confidence and trust in governments. Corrupted bidding processes also make a mockery of the level playing field for businesses, especially for younger, innovative companies eager to compete in a fair manner who may not have the backdoor contacts to buy contracts.[16]

Thus, public procurement corruption results not only in immediate, tangible losses to the public, but also in a deeper erosion of public trust in the government. The effect may be to drive away good companies who are unwilling to buy their way into procurement contracts,

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[11] Peter Bosshard, "The Environment at Risk from Monuments of Corruption" in Rodriguez, Waite & Wolfe, eds, (2005) 19 at 20.
[12] James Lewis, "Earthquake Destruction: Corruption on the Fault Line" in Rodriguez, Waite & Wolfe, eds, (2005) 23 at 23.
[13] *Ibid.*
[14] David Alexander, "The Italian Mafia's Legacy of High-Rise Death Traps" in Rodriguez, Waite & Wolfe, eds, (2005) 26 at 26.
[15] *Ibid.*
[16] Cobus de Swardt, "Transparency in Public Procurement: Moving Away from the Abstract", Transparency International (27 March 2015), online: <oecdinsights.org/2015/03/27/transparency-in-public-procurement-moving-away-from-the-abstract/>.

leaving behind a pool of unscrupulous and inexperienced contractors to carry out the projects.

The broader implications of a loss of confidence in the State and its institutions are severe. Professor Larry Diamond observes:

> In the absence of trust, citizens become cynical about their political system and disaffected with the existing order. Distrust may produce alienation and withdrawal from the political process, leaving behind a shallow, fragile state that cannot mobilize national resources or shape a collective vision for national development. If it festers for very long, widespread and intense distrust may eventually generate a backlash against the political order and a search for more radical, anti-system alternatives. Failed states, revolutions, civil wars, and other related traumatic failures of governance all share in common the absence or collapse of trust.[17]

1.2 How Much Money Is Spent on Public Procurement?

Annually, governments worldwide spend approximately US$9.5 trillion on public procurement projects, which represents 10 to 20% of GDP and up to 50% or more of total government spending.[18] The OECD estimates that corruption costs account for around US$2 trillion of this annual procurement budget.[19] Broadly speaking, this distorts competition, compromises the quality of public projects and purchases, wastes taxpayer dollars and contributes to endemic corruption, thus eroding trust in government.[20] Some procurement projects—such as the construction of facilities for major sporting events like the Olympics or the construction of airports—are so large in relation to local economies that cost overruns

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[17] Larry Diamond, "Building Trust in Government by Improving Governance" (Paper presented to the 7th Global Forum on Reinventing Government, Vienna, 27 June 2007), online: <https://stanford.edu/~ldiamond/paperssd/BuildingTrustinGovernmentUNGLobalForum.pdf>.

[18] Kühn & Sherman (2014) at 4, online: <www.acec.ca/source/2014/november/pdf/2014_AntiCorruption_PublicProcurement_Guide_EN.pdf>. Canadian federal departments and agencies alone spend about CAD$18 billion annually: Office of the Procurement Ombudsman, *Annual Report 2015–16* at 7, online: <opo-boa.gc.ca/documents/rapports-reports/2015-2016/annuel-annual-2015-2016-eng.pdf>.

[19] *Ibid*.

[20] *Ibid*. Like all forms of corruption, corruption in public procurement is extremely difficult to quantify. Even where corrupt activities are identified, it can be very difficult to trace and calculate the chain of losses that flow from incidences of corruption. It is often practically impossible to calculate the quantum of loss. See e.g., Global Infrastructure Anti-Corruption Centre, "Section 1: Understanding the Cost of Corruption in Relation to Infrastructure Projects", online: <www.giaccentre.org/cost_of_corruption.php>.

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may distort an entire country or region's economy.[21] To the extent that such cost overruns are due to corruption, corruption contributes to the destabilization of local economies.

1.3 Public Procurement Corruption within Developed Countries

Corruption in public procurement is not only a concern for the developing world, but also exists in developed countries. Therefore, adequate controls are needed in all countries. The US spends approximately US$530 billion a year on procurement, and although it has extensive laws and regulations in place, its system is not free from corruption.[22] For example, in the US in 2013, a former manager of the Army Corps of Engineers was found guilty of accepting bribes from construction contractors for certifying bogus and inflated invoices.[23] Italy provides another example:

> Italian economists found that the cost of several major public construction projects fell dramatically after the anti-corruption investigations in the early nineties. The construction cost of the Milan subway fell from $227 million per kilometre in 1991 to $97 million in 1995. The cost of a rail link fell from $54 million per kilometre to $26 million, and a new airport terminal is estimated to cost $1.3 billion instead of $3.2 billion.[24]

A further example of public procurement corruption within developed countries is provided by the findings of the Charbonneau Commission. The Charbonneau Commission, known officially as the *Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry*, was a major public inquiry into corruption in public contracting in Quebec.[25] Justice France Charbonneau chaired the commission launched on October 19, 2011 by Premier Jean Charest. The Commission had a three-fold mandate:

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[21] Bent Flyvbjerg & Eamonn Molloy, "Delusion, Deception and Corruption in Major Infrastructure Projects: Cases, Consequences, and Cures" in Susan Rose-Ackerman & Tina Søreide, eds, *International Handbook on the Economics of Corruption*, vol 2 (Edward Elgar, 2011) at 87.

[22] Daniel I Gordon, "Protecting the Integrity of the U.S. Federal Procurement System: Conflict of Interest Rules and Aspects of the System That Help Reduce Corruption" in Jean-Bernard Auby, Emmanuel Breen & Thomas Perroud, eds, *Corruption and Conflicts of Interest: A Comparative Law Approach* (Edward Elgar, 2014) 39 at 39.

[23] "19-Year Corruption Sentence for Ex-Manager with Army Corps of Engineers", *The New York Times* (12 July 2013), online: <www.nytimes.com/2013/07/12/us/19-year-corruption-sentence-for-ex-manager-with-army-corps-of-engineers.html?_r=0>.

[24] Tina Søreide, "Corruption in Public Procurement: Causes, Consequences, and Cures" (Chr Michelson Institute, 2002) at 1, online: <https://www.cmi.no/publications/file/843-corruption-in-public-procurement-causes.pdf>.

[25] For a concise summary of the Charbonneau Commission's activities and findings, see "Charbonneau Commission Finds Corruption Widespread in Quebec's Construction Sector", *CBC News* (24 November 2015), online: <www.cbc.ca/news/canada/montreal/charbonneau-corruption-inquiry-findings-released-1.3331577>.

1) Examine the existence of schemes and, where appropriate, paint a portrait of activities involving collusion and corruption in the provision and management of public contracts in the construction industry (including private organizations, government enterprises, and municipalities) and include any links with the financing of political parties.
2) Investigate possible infiltration of organized crime in the construction industry.
3) Consider possible solutions and make recommendations establishing measures to identify, reduce, and prevent collusion and corruption in awarding and managing public contracts in the construction industry.[26]

In her final report, Justice Charbonneau concluded that corruption and collusion in the awarding of government contracts in Quebec was far more widespread than originally believed.[27] Influence peddling was found to be a serious issue in Quebec's construction sector and organized crime had infiltrated the industry. As Justice Charbonneau writes in the preamble to the full report, "[t]his inquiry confirmed that there is a real problem in Quebec, one that was more extensive and ingrained than we could have thought."[28]

While Quebec has faced significant corruption issues, journalist McKenna suggests that it is not the only Canadian province affected by ongoing corruption scandals involving the Montreal construction sector and Montreal-based SNC-Lavalin.[29] He provides three reasons for this assertion: (1) federal tax money is wasted, (2) the negative reputation of a Canadian company engaging in international business affects all Canadian companies, and (3) corruption spreads and is not necessarily stopped by provincial borders.[30] He claims, "[i]t defies logic that corruption would be a way of life in one province and virtually absent in the rest of the country."[31]

These examples demonstrate that all countries, whether developed or developing, need effective procedures and laws in place to reduce the opportunity for corruption in public procurement.

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[26] Gouvernement du Québec, "Mandat" (9 November 2011), online: <www.ceic.gouv.qc.ca/la-commission/mandat.html>.
[27] France Charbonneau, "Rapport final de la Commission d'enquête sur l'octroi et la gestion des contrats publics dan l'industrie de la construction" (November 2015), online: <s3.documentcloud.org/documents/2599890/charbonneau-report-final-recommendations.pdf>.
[28] Martin Patriquin, "No One Can Deny It Now: Quebec Is Facing a Corruption Crisis", *Maclean's* (24 November 2015), online: <www.macleans.ca/news/canada/quebecs-now-undeniable-corruption-crisis/>.
[29] Martin Patriquin, "carbonneauQuebec: The Most Corrupt Province", *Maclean's* (24 September 2010), online: <www.macleans.ca/news/canada/the-most-corrupt-province/>.
[30] Barrie McKenna, "Quebec's Corruption Scandal Is a Canadian Problem", *The Globe and Mail* (10 December 2012), online: <www.theglobeandmail.com/report-on-business/quebecs-corruption-scandal-is-a-canadian-problem/article6140631/>.
[31] *Ibid*.

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1.4 The Importance of Maintaining a Low-Risk Environment

Anti-corruption scholars and practitioners agree that increased opportunities for corruption have a positive relationship with actual incidences of corruption. It is therefore crucial to maintain a low-risk environment. The lack of accountability enabled by a loose regulatory framework produces opportunities for corruption. The World Bank explains the connection between accountability and decreased corruption risk as follows:

> Accountability … is the degree to which local governments have to explain or justify what they have done or failed to do.… Accountability can be seen as the validation of participation, in that the test of whether attempts to increase participation prove successful is the extent to which [the public] can use participation to hold a local government responsible for its actions …. In theory, … more transparency in local governance should mean less scope for corruption, in that dishonest behavior would become more easily detectable, punished and discouraged in the future.[32]

2. RISKS AND STAGES OF CORRUPTION IN PUBLIC PROCUREMENT

2.1 Risk of Corruption by Industry and Sector

Transparency International's Bribe Payer's Index (2011) ranked 19 industries for prevalence of foreign bribery. The public works and construction sector scored lowest, making it the industry sector most vulnerable to bribery.[33] The list below ranks the industries and business sectors from highest prevalence of foreign bribery to lowest prevalence of foreign bribery:

1. Public works contracts and construction
2. Utilities
3. Real estate, property, legal and business services
4. Oil and gas
5. Mining
6. Power generation and transmission
7. Pharmaceutical and healthcare

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[32] Decentralization Thematic Team, "Accountability, Transparency and Corruption in Decentralized Governance", World Bank, online: <https://www.ciesin.columbia.edu/decentralization/English/Issues/Accountability.html>.

[33] Transparency International, *Bribe Payers Index 2011* at 15, online: <www.transparency.org/bpi2011/results>. The 2011 Bribe Payers Index is Transparency International's most recent Bribery Index.

8. Heavy manufacturing
9. Fisheries
10. Arms, defence, and military
11. Transportation and storage
12. Telecommunications
13. Consumer services
14. Forestry
15. Banking and finance
16. Information technology
17. Civilian aerospace
18. Light manufacturing
19. Agriculture

TI suggests that the construction industry is particularly vulnerable to bribery because of the large size and fragmented nature of construction projects, which often involve multiple contractors and sub-contractors.[34] The large and complex nature of many construction projects makes it difficult to monitor payments and implement effective policies and standards. Since major public infrastructure projects are often "special purpose, one-of-a-kind deals" that are massive in scale, produce high levels of economic rents, present difficulties in establishing benchmarks for cost and quality and can be challenging to monitor, corruption risks abound.[35] Construction projects also involve many instances in which private actors require government approval, resulting in opportunities for the offering or demanding of bribes. The prevalence of bribery in the procurement industry is illustrated by the OECD's finding: 57% of the 427 foreign bribery cases prosecuted under the OECD Anti-Bribery Convention between 1999 and 2014 involved bribes to obtain public procurement contracts.[36]

2.2 Stages and Opportunities for Procurement Corruption

Corruption in public procurement can take many forms and can occur at any time throughout the lengthy procurement process. Most corruption experts agree that the following factors magnify opportunities for corruption: (1) monopoly of power, (2) wide discretion, (3) weak accountability and (4) lack of transparency.[37] Government agencies in developing countries tend to display these characteristics, creating more opportunities for corruption in procurement in those countries. Procurement in developing countries can

[34] Kühn & Sherman (2014) at 20.
[35] Susan Rose-Ackerman & Rory Truex, "Corruption and Policy Reform" (2012) Yale Law & Economics Research Paper 444 at 24, online: <papers.ssrn.com/sol3/Papers.cfm?abstract_id=2007152>.
[36] OECD, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (2014) at 8, online: <http://dx.doi.org/10.1787/9789264226616-en>.
[37] Glenn T Ware et al (2011) 65 at 67.

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comprise up to 20% of the country's GDP, and the high proportion of the economy occupied by public procurement makes it difficult for companies to find contracts outside the public sphere. This motivates companies to resort to corruption when competing for contracts in developing countries,[38] while public officials are often motivated by low wages.[39] Meanwhile, the broad discretion afforded to officials in making procurement decisions and the lack of capacity to monitor and punish corruption exacerbates opportunities for corruption.

Wells wrote a helpful article for the U4 Anti-Corruption Resource Centre entitled "Corruption in the Construction of Public Infrastructure: Critical Issues in Project Preparation."[40] This article explores how corruption opportunities arise, especially in the project selection and project preparation stages of the procurement process for public infrastructure projects. Since public infrastructure projects carry the highest risk for procurement corruption and consume "roughly one half of all fixed capital investment by governments,"[41] the public infrastructure sector is a worthy area for more detailed analysis. According to Wells, estimates of bribery payments in public infrastructure construction "vary globally from 5% to 20% [of construction costs] or even higher."[42] However, focusing solely on bribe payments distorts the overall size and impact of corruption. Wells cites the work of Kenny, who engages in a broader impact analysis and suggests that the most harmful forms of corruption for development outcomes are:

> (1) Corruption that influences the project appraisal, design, and budgeting process by diverting investment towards projects with low returns and towards new construction at the expense of maintenance and (2) corruption during project implementation that results in substandard construction that shortens the life of projects and hence drastically reduces the economic rate of return (ERR).[43]

Procurement scholars and practitioners agree that public investment in infrastructure projects requires an effective public investment management system (PIM System). Absence of such a system, or a weak management system, is a sure means of promoting high levels

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[38] *Ibid* at 66.

[39] Marie Chêne, "Low Salaries, the Culture of Per Diems and Corruption", U4 Expert Answer (23 November 2009), online: <www.u4.no/publications/low-salaries-the-culture-of-per-diems-and-corruption/>.

[40] Jill Wells, "Corruption in the Construction of Public Infrastructure: Critical Issues in Project Preparation", U4 (March 2015, Issue No 8), online: <www.u4.no/publications/corruption-in-the-construction-of-public-infrastructure-critical-issues-in-project-preparation/>.

[41] *Ibid* at 1.

[42] *Ibid.*

[43] *Ibid.*

of corruption.[44] Wells notes that management systems should include an analysis of whether the proposed project is a strategic priority, whether there are alternatives, whether the proposed project is likely to be economically feasible, and whether the project is likely to survive environmental and social impact assessments. Before an infrastructure project is chosen, it should be subject to an independent, professional appraisal to ensure that improper, irrelevant or corrupt influences were not driving the project proposal. Once a project is selected, a detailed design and budget must be prepared in a manner that ensures against, or at least minimizes the risk of, corruption influencing the design and budget phases. The other stages of the procurement process involve tenders for the project, implementation of the project, supervision of the project's implementation, and a final audit upon completion.

Wells provides an overview of corruption risks at various stages of the public procurement process for infrastructure projects:

Table 11.1 Overview of Corruption Risks during Public Procurement Process for Infrastructure Projects[45]

Stages	Risks	Main actors
Project appraisal	• Political influence or lobbying by private firms that biases selection to suit political or private interests • Promotion of projects in return for party funds • Political influence to favour large projects and new construction over maintenance • Underestimated costs and overestimated benefits to get projects approved without adequate economic justification	• Government ministers • Senior civil servants • Procurement officers • Private consultants (e.g., planners, designers, engineers, and surveyors)
Project selection, design, and budgeting	• Costly designs that increase consultants' fees and contractors' profits • Designs that favour a specific contractor • Incomplete designs that leave room for later adjustments (which can be manipulated) • High cost estimates to provide a cushion for the later diversion of funds • Political influence to get projects into the budget without appraisal	• Government ministers • Senior civil servants • Procurement officers • Private consultants (e.g., planners, designers, engineers, and surveyors)

[44] Anand Rajaram et al, "A Diagnostic Framework for Assessing Public Investment Management" (World Bank, 2010), online: <siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/FrameworkRajaram.pdf>.

[45] Wells (March 2015) at 18.

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Stages	Risks	Main actors
Tender for works and supervision contracts	• Bribery to obtain contracts (leaving costs to be recovered at later stages) • Collusion among bidders to allocate contracts and/or raise prices (potentially with assistance from procurement officers) • Interference by procurement officers to favour specific firms or individuals • Going to tender and signing contracts for projects that are not in the budget	• Procurement officers • Private consultants (e.g., supervising engineer) • Contractors
Implementation	• Collusion between contractor and the supervising engineer (with or without the client's knowledge) that results in the use of lower quality materials and substandard work • Collusion between contractors and the supervising engineer to increase the contract price or adjust the work required in order to make extra profits, cover potential losses, or recover money spent on bribes	• Procurement officers • Private consultants (e.g., supervising engineer) • Contractors and subcontractors
Operation and maintenance, including evaluation and audit	• Agreement by the supervising engineer to accept poor quality work or work below the specification, leading to rapid deterioration of assets • A lack of allocated funds for maintenance, as new construction takes precedence in the project identification stage for future projects	• Procurement officers • Private consultants (e.g., supervising engineer) • Contractors and subcontractors

Wells refers to an index developed by Dabla-Norris et al. to measure the efficiency (effectiveness) of public management of public investments in various countries.[46] Wells summarizes the index and the results of its application:

> The index records the quality and efficiency of the investment process across four stages: (1) ex ante project appraisal, (2) project selection and budgeting, (3) project implementation, and (4) ex-post evaluation and audit.… A total of 71 low and middle income countries were scored on each of the four stages. The scoring involved making qualitative assessments on 17 individual components in each stage, with each component scored on a

[46] Era Debla-Norris et al, "Investing in Public Investment: An Index of Public Investment Efficiency", IMF Working Paper WP/11/37 (2010), online: <https://www.imf.org/external/pubs/ft/wp/2011/wp1137.pdf>.

> scale of 0 to 4 (with a higher score reflecting better performance). The various components were then combined to form a composite PIM index....
>
> Unsurprisingly, Dabla-Norris et.al. (2011) found that low income countries and oil exporting countries had the lowest overall scores. The overall median score was 1.68, but scores ranged from a low of 0.27 (Belize) to a high of 3.50 (South Africa). The highest scores were among middle income countries (South Africa, Brazil, Colombia, Tunisia, and Thailand). Across regions, Eastern Europe and central Asian countries had relatively more developed PIM processes, followed by Latin America, East Asia, and the Pacific. The Middle East, North Africa, and sub-Saharan Africa regions trailed furthest behind....
>
> More interesting than variations across countries and regions was the considerable variation in individual scores for each of the four stages. Generally, the first and last stages (ex-ante appraisal and ex post evaluation) were the weakest. The median score for project appraisal was only 1.33, with country scores ranging from 4 for South Africa and Colombia down to 0 for a number of low income countries. These included several in sub-Saharan Africa (Guinea, Chad, Sierra Leone, the Republic of Congo, and Sao Tome and Principe), as well as Trinidad and Tobago, Belize, the West Bank and Gaza, and the Solomon Islands....
>
> The conclusion emerging from this exercise is that, while a number of countries have improved their project implementation (mainly through the introduction of procurement reforms), only a handful of developing countries have been able to improve the processes of project appraisal, design, and selection – hence moving towards better construction project management.[47]

As discovered by governments in many countries, infrastructure procurement projects can be used for improper personal gain by public officials and others (e.g., through bribes, kickbacks, etc.) or for overt or clandestine political purposes. Wells refers to a study in Uganda in which Booth and Golooba-Mutebi[48] found that the price of road construction per kilometer in Uganda was twice as high as similar road construction in Zambia:

> Booth and Golooba-Mutebi (2009, 5) concluded, "All of the evidence indicates that, under the pre-2008 arrangements, the roads divisions of the Ministry of Works operated as a well-oiled machine for generating corrupt earnings from kickbacks." They went on to show how this operated as a

[47] Wells (March 2015) at 5.

[48] David Booth and Frederick Golooba-Mutebi, "Aiding Economic Growth in Africa: The Political Economy of Roads Reform in Uganda", Overseas Development Institute Working Paper No 307 (September 2009), online: <www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinionfiles/4965.pdf>.

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> complex system of political patronage. In addition to ensuring the personal enrichment of the minister, chief engineer, and many senior civil servants, the arrangement also provided a reliable means of accumulating funds to be made available to state house and other top government offices for "political" uses (such as patronage and campaign finance). Public officials raised money through a variety of means including accepting bribes for awarding contracts and signing completion certificates. The relative difficulty of skimming resources from donor-funded projects led to a situation where only a fraction of project funds made available by donors was being utilised.[49]

The evidence before the Charbonneau Commission, discussed above in Section 1.3, in relation to corruption in public infrastructure projects in Quebec and the connection between those corrupt funds and illegal campaign financing demonstrates that these types of corrupt public infrastructure practices can also exist in countries, such as Canada, that are perceived to have low levels of corruption.

Effective project screening will align proposed investment with actual development needs. Wells notes that inadequate independent pre-screening of infrastructure projects can lead to the proverbial "white elephant" phenomenon. She refers to a 2013 World Bank study[50] that describes three types of white elephant projects:

- [Projects involving e]xcess capacity infrastructure, such as a road or airport with little or no traffic demand;
- Projects for which there is no operational budget to provide services that will be needed for success (such as hospitals or schools); and
- Capital investment in projects that are never completed (sometimes not even started) but are used to secure access to the contract value.

> An example of the first type can be found in Angola, where close examination of the list of projects in 2011 revealed a bridge to be built in a remote area of the country's southeast region for which there were no connecting roads—quite literally, this was a "bridge to nowhere." This project could not have been approved with even a cursory evaluation (Wells, 2011).
>
> The second type (also in Angola) is illustrated by the expansion of power generation capacity that was not matched by investment in transmission

[49] Wells (March 2015) at 7.

[50] "Investing to Invest: Strengthening Public Investment Management" (World Bank Poverty Reduction and Economic Management Network, May 2013) [unpublished, Country Clearance Version].

> and distribution, so that the power could get to the users (Pushak and Foster, 2011).
>
> The third type has been well-illustrated by the award of a contract for major road projects in Uganda. Part of the contract value was siphoned off and used for patronage payments, and many of the projects were never completed (Booth and Golooba-Mutebi, 2009). [footnotes omitted][51]

2.3 Corrupt Procurement Offences

Corruption in public procurement occurs most frequently through bribes, extortion, bid-rigging and other forms of fraud. These types of corruption are discussed in more detail below.

2.3.1 Bribery

The OECD estimates that bribery in government procurement in OECD countries increases contract costs by 10-20%, suggesting that at least US$400 billion is lost to bribery every year.[52] The following are a few examples of how bribery of public officials can occur in relation to an infrastructure project:

- a government official may be bribed to either provide planning permission for a project or approve a design which does not meet the necessary regulations;
- a bidder may offer bribes to a government official in order to be improperly favoured throughout the bidding process, or to induce the official to manipulate the tender evaluation; or
- a bidder may make a donation to a certain political party in order to ensure preferential treatment.[53]

Bribery and corrupt behaviour can also constitute other criminal offences such as extortion and fraud.

2.3.2 Extortion

The following are examples of how extortion—the making of a demand backed by force or threat—can manifest in public procurement:

- a bidder may threaten to harm a government official or the official's family unless the official gives unwarranted favourable treatment to the bidder;

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[51] Wells (March 2015) at 10.
[52] OECD, *OECD Principles for Integrity in Public Procurement* (2009) at 9, online: <www.oecd.org/gov/ethics/48994520.pdf>.
[53] Global Infrastructure Anti-Corruption Centre, "How Corruption Occurs", online: <www.giaccentre.org/how_corruption_occurs.php>.

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- a government official may demand something in return for assisting a company to win a bid or for fair treatment of the company in the bidding process; and
- any situation that involves the payment of bribes can include an element of extortion.

2.3.3 Bid-Rigging, Kickbacks and Other Forms of Fraud

The public procurement process attracts fraudulent behaviour because it involves the exchange of massive amounts of money and resources.[54] Examples of fraud in public procurement include:

- where a bidder deliberately submits false invoices or other false documentation (with or without collusion of public officials);
- where bidders form a cartel and secretly pre-select the winners for certain projects;
- where a contractor submits false claims in order to receive more money or more time to complete a project; or
- various forms of illegally diverting money, such as money laundering and embezzlement.

These examples are just a few of the ways corruption manifests in public procurement. Given the great potential for many types of corrupt practices in public procurement, regulation of public procurement procedures should be a priority at all levels of government.

3. TYPES OF PUBLIC PROCUREMENT: P3S, SOLE SOURCING AND COMPETITIVE BIDDING

This section will describe the three main ways procurement occurs: P3s, sole sourcing and competitive bidding.

3.1 P3s

Procurement of large-scale, complex projects such as public infrastructure can involve construction-related public-private partnerships (P3s). Public Private Partnership Canada (PPP Canada),[55] a federal Crown corporation that facilitates P3 projects, defines a P3 as:

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[54] Paul Fontanot et al, "Are You Tendering for Fraud?", *Keeping Good Companies* (April 2010) 146 at 146.

[55] In 2015, PPP Canada contributed to 13 P3 projects entering the market, 21 projects reaching financial close (with a combined value of over CAD$14.1 billion), and 7 municipal P3 projects reaching financial close: PPP Canada, *Annual Report 2015–16* at 7, online: <www.p3canada.ca/~/media/english/annual-reports/files/2015-2016 annual report.pdf>.

> A long-term performance-based approach to procuring public infrastructure where the private sector assumes a major share of the risks in terms of financing and construction and ensuring effective performance of the infrastructure, form design and planning, to long-term maintenance.[56]

Although P3s in the public infrastructure context can take many forms and can include a variety of attributes, at least three features tend to be present: (1) bundling of construction and operation, (2) private but temporary ownership of assets and (3) risk sharing over time between the public and private sector.[57] One distinguishing feature found in most major infrastructure P3s is that the private sector bears considerable (if not complete) responsibility for project financing. This follows from a core conceptual underpinning of the P3 model: project risks should be transferred to the party best able to manage those risks.[58] The transfer of financing responsibilities to the private sector is said to alleviate strains on public budgets and harness the efficiency and depth of private finance markets. Through a P3 arrangement, the costs of a project can be paid off over the project lifecycle, which poses less risk to both governments and taxpayers as compared to front-loaded arrangements.[59] In addition, many P3 arrangements take some form of a "concession" model, whereby a private sector concessionaire undertakes investment and operation of the project for a fixed period of time after which ownership of the assets reverts to the public sector.

Each P3 arrangement sits along a continuum between "purely public" and "purely private."[60] A project sitting closer to the "private" end of the spectrum might include an agreement whereby private sector participants build, own and operate the infrastructure. This is commonly referred to as a public investment management system "BOO" (build-own-operate) arrangement.[61] By contrast, a project sitting closer to the "public" end of the spectrum might involve an agreement whereby private sector participants merely operate and maintain the infrastructure. This is referred to as an "OM" (operate and maintain) arrangement.[62]

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[56] PPP Canada, "Frequently Asked Questions: What Is a P3?", online: <www.p3canada.ca/en/about-p3s/frequently-asked-questions>.

[57] Eduardo Engel, Ronald Fischer & Alexander Galetovic, "Public-Private Partnerships: When and How" (19 July 2008) at 49, online: <www.econ.uchile.cl/uploads/publicacion/c9b9ea69d84d4c93714c2d3b2d5982a5ca0a67d7.pdf>.

[58] PPP Canada, "Frequently Asked Questions: What Is a P3?"

[59] Engel, Fischer & Galetovic (19 July 2008) at 49.

[60] Young Hoon Kwak, YingYi Chih & C William Ibbs, "Towards a Comprehensive Understanding of Public Private Partnership for Infrastructure Development" (2009) 51:2 California Management Review 51 at 54. Some suggest that based on the nature of the public–private relationship inherent in P3s, governments *set* policy while the private sector *implements* policy, invoking the metaphor of "governments steering and the private sector rowing": Joan Price Boase, "Beyond Government? The Appeal of Public–Private Partnerships" (2000) 43:1 Canadian Public Administration 75 at 75.

[61] *Ibid*.

[62] *Ibid*.

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Despite substantial private-sector involvement in many P3 arrangements, governments continue to maintain a substantial role in ensuring that P3 projects operate effectively. The government must provide a favourable investment environment, establish adequate regulatory frameworks and chains of authority, select a suitable procurement process, and maintain active involvement throughout the project lifecycle.[63] These responsibilities highlight the need to ensure that government officials are acting with honesty and integrity.

To distinguish between P3s and the other two models discussed below, we can look to the list of five essential differences between so-called "conventional procurement" and P3s, as outlined by the World Bank:

1) Conventional public procurement contracts for major public infrastructure typically last, at most, for only a few years (typically expiring within five years). P3s, by contrast, are long-term contracts that can exceed 30 years in duration. This creates an ongoing partnership relationship of interdependency and, as a result, the selection requirements, expectations, and procedures are very different.
2) Conventional public procurement contracts typically have as their object the construction of facilities, and the final product—which is often designed and planned by the public authority—can be tested and accepted at the end of the construction. P3s focus instead on the provision of a service with private sector participation in the delivery of that service. As such, conventional procurement tends to be more *input oriented*, whereas P3s are more *output oriented*.
3) In most P3s, the project proponent (i.e., the lead firm carrying out the project) creates a Special Purpose Vehicle (SPV) to develop, build, maintain, and operate the asset(s) for the life of the contract. The SPV constitutes a consortium that includes the building contractor, bank lender(s), and other private sector participants. The SPV is the entity that signs the contract with the government, and the SPV subcontracts out its various obligations. This unique way of structuring the contract and the various obligations is not typically found in conventional procurement.
4) Conventional procurement is typically a public-sector financed endeavor. It relies ultimately on taxpayer dollars. User fees, tariffs, direct payments from the public authority, loans, guarantees from lenders, equity contributions from P3 partners, or some combination thereof, by contrast, often finance P3s.
5) P3s, some argue, can reduce costs by allocating risks such as project failure or delays to parties best able to manage them, and private sector participants have

[63] *Ibid*.

> stronger incentives to reduce costs in P3s as compared to conventional procurement.[64]

PPP Canada suggests that the P3 model may be preferred over alternative models such as competitive bidding where the following conditions are present:

- You have a major project, requiring effective risk management throughout the lifecycle;
- There is an opportunity to leverage private sector expertise;
- The structure of the project could allow the public sector to define its performance needs as outputs/outcomes that can be contracted for in a way that ensures the delivery of the infrastructure in the long term;
- The risk allocation between the public and private sectors can be clearly identified and contractually assigned;
- The value of the project is sufficiently large to ensure that procurement costs are not disproportionate;
- The technology and other aspects of the project are proven and not susceptible to short-term obsolescence; and
- The planning horizons are long-term, with assets used over long periods and are capable of being financed on a lifecycle basis.[65]

The likelihood that the P3 model will be selected over alternative models such as competitive bidding increases where there is significant scope for innovation and a long project lifecycle (e.g., the design, construction and operation of state-of-the-art hospitals). By contrast, where the project is comparatively simple and has a short project lifecycle (e.g., the installation of a simple transmission line), the likelihood that some other form of procurement will be selected increases.

Professors Engel, Fischer, and Galetovic suggest that P3s are the superior choice where there is a need to provide strong incentives to reduce or control project lifecycle costs.[66] This is because in the P3 arrangement, the private-sector participant involved in the operation of the project has an incentive to minimize costs while still meeting project standards, since the firm shares in the economic savings derived from any cost-cutting measures that enhance the project. This can, however, present problems to the extent that such measures reduce the quality of service.[67] Engel, Fischer, and Galetovic also suggest that P3s may be the superior

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[64] World Bank, "Procurement Arrangements Application to Public-Private Partnerships (PPP) Contracts Financed under World Bank Projects", Guidance Note (September 2010) at 14, online: <ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/GuidanceNote_PPP_September2010.pdf>.

[65] PPP Canada, "Frequently Asked Questions: What Is a P3?"

[66] Engel, Fischer & Galetovic (19 July 2008) at 49.

[67] *Ibid* at 50.

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choice where demand risk is largely exogenous and there is a large upfront investment.[68] The authors add, however, that any form of public procurement—such as P3s or competitive bidding—should be pursued only where full privatization is not possible.[69] This will generally be the case where competition is not feasible.[70]

Note that despite the foregoing observations, P3s can—and often do—contain elements of the competitive bidding model. For example, private-sector partners are often selected based on a competitive bidding process, as described in Section 3.3 below.

P3s have gained ascendency on the world stage as a preferred model of delivering large-scale infrastructure goods and services to the public. Between 1985 and 2004, 2,096 P3 infrastructure projects were undertaken worldwide, with a combined capital value of nearly US$887 billion.[71] The World Bank estimates that the private sector financed approximately 20% of infrastructure investments in developing countries in the 1990s, totaling about US$850 billion.[72]

Enthusiasm for P3s can be found in Canada as well. In 2009, then–prime minister Stephen Harper created P3 Canada Inc.—a Crown corporation—in order to deepen Canada's commitment to P3s. Harper opined, "[P3s are] an excellent additional tool to allow taxpayers to share risk and thus help get projects completed on time and on budget."[73] As noted by the Council of Canadians, the Harper government originally created a $14 billion Building Canada Fund that required federal support be approved by P3 Canada, essentially entrenching the P3 model as the preferred model for large, federally funded infrastructure projects.[74] In addition, provinces such as British Columbia and Ontario have, at various times and in various capacities, adopted and expressed support for the P3 model. Thus, in Canada,

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[68] *Ibid* at 49.
[69] *Ibid*.
[70] *Ibid*.
[71] AECOM Consult, Inc, "Synthesis of Public-Private Partnership Projects for Roads, Bridges & Tunnels from Around the World, 1985-2004" (United States Department of Transportation, 2005), cited in Young Hoon Kwak, YingYi Chih & C William Ibbs (2009) at 56.
[72] See Mona Hammami, Jean-Francois Ruhashyankiko & Etienne B Yehoue, "Determinants of Public-Private Partnerships in Infrastructure", International Monetary Fund, WP/06/99 (April 2006) at 3, online: <www.imf.org/external/pubs/ft/wp/2006/wp0699.pdf>.
[73] Brent Patterson, "Trudeau Abandons Harper's Unpopular P3 Requirement for Infrastructure Funding", The Council of Canadians (19 November 2015), online: <canadians.org/blog/trudeau-abandons-harpers-unpopular-p3-requirement-infrastructure-funding>.
[74] *Ibid*.

P3s are an increasingly popular mechanism for public procurement, with proponents highlighting their economic efficiency.[75]

However, views on the advisability of P3s are mixed. Detractors argue that P3s—rather than being efficient, revolutionary models of delivering public goods and services—"cost more and deliver less."[76] Some scholars, such as Minow, Custos and Reitz, have criticized P3s for failing to sufficiently protect public values and interests.[77] Scholars who espouse this view argue that P3s can open the door to private capture of public decision makers.[78]

3.2 Sole Sourcing

Although most public procurement now occurs through a competitive bidding process, the sole source contracting method is still used for some services. Plainly stated, sole source contracting involves two parties negotiating a contract, without an open competitive process.[79] Sole sourcing may be preferred for efficiency purposes in emergencies, for small value contracts, or where there are confidentiality concerns.[80] However, as sole sourcing is not a public and transparent process, it can be difficult for public bodies to justify this

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[75] The Canadian Council for Public-Private Partnerships, Public-Private Partnerships, A Guide for Municipalities (2011) at 10, online: <www.p3canada.ca/en/about-p3s/p3-resource-library/public-private-partnerships-a-guide-for-municipalities/ >.See also Maurice Rachwalski, *Public Sector Capacity to Plan and Deliver Public/Private Infrastructure Partnerships (P3s): A Case Study of British Columbia's Healthcare Sector* (PhD Thesis, University of Victoria School of Public Administration, 2013) [unpublished].

[76] See e.g. Toby Sanger, "Ontario Audit Throws Cold Water on Federal-Provincial Love Affair with P3s", Canadian Centre for Policy Alternatives (2 February 2015), online: <https://www.policyalternatives.ca/publications/monitor/ontario-audit-throws-cold-water-federal-provincial-love-affair-p3s - sthash.SKJBMSP6.dpuf>. For an extended discussion of the merits and critiques of P3s, see Young Hoon Kwak, YingYi Chih & C William Ibbs, "Towards a Comprehensive Understanding of Public Private Partnership for Infrastructure Development" (2009) 51:2 California Management Review 51; Eduardo Engel, Ronald Fischer & Alexander Galetovic, "Public-Private Partnerships: When and How" (19 July 2008), online: <www.econ.uchile.cl/uploads/publicacion/c9b9ea69d84d4c93714c2d3b2d5982a5ca0a67d7.pdf>; World Bank, Asian Development Bank & Inter-American Development Bank, "Public-Private Partnerships Reference Guide", Version 2.0 (2014), online: <api.ning.com/files/Iumatxx-0jz3owSB05xZDkmWIE7GTVYA3cXwt4K4s3Uy0NtPPRgPWYO1lLrWaTUqybQeTXIeuSYUxbPFWlysuyNI5rL6b2Ms/PPPReferenceGuidev02Web.pdf>.

[77] Robert Klitgaard, *Addressing Corruption Together* (OECD, 2015) at 5, online: <www.oecd.org/dac/governance-peace/publications/FINAL Addressing corruption together.pdf>.

[78] See *ibid* at 5, 7.

[79] Robert C Worthington, "Legal Obligations of Public Purchasers" (Treasury Board of Canada Secretariat, May 2002), online: <www.tbs-sct.gc.ca/cmp/doc/lopp_olap/lopp_olap-eng.asp>.

[80] *Ibid*.

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method due to concerns relating to fairness and discrimination.[81] From an anti-corruption perspective, a public entity should sole source its contracts as seldom as possible.

One added complication in the sole-sourcing context is the phenomenon of unsolicited bids.[82] Some public authorities are willing to consider project proposals initiated, designed and submitted by private firms, rather than the authority itself. This flips the traditional competitive bidding model on its head: the idea for the project comes not from the public authority, but from the private sector.

Although unsolicited bids may be seen as a welcome opportunity to introduce greater private sector participation in the identification of public needs, as well as to inject private sector innovation into the delivery of public goods and services, they may also be a dangerous proposition. The result of increased acceptance of unsolicited bids may be to allow private firms to intrude upon the government's role in formulating policy and designing public infrastructure to achieve public policies.

Perhaps the principal issue with unsolicited bids is that they may be associated with a lack of competition and transparency.[83] In an unsolicited bid, where there is only one party seeking an exclusive contract for a project that was drawn up by that party, the public might perceive the proposed project as serving special interests or being tainted by corruption.[84]

Professors Hodge and Greve summarize the concerns raised over unsolicited bids:

> [Unsolicited bids add] a whole new dimension to project initiation, planning and completion with new powerful interest groups moving in alongside elected governments. Thus, we see today new infrastructure projects being suggested by real estate agents as well as various project financiers and merchant bankers, rather than bureaucrats—whose purpose, one would have thought, would be to do just this, as well as analyzing a range of smaller packages of alternative improvement options. Whilst such

[81] *Ibid*.

[82] For a detailed discussion of unsolicited bids, see John T Hodges & Georgina Dellacha, "Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency", Working Paper No 1 (Public Private Infrastructure Advisory Facility, 2007), online: <www.ppiaf.org/sites/ppiaf.org/files/publication/WP1-Unsolicited Infra Proposals - JHodges GDellacha.pdf>.

[83] See Hodges & Dellacha (2007) at vi.

[84] *Ibid* at 1.

> government-business deals may well end up meeting the public interest, it would seem more by coincidence than by design.[85]

Hodges and Dellacha suggest that, with unsolicited bid submissions, it may be best for the public authority to hold a tendering process nonetheless in order to preserve some level of competition and enhance transparency, even if there is only one bidder.[86] This is said to (1) evidence the government's commitment to transparency and (2) demonstrate that there is in fact only one interested bidder.[87] The effect is to lend the project greater legitimacy in the public eye.

At the end of the day, whether unsolicited bids serve the public interest will depend on the particular circumstances surrounding the proposed project, including the actors involved, the need for the project, whether the party proposing the project is the only one who could successfully carry it out, and other factors.

3.3 Competitive Bidding

Public procurement more often occurs through the process of competitive bidding, or tendering. Though tendering is often used synonymously with bidding, tendering is a specific type of competitive bidding. The tendering process involves particular contractual relationships and obligations, which will be discussed later in this chapter. Broadly speaking, there are four stages of the traditional competitive bidding process: planning, bidding, bid evaluation, and implementation and monitoring.[88] These are also the basic stages in the P3 context, although some details vary. There can be many parties involved throughout the various stages of the bidding process. The bidder is the party or individual responding to the call for bids in the hope of winning the contract. The next section will focus on situations in which a government entity or official is the party requesting tenders. Other stakeholders can include contractors, engineers, agents, sub-contractors and suppliers. The following four stages briefly describe the procurement process:

1. **Planning**: This stage involves needs assessment, advertising, the production of bidding documents, and the formation of a procurement plan.[89] At this stage, the government assesses what is necessary to serve the public interest, with

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[85] Graeme Hodge & Carsten Greve, "The PPP Debate: Taking Stock of the Issues and Renewing the Research Agenda" (Paper presented at the International Research Society for Public Management Annual Conference, Brisbane, Australia, 26-28 March 2008), cited in World Bank & Department for International Development of the United Kingdom, *Good Governance in Public-Private Partnerships: A Resource Guide for Practitioners* (June 2009) at 36, n 30, online: <www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/07/04/000386194_20120704034652/Rendered/PDF/708460ESW0P1050e0Practices0in0PPPs.pdf>.

[86] Hodges & Dellacha (2007) at 3.

[87] *Ibid*.

[88] Kühn & Sherman (2014) at 7.

[89] *Ibid*.

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consideration to factors such as cost and timeliness.[90] The administrative and technical documents needed for launching the call for bids are prepared.[91]

2. **Bidding**: Candidates are short-listed, the government holds pre-bid conferences, the bids are submitted, and questions about the respective bids are clarified.[92] There are various types of bidding procedures that may be employed at this stage. For example, Public Works and Government Services Canada (PWGSC) uses two bidding approaches: tenders and proposal calls.[93] In the tender process, the government will solicit tenders through an Invitation to Tender (ITT) or Request for Quotation (RFQ).[94] Tenders are used when the government is searching for technical compliance with contract requirements and the lowest acceptable price for a specifically defined project.[95] On the other hand, when using the call for proposals approach, the government will issue a Request for Proposal (RFP), Request for Standing Offer (RFSO), or Request for Supply Arrangement (RFSA). Proposal calls—particularly RFPs—are used for complex or lengthy construction projects, and are most likely to be used in the P3 context.[96] Where the government is contemplating a P3, a Request for Qualifications (RFQu) is often issued prior to RFPs.[97] RFQus help the government to identify a shortlist of qualified bidders who will be invited to submit proposals at the RFP stage.
3. **Bid evaluation**: The bids are evaluated, the government compiles a bid evaluation report, and the contract is awarded to the winning bidder.[98] The process by which the bids are evaluated and the contract granted varies according to the bidding approach selected, as well as the governing legislation. For example, in Canada, PWGSC requires that RFPs be evaluated transparently and that debriefs be provided to losing bidders.[99]
4. **Implementation and monitoring**: The final contract between the bidder and the government is drafted and implemented, any changes are incorporated, the bidder's project is monitored and audited, and any appeals are launched.[100]

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[90] *OECD Principles for Integrity in Public Procurement* (2009) at 77.
[91] *Ibid* at 81.
[92] Kühn & Sherman (2014) at 7.
[93] Public Works and Government Services Canada, "Procurement Management Manual", online: <www.tpsgc-pwgsc.gc.ca/biens-property/sngp-npms/bi-rp/conn-know/approv-procure/manuelga-pmmanual-8-eng.html>.
[94] *Ibid*.
[95] *Ibid*.
[96] *Ibid*.
[97] The Canadian Council for Public-Private Partnerships, *Public-Private Partnerships, A Guide for Municipalities* (2011) at 29, online: <www.p3canada.ca/en/about-p3s/p3-resource-library/public-private-partnerships-a-guide-for-municipalities/>.
[98] Kühn & Sherman (2014) at 7.
[99] *Ibid* at 30.
[100] *Ibid*.

4. HALLMARKS OF A GOOD PROCUREMENT SYSTEM

Governments have many goals in enacting public procurement laws, including fair competition, integrity, transparency, efficiency, customer satisfaction, best value, wealth distribution, risk avoidance, and uniformity. Competition, integrity and transparency are often viewed as most important.[101]

4.1 Transparency

Transparency is important because it reduces the risk of corruption and bribery by opening up the procurement process to monitoring, review, comment and influence by stakeholders.[102] Transparency was explained at the 1999 International Anti-Corruption Conference as:

> Transparency, in the context of public procurement, refers to the ability of all interested participants to know and understand the actual means and processes by which contracts are awarded and managed. Transparency is a central characteristic of a sound and efficient public procurement system and is characterised by well-defined regulations and procedures open to public scrutiny, clear standardised tender documents, bidding and tender documents containing complete information, and equal opportunity for all in the bidding process. In other words, transparency means the same rules apply to all bidders and that these rules are publicised as the basis for procurement decisions prior to their actual use.[103]

Former Secretary-General of the United Nations Ban Ki-moon describes the connection between transparency and public procurement in the following terms:

> Transparency is a core principle of high-quality public procurement. An open and transparent procurement process improves competition, increases efficiency and reduces the threat of unfairness or corruption. A robust transparency regime enables people to hold public bodies and politicians to account, thereby instilling trust in a nation's institutions. Transparency also

[101] Steven L Schooner, "Desiderata: Objective for a System of Government Contract Law" (2002) 11:2 Public Procurement Law Review 103 at 104.
[102] Kühn & Sherman (2014) at 12.
[103] Wayne A Wittig, "A Strategy for Improving Corruption in Public Procurement" (Paper presented at the International Anti-Corruption Conference, Durban, ZA, 10–15 October 1999), online: <http://9iacc.org/papers/day2/ws2/d2ws2_wwittig2.html>.

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> supports the wise use of limited development funds, from planning investments in advance to measuring the results.[104]

Transparency in public procurement can be enhanced by implementing a number of best practices, including:

- publishing procurement policies;
- advance publication of procurement plans;
- advertisement of tender notices;
- disclosure of evaluation criteria in solicitation documents;
- publication of contract awards and prices paid;
- establishing appropriate and timely complaint and dispute mechanisms;
- implementing financial and conflict of interest disclosure requirements for public procurement officials; and
- publishing supplier sanction lists.[105]

Transparency encourages public confidence in the project, which is particularly important in a democracy. Without transparency, corruption is free to continue in the shadows. With transparency, corruption is subject to the glare of public scrutiny. As Justice Louis Brandeis once wrote, "[s]unlight is said to be the best of disinfectants."[106]

Although transparency is recognized as a key condition for promoting integrity and preventing corruption in public procurement, it must be balanced with other imperatives of good governance.[107] For example, demands for greater transparency and accountability may create some tension with the objective of ensuring an efficient management of public resources (administrative efficiency) or providing guarantees for fair competition.[108] The challenge for policy makers is to design a system in which an appropriate degree of transparency and accountability is present to reduce corruption risks while still pursuing other aims of public procurement.

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[104] Ban Ki-moon, "Foreword" in United Nations, *Supplement to the 2011 Annual Statistical Report on United Nations Procurement* (2011) i, online: <https://www.ungm.org/Areas/Public/Downloads/ASR_2011_supplement.pdf>.
[105] Therese Ballard, "Transparency in Public Procurement" in United Nations, *Supplement to the 2011 Annual Statistical Report on United Nations Procurement* (2011) 2 at 2, online: <https://www.ungm.org/Areas/Public/Downloads/ASR_2011_supplement.pdf>
[106] Louis D Brandeis, *Other People's Money*, online: University of Louisville <www.law.louisville.edu/library/collections/brandeis/node/196>.
[107] OECD, *Integrity in Public Procurement: Good Practice from A to Z* (2007) at 10, online: <www.oecd.org/development/effectiveness/38588964.pdf>.
[108] *Ibid*.

4.2 Competition

Competition is seen as vital to the process because, under laissez-faire economic theory, it provides governments with the best quality for the best price.[109] Anderson, Kovacic and Müller identify three leading reasons why competition is important in public procurement:

1) with free entry and an absence of collusion, prices will be driven towards marginal costs;
2) suppliers will have an incentive to reduce their production and other costs over time; and
3) competition drives innovation.[110]

4.3 Integrity

TI defines integrity as "behaviours and actions consistent with a set of moral or ethical principles and standards, embraced by individuals as well as institutions that create a barrier to corruption" and notes that integrity requires that procurement be carried out in accordance with the law and without discrimination or favouritism.[111]

In 2008, the OECD developed best practices guidance to "reinforce integrity and public trust in how public funds are managed"[112] and promote a good governance approach to procurement based on the following principles:

Transparency

1. Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers.
2. Maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering.

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[109] Schooner (2002) at 105.

[110] Robert D Anderson, William E Kovacic & Anna Caroline Müller, "Ensuring Integrity and Competition in Public Procurement Markets: A Dual Challenge for Good Governance" in United Nations, *Supplement to the 2011 Annual Statistical Report on United Nations Procurement* (2011) 9 at 10, online: <https://www.ungm.org/Areas/Public/Downloads/ASR_2011_supplement.pdf>.

[111] Transparency International, *The Anti-Corruption Plain Language Guide* (2009) at 24, online: <https://www.transparency.de/fileadmin/pdfs/Themen/Wirtschaft/TI_Plain_Language_Guide_280709.pdf>.

[112] OECD, *OECD Principles for Integrity in Public Procurement* (2009) at 3, online: <www.oecd.org/gov/ethics/48994520.pdf>.

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Good management

3. Ensure that public funds are used in procurement according to the purposes intended.
4. Ensure that procurement officials meet high professional standards of knowledge, skills, and integrity.

Prevention of misconduct, compliance and monitoring

5. Put mechanisms in place to prevent risks to integrity in public procurement.
6. Encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management.
7. Provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly.

Accountability and control

8. Establish a clear chain of responsibility together with effective control mechanisms.
9. Handle complaints from potential suppliers in a fair and timely manner.
10. Empower civil society organizations, media and the wider public to scrutinise public procurement.[113]

This list illustrates how the three key pillars of an effective procurement system—transparency, competition, and integrity—are closely connected to one another.

Although sound procurement rules are essential to the achievement of a robust procurement system, rules alone are not sufficient. As the OECD observes:

> Implementing rules requires a wider governance framework that encompasses: an adequate institutional and administrative infrastructure; an effective review and accountability regime; mechanisms to identify and close off opportunities for corruption; as well as adequate human, financial and technological resources to support all of the elements of the system. They also require a sustained political commitment to apply these rules and regularly update them.[114]

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[113] OECD, *Checklist for Enhancing Integrity in Public Procurement* (2008), online: <https://www.oecd.org/gov/41760991.pdf>.

[114] OECD, *Implementing the OECD Principles for Integrity in Public Procurement: Progress Since 2008* (2013) at 24–25, online:<www.oecd-ilibrary.org/governance/implementing-the-oecd-principles-for-integrity-in-public-procurement_9789264201385-en>.

5. PRIVATE LAW ENFORCEMENT OF TENDERING FOR PUBLIC CONTRACTS

Private law remedies are not the focus of the analysis of procurement in this chapter. However, the following is a brief overview of how companies may use private law tools to ensure that government bodies in the US, UK and Canada follow tendering processes. Even where the purchaser is a government body, procurement contracts are considered "generally commercial in nature" and therefore typically fall into the realm of private law remedies.[115] Generally, the private law framework allows companies to seek a private law remedy (damages) against the public body.

It is somewhat problematic that a private law action for damages is by far the most common remedy sought in public procurement disputes.[116] Because civil actions are expensive, legal recourse is often inaccessible to smaller bidders who cannot afford the legal costs, or where the value of the procurement contract does not economically warrant a lawsuit. Moreover, the settlement of private lawsuits often involves confidentiality agreements that impede public transparency. All three countries have public law bodies in place to hear complaints about the procurement process and resolve disputes between the contracting bodies. However, the remedies available in the public law context do not always sufficiently account for the damages the contracting party has suffered.

5.1 US Private Law

The *Contract Disputes Act of 1978* (*CDA*)[117] provides a mechanism for parties to make a claim in contract law against the federal government. Bid protests are heard by the Government Accountability Office (GAO) or the Court of Federal Claims. The GAO hears the majority of the protests.[118] The GAO has not allowed losing bidders to claim lost profits as part of their damages. Instead, companies are limited to seeking the costs of preparing their quotation and filing their protest.[119] This position was solidified in the *Effective Learning* decision:

> [W]e know of no situation where anticipated profits may be recovered when the underlying claim is based upon equitable, rather than legal principles…Here, since a contract between the government and Effective

[115] *Irving Shipbuilding Inc v Canada (AG)*, 2009 FCA 116 at para 21, 314 DLR (4th) 340.
[116] Decentralization Thematic Team, "Accountability, Transparency and Corruption in Decentralized Governance", World Bank, online: <https://www.ciesin.columbia.edu/decentralization/English/Issues/Accountability.html>.
[117] *Contract Disputes Act of 1978*, codified as amended at 41 USC §§ 4101–7109.
[118] Kate M Manuel & Moshe Schwartz, *GAO Bid Protests: An Overview of Time Frames and Procedures* (Congressional Research Services, 2014) at 1, online: <https://www.fas.org/sgp/crs/misc/R40228.pdf>.
[119] *Introl Corp* B-218339, 9 July 1985, 85-2 CPD 35, online at: <www.gao.gov/products/422301 - mt=e-report>.

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> Learning never came into being, the only relief possible was equitable in nature. Hence, the monetary recovery in this situation was limited to the reasonable value of services and did not encompass any potential profits that might have been earned by Effective Learning.[120]

The GAO's position on damages stems from precedential inability of parties who do not secure a contract to sue and seek damages.[121] US law requires a contract to exist between the parties before a plaintiff is entitled to seek anticipated profits.[122] Unlike in Canada and the UK, US law does not imply a contract between the party soliciting bids and the bidding parties; the only contract that exists is when the party soliciting bids selects one of the bids. At that point, the government agency and the bidding party form a contract for services, goods or construction.

However, US law has developed to a point that allows disgruntled bidding parties to bring an action against the federal government for failure to follow its procurement laws and procedures. In 1940, the Supreme Court held in *Perkins v Lukens Steel Co* that aggrieved parties lacked standing in federal court to challenge government contract awards where they failed to receive the contract.[123] In a subsequent case, *Heyer Products Co v United States*, the United States Court of Claims found an implied commitment in procurement requests to consider each bid fairly and honestly, and allowed an unsuccessful bidder to file a claim for "bid preparation expenses."[124] In *Scanwell Laboratories v Shaffer*, the US Court of Appeals for the District of Columbia Circuit held that the *Administrative Procedure Act*[125] reversed *Perkins* and that review of public procurement decisions was available in district courts.[126]

5.2 UK Private Law

English courts established in *Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council* that when an organization, particularly a public sector body, invites tenders to be submitted they are giving an implicit promise to strictly adhere to the tendering rules set out for the particular tender.[127] Failure to do so will give aggrieved parties the right to bring an action

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[120] *Effective Learning, Inc – Request for Review of Prior Claim Decision*, B-215505, 19 Feb 1985, 85-1 CPD 207, online: <www.gao.gov/assets/470/461929.pdf>.

[121] Duncan Fairgrieve & François Lichère, eds, *Public Procurement Law: Damages as an Effective Remedy* (Portland: Hart, 2011) at 202.

[122] *Heyer Products Co v United States*, 140 F Supp 409 (Ct Cl 1956), prevented unsuccessful bidders from making a claim for lost profits because there was no contract upon which to base this claim. *Cincinnati Electric Corp v Kleppe*, 509 F (2d) 1080 (6th Cir 1975), upheld the finding that the only loss the unsuccessful bidder could claim was the cost of preparing the bid.

[123] *Perkins v Lukens Steel Co*, 310 US 113 (1940).

[124] *Heyer Products Co v United States*, 140 F Supp 409 (Ct Cl 1956).

[125] *Administrative Procedure Act*, codified as amended at 5 USC §§ 551-59 (1946).

[126] *Scanwell Laboratories v Shaffer*, 424 F (2d) 859 (DC Cir 1970).

[127] *Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25, [1990] 1 WLR 1195 (CA).

for damages. Further, in *Hughes Aircraft Systems International v Airservices Australia*, the Federal Court of Australia held that the procuring party was under a contractual obligation to apply the tender process criteria they had advertised along with the call for tenders.[128]

This principle developed further in *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons*, in which the High Court pronounced that when tenders are sought by the public sector, a contract exists between the bidder and public body that requires all tenders to be considered fairly. In *Harmon*, the trial judge found that the bids had been manipulated and the defendant had chosen a bid over the plaintiff's, who was in fact the lowest bidder.[129] The judge found this to be a breach of contract:

> In the public sector where competitive tenders are sought and responded to, a contract comes into existence whereby the prospective employer impliedly agrees to consider all tenders fairly.[130]

This creates a contract distinct from the contract being tendered for and requires that the purchaser abide by the terms it sets out in its call for tenders.

5.3 Canadian Private Law

The legal framework for procurement in Canada was established in the seminal case *The Queen (Ont) v Ron Engineering*.[131] This case created the concept of dual contracts in procurement cases.[132] Contract A is formed when a call for tenders is issued (the offer) and a bid is submitted in response (the acceptance).[133] Contract B arises between the entity calling for tenders and the successful bidder.

In Quebec, although *Ron Engineering* has been applied by the courts, the same results are obtained under civil law principles of offer and acceptance.[134] This is because Quebec's *Civil Code* imposes obligations on the parties arising from pre-contractual negotiations even

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[128] *Hughes Aircraft Systems International v Airservices Australia*, (1997) 146 ALR 1 (FC).
[129] *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons*, (1999) 67 Con LR 1, [1999] EWHC Technology 199.
[130] *Ibid.*
[131] *The Queen (Ont) v Ron Engineering*, [1981] 1 SCR 27, 1981 CanLII 17.
[132] Prior to *Ron Engineering*, it was believed that no formal contractual relationships arose until the acceptance of a bid. See e.g. *Belle River Community Arena Inc v WJC Kaufmann Co*, 20 OR (2d) 447, 87 DLR (3d) 761 (CA).
[133] This is a simplification; Contract A will not always be formed upon the submission of a tender. For example, a contract will arise only where there is a clear intention to contract. However, what is relevant is that the submission of a tender will often give rise to contractual obligations. See *MJB Enterprises Ltd v Defence Construction (1951) Ltd*, [1999] 1 SCR 619 at paras 17, 19, 23, 170 DLR (4th) 577.
[134] *Civil Code of Québec*, SQ 1991, c 64, Articles 1385, 1396. See *Halsbury's Laws of Canada, Construction* (2013 Reissue) at para HCU-18 [online edition].

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though no contractual relationship arises between the party calling for tenders and the bidder before acceptance of the bid.[135]

After *Ron Engineering*, the Supreme Court of Canada further developed this dual contract procurement paradigm. In *MJB Enterprises Ltd v Defence Construction*, the Court established that Contract A will only form between the procuring entity and compliant bidders.[136] A compliant bidder is one whose bid complies with the requirements of the tender documents. This requirement ensures a degree of fairness and transparency. *MJB* also clarified that the terms of Contract A are dictated by the terms and conditions of the tender call.[137] In *Martel Building Ltd v Canada*, the Court held that procuring entities have an obligation of fairness towards bidders with whom Contract A has formed.[138] Purchasers must be "fair and consistent," and treat all bidders "fairly and equally."[139] This means, at minimum, that when a purchaser sets the bid requirements, the purchasing entity must fairly evaluate each bidder based upon the indicated criteria. *Design Services Ltd v Canada* clarified that the duty of care owed by the procuring entity to bidders does not extend to subcontractors.[140]

The 2014 Federal Court case *Rapiscan Systems, Inc v Canada (AG)* held that government procurement decisions could be subject to the administrative law remedy of judicial review if an "additional public element" exists.[141] The Federal Court outlined numerous considerations to help determine the presence of an "additional public element;" where the procurement decision is closely connected to the procuring entity's statutory powers or mandate, it is more likely that the public law remedy of judicial review will be available.[142] The operative question is whether "the matter is coloured with a "public element" sufficient to bring it within the purview of the public law and therefore review by the Court on the rationale that (i) it involves a breach of a statutory duty, or (ii) it undermines the integrity of government procurement processes."[143]

Judy Wilson and Joel Richler of Blake, Cassels & Graydon LLP extract three principles from the line of jurisprudence emanating from *Ron Engineering*:

> [F]irst, the law imposes obligations on both the procuring authorities and the bidders. Procuring authorities must, at all times, adhere to the terms and conditions of Contract A and cannot accept any non-compliant bids, no

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[135] *Ibid*.
[136] *MJB Enterprises Ltd v Defence Construction (1951) Ltd*, [1999] 1 SCR 619 at para 30, 170 DLR (4th) 577.
[137] *Ibid* at para 22.
[138] This is a simplification. This will be true except where it is clear that the parties did not expect and intend fair and consistent treatment. See *Martel Building Ltd v R*, 2000 SCC 60 at para 88, 193 DLR (4th) 1.
[139] *Ibid* at paras 88, 84.
[140] *Design Services Ltd v Canada*, 2008 SCC 22, [2008] 1 SCR 737.
[141] *Rapiscan Systems, Inc v Canada (Attorney General)*, 2014 FC 68 at paras 50–51, 369 DLR (4th) 526.
[142] *Ibid* at para 51.
[143] *Ibid*.

> matter how attractive they may be. As well, procuring authorities must act towards all compliant bidders fairly and in good faith, particularly during the evaluation of any bidder's submission. Also, procuring authorities cannot make their ultimate decisions to award or reject submissions based on criteria that are not disclosed in the terms and conditions of the procurement documents. Bidders, for their part, cannot revoke or supplement their submissions, unless permitted to do so by the terms and conditions of Contract A.
>
> Second, the law *does* permit procuring authorities to create the terms and conditions of Contract "A" as they see fit. Thus, privilege clauses – clauses which provide the procuring authority with discretionary rights – are recognized as fully enforceable and, if properly drafted, allow procuring authorities to reserve to themselves the right to award contracts to bids that may not be for the lowest price, or not to award contracts at all. As well, procuring authorities are free to impose any number of criteria on bidders such as: prior similar work experience; the absence of claims or prior litigation; local contracting; scheduling criteria; composition of construction teams; and so on.
>
> Third, and perhaps somewhat contradictory of the second principle, while the list of requirements and criteria imposed on bidders may be extensive, it will always be open to the courts to impose limitations where the discretion retained by the procuring authority is extreme. The courts have made it clear that maintaining the integrity of competitive procurement processes was a fundamental goal of procurement law in Canada.[144]

6. PUBLIC LAW FRAMEWORK

6.1 International Legal Instruments

6.1.1 UNCAC

Article 9(1) of UNCAC requires State parties "establish systems of procurement based on transparency, competition and objective criteria in decision-making, and which are also

[144] Jody Wilson & Joel Richler, "Canadian Procurement Law: The Basics", Blake, Cassels & Graydon LLP (23 September 2011) [emphasis in original], online: <www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=1385>.

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effective in preventing corruption."[145] As the *Legislative Guide* to UNCAC notes, Article 9 includes, at minimum:

> a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;
>
> b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;
>
> c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;
>
> d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to paragraph 1 of article 9 are not followed;
>
> e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.[146]

As with other international agreements that address domestic procurement, UNCAC contemplates that these requirements may not apply to contracts below a certain dollar threshold.[147] The Legislative Guide to UNCAC justifies this exception on the grounds that "excessive regulation can be counterproductive by increasing rather than diminishing vulnerability to corrupt practices," but does not provide further elaboration.[148]

6.1.2 OECD Anti-Bribery Convention

The OECD Convention contains no articles on public procurement. However, the *Recommendations of the Council for Further Combating Bribery of Foreign Public Officials*, adopted in November 2009, includes the following as Recommendation XI:

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[145] United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd revised ed (United Nations, 2012) at 28, online: <https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf>.

[146] *Ibid* at 29–30.

[147] *Ibid* at 29.

[148] *Ibid*.

> Member countries should support the efforts of the OECD Public Governance Committee to implement the principles contained in the 2008 Council Recommendation on Enhancing Integrity in Public Procurement [C(2008)105], as well as work on transparency in public procurement in other international governmental organizations such as the United Nations, the World Trade Organization (WTO) and the European Union, and are encouraged to adhere to relevant international standards such as the WTO Agreement on Government Procurement.[149]

Recommendation XI(i) states that member states should, through laws and regulations, permit authorities to suspend enterprises convicted of bribery of foreign public officials from competition for public contracts.

6.1.3 The World Bank

The World Bank funds large infrastructure projects throughout the developing world. According to the World Bank, its procurement system includes a portfolio of approximately US$56 billion across 172 countries.[150] To combat corruption, the World Bank has created its own sanctioning system, which relies heavily on debarment as a penalty. Because of a reciprocal agreement between the World Bank and other development banks, debarment from World Bank projects also leads to debarment from projects funded by the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, and the Inter-American Development Bank.[151] This is commonly referred to as "cross-debarment." For more on the World Bank's sanctioning process, see Section 8.3 in Chapter 7.

In July 2015, the World Bank announced a new Procurement Framework, which came into effect on July 1, 2016.[152] Most notably, the new framework allows contract award decisions to be based on criteria other than lowest price. In this respect, "value for money" was introduced as a core procurement principle. This signals "a shift in focus from the lowest evaluated compliant bid to bids that provide the best overall value for money, taking into

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[149] OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (26 November 2009), online: <www.oecd.org/daf/anti-bribery/44176910.pdf>.

[150] World Bank, Press Release, "New World Bank Procurement Framework Promotes Strengthened National Procurement Systems " (30 June 2016), online: <www.worldbank.org/en/news/press-release/2016/06/30/new-world-bank-procurement-framework-promotes-strengthened-national-procurement-systems>.

[151] Graham Steele, *Quebec's Bill 1: A Case Study in Anti-Corruption Legislation and the Barriers to Evidence-Based Law-Making* (LLM Thesis, Dalhousie University Schulich School of Law, 2015) at 54, online: <dalspace.library.dal.ca/handle/10222/56272>.

[152] Guidance on the framework, as well as the framework itself, can be accessed online: <www.worldbank.org/en/projects-operations/products-and-services/brief/procurement-new-framework>.

www.dbooks.org

account quality, cost, and other factors as needed."[153] In addition, the World Bank prepared a series of "Standard Procurement Documents" requiring bidders to provide beneficial ownership information.[154] This followed after the World Bank announced it would be considering ways of collecting and disseminating information on beneficial ownership of entities participating in its procurement processes, having received a letter signed by 107 civil society organizations encouraging it to do so.[155]

The procurement process has been subject to some criticism. After noting that the *FCPA* provides little deterrence to companies operating in countries where demand for bribes is high and profits to be made are great, US lawyer and academic Leibold criticized the World Bank's conduct when financing a pipeline project in Chad:

> Even the World Bank was ineffective at preventing corruption there. It rushed the pipeline project, ignored important information about the empirical nature of the resource curse, and divorced its own analysis from Chad's political and economic context.[156]

Another US academic Sarlo criticized the World Bank's "undisciplined lending practices," stating that "[t]he World Bank undermines the transnational anti-corruption regime through its failure to carry out due diligence of project-implementing agencies when it advances loans to notoriously corrupt governments."[157] He points out that the personal success of World Bank officials "depend[s] on the number of loans they approve".[158] Further, "whether a loan is stolen should make little difference to the World Bank because of its ability to earn interest and even accelerate payment on that loan."[159] Due to the lack of incentive to ensure loans are used for their intended purpose, Sarlo called for increased regulation of World Bank lending practices.

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[153] *Ibid*.

[154] These forms can be accessed online: <www.worldbank.org/en/projects-operations/products-and-services/brief/procurement-new-framework>.

[155] Richard L Cassin, "Compliance Alert: World Bank Adopts More Flexible and Transparent Procurement Reforms", *The FCPA Blog* (22 July 2015), online: <www.fcpablog.com/blog/2015/7/22/compliance-alert-world-bank-adopts-more-flexible-and-transpa.html>; Daniel Dudis, "World Bank Adopts Key Transparency International Goals in New Procurement Policies", Transparency International (31 July 2015), online: <blog.transparency.org/2015/07/31/world-bank-adopts-key-transparency-international-goals-in-new-procurement-policies/>.

[156] Annalisa Leibold, "Chad: Corruption Is Real, the FCPA Not So Much", *The FCPA Blog* (8 July 2015), online: <www.fcpablog.com/blog/2015/7/8/chad-corruption-is-real-the-fcpa-not-so-much.html>.

[157] Paul Sarlo, "The Global Financial Crisis and the Transnational Anti-Corruption Regime: A Call for Regulation of the World Bank's Lending Practices" (2014) 45:4 Geo J Intl L 1293 at 1308.

[158] *Ibid* at 1309.

[159] *Ibid*.

6.1.4 WTO Agreement on Government Procurement (WTO-AGP)

The WTO-AGP[160] has the status of a binding international treaty among its 43 members.[161] Although the primary objective of the WTO-AGP is to ensure free market access among State parties, it is relevant to procurement in that it contains provisions that require fairness and transparency in government procurement.[162] For example, Article XVI.1 mandates that a procuring entity "promptly inform participating suppliers of the entity's contract award decisions […and], on request, provide an unsuccessful supplier with an explanation of the reasons why the entity did not select its tender and the relative advantages of the successful supplier's tender."[163] Article XVII.1 requires that, upon request, "a Party shall provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially, and in accordance with this Agreement, including information on the characteristics and relative advantages of the successful tender."[164] However, The WTO-AGP applies only to "covered entities purchasing listed goods, services or construction services of a value exceeding specified threshold values."[165] In the context of government construction contracts in Canada, the WTO-AGP applies to:

- listed central government entities procuring construction services in excess of $8.5 million CAD;
- listed sub-central government entities (which do not include provincial legislatures or Crown corporations but do include provincial departments and ministries) procuring construction services in excess of $8.5 million CAD; and
- all construction services identified in Division 51 of the United Nations Provisional Central Product Classification.[166]

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[160] *Agreement on Government Procurement*, 1915 UNTS 103 (being Annex 4(b) of the *Marrakesh Agreement Establishing the World Trade Organization*, 1867 UNTS 3).
[161] World Trade Organization, "Agreement on Government Procurement: Parties, Observers and Accessions", online: <https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm>.
[162] World Trade Organization, "Government Procurement: Agreement on Government Procurement", online: <https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm>.
[163] *Revised Agreement on Government Procurement*, Annex to the Protocol Amending the Agreement on Government Procurement (adopted on 30 March 2012) (GPA/113), online: <https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm>.
[164] *Ibid*.
[165] WTO, "Agreement on Government Procurement: Parties, Observers and Accessions".
[166] World Trade Organization, "Agreement on Government Procurement: Coverage Schedules", online: <https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm>; World Trade Organization, "Thresholds in National Currencies (All Notifications by Canada)", online: <https://e-gpa.wto.org/en/ThresholdNotification?PartyId=216>.

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6.1.5 NAFTA

One of the goals of NAFTA is to provide Canada, the US and Mexico with access to one another's government procurement opportunities at the federal level.[167] Chapter 10 of NAFTA sets out requirements for tendering procedures with which the federal government of Canada must comply. The requirements of NAFTA focus mainly on free trade and fair competition, and typically do not apply to Canadian provinces or municipalities. NAFTA's requirements for tendering procedures apply only to construction services contracts in excess of CAD$11.6 million where a government department or agency is contracting, or CAD$14.3 million where a Crown corporation is contracting.[168]

6.1.6 Comprehensive Economic and Trade Agreement (CETA)

Negotiations for the Comprehensive Economic and Trade Agreement (CETA)—Canada's new trade agreement with the European Union—began during the EU-Canada Summit in Prague on May 6, 2009 and ended on September 26, 2014 at the EU-Canada Summit in Ottawa where leaders released the completed text of the Agreement.[169] On October 30, 2016, the EU and Canada approved and signed the agreement.[170] The Government of Canada describes CETA as Canada's "most ambitious trade agreement, broader in scope and deeper in ambition than the historic NAFTA."[171] The Government adds, "CETA covers virtually all sectors and aspects of Canada-EU trade in order to eliminate or reduce barriers. CETA

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[167] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico, and the Government of the United States*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289 (entered into force 1 January 1948), online: NAFTA <www.naftanow.org/agreement/default_en.asp>.

[168] Government of Canada, "Trade Agreements: Thresholds Update", Contracting Policy Notice 2015-3 (30 December 2015), online: <www.tbs-sct.gc.ca/hgw-cgf/business-affaire/gcp-agc/notices-avis/2015/15-03-eng.asp>.

[169] Elfriede Bierbrauer, "Negotiations on the EU-Canada Comprehensive Economic and Trade Agreement (CETA) Concluded" (Brussels: European Parliament, Policy Department, Directorate-General for External Policies, 2014) at 4, online: <www.europarl.europa.eu/RegData/etudes/IDAN/2014/536410/EXPO_IDA(2014)536410_EN.pdf>. See also Government of Canada, "Chronology of Events and Key Milestones", online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/chronology-chronologie.aspx?lang=eng>.

[170] The European Commission, "EU-Canada Summit: Newly Signed Trade Agreement Sets High Standards for Global Trade" (30 October 2016), online: <trade.ec.europa.eu/doclib/press/index.cfm?id=1569>.

[171] Canada-European Union Comprehensive Economic and Trade Agreement [CETA], online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>.

addresses everything from tariffs to product standards, investment, professional certification and many other areas of activity."[172]

CETA still has to go through the stages of democratic oversight before it comes fully into force.[173] Canada's federal Parliament must enact implementing legislation. This process has already begun: on October 31, 2016, Minister of International Trade Chrystia Freeland tabled the treaty and introduced implementing legislation, Bill C-30,[174] in the House of Commons.[175] Bill C-30 was enacted and received Royal Assent on May 16, 2017, and most of its provisions came into force on that date. A similar process of parliamentary approval and ratification must also occur in EU countries. Once Canada's federal Parliament and parliaments in EU countries approve the agreement, CETA will fully come into force. Until that time, assent from the European Parliament would allow CETA to enter force provisionally.[176]

Like NAFTA, the applicability of CETA to any given procurement will depend upon whether the procuring entity and goods or services being procured are designated under the agreement and whether the necessary monetary threshold is exceeded. However, CETA designates a much broader list of applicable entities than does NAFTA. CETA will apply to Canadian and EU suppliers bidding on procurements by federal, provincial and MASH[177] entities.[178] The applicability of CETA to Canada's MASH sector is noteworthy and signifies a "changing dynamic" in public procurement.[179] Moreover, CETA's chapter on government

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[172] Government of Canada, "Agreement Overview", online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/overview-apercu.aspx?lang=eng>.

[173] The European Commission, "CETA Explained", online: <ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/>.

[174] Bill C-30, *An Act to implement the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States and to provide for certain other measures*, 1st Sess, 42nd Parl, 2016.

[175] Global Affairs Canada, Press Release, "International Trade Minister Introduces Legislation to Parliament to Implement CETA" (31 October 2016), online: < https://www.canada.ca/en/global-affairs/news/2016/10/international-trade-minister-introduces-legislation-parliament-implement-ceta.html?wbdisable=true>.

[176] Philip Blenkinsop, "CETA: EU-Canada Trade Deal Clears Legal Hurdle in EU Parliament", *Global News* (23 November 2016), online: <globalnews.ca/news/3083618/ceta-eu-canada-trade-deal-clears-legal-hurdle-in-eu-parliament/>.

[177] MASH is the acronym used in procurement laws and practices involving "Municipalities, Academic institutions, Schools, and Hospitals".

[178] CETA explicitly applies to municipalities, school boards, publicly funded academic institutions, health and social services entities, Crown corporations, mass transit by provinces, and 75% of procurements by public utilities: Brenda C Swick, "A New Era in Municipal Procurement: Canada-EU Comprehensive Economic and Trade Agreement" (McCarthy Tétrault LLP, presentation for Ontario Public Buyers Association, Thorold, Ontario, 17 November 2014) at 7, online: <www.mccarthy.ca/pubs/New_Era_in_Municipal_Procurement_(November_17__2014_at_OPBA).pdf>.

[179] *Ibid*.

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procurement is very detailed, including extensive sections on publication of procurement information and transparency in the procurement process.[180]

CETA reflects the pressure on the federal government to open up the entire Canadian procurement market to international bidders. This pressure results from the recognition that significant sums of money are exchanged via procurement at the MASH level.[181]

Experts predict that under CETA, municipal procurements will become more competitive, scrutinized, and susceptible to challenge, and will more closely mirror the federal government procurement experience.[182] One commentator suggested that under CETA municipalities and publicly funded organizations will lose some flexibility in the design and conduct of their procurements, as they will be subject to various statutory duties and an implied duty of fairness and good faith in carrying out their procurements where they might not otherwise have been.[183] That said, CETA will only apply to MASH sector construction procurement valued at CAD$7.8 million or greater, a threshold that will not be met by most MASH sector contracts.[184]

6.1.7 African Union Convention on Preventing and Combating Corruption

Article 11(2) of the AU Convention requires parties to establish mechanisms "to encourage participation by the private sector in the fight against unfair competition, respect of the tender procedures and property rights."[185] This provision can be criticized as being too weak in comparison to the international community's response to corruption in the procurement process. Article 11(3) requires state parties to adopt "other such measures as may be necessary to prevent companies from paying bribes to win tenders."[186]

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[180] CETA, Chapter 19, online: Foreign Affairs, Trade and Development Canada <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/19.aspx?lang=eng>.
[181] Swick (17 November 2014) at 3.
[182] *Ibid*; Brenda C Swick, Leila Rafi & John Boscariol, "Update on Procurement Law in Canada", McCarthy Tétrault LLP (21 January 2015) at 51, online: <www.mccarthy.ca/pubs/McCarthy Tetrault_2015-01-21_Update Procurement Law Canada_Presentation.pdf>.
[183] PatryLaw, "Public Procurement Law in Canada: An Overview" (29 February 2016), online: <https://patrylaw.ca/government-procurement-bidding-tendering/procurement-law-canada-overview/ -_ednref10>.
[184] Swick (17 November 2014) at 9.
[185] *African Union Convention on Preventing and Combating Corruption* (adopted 11 July 2003), online: <https://www.legal-tools.org/uploads/tx_ltpdb/AfricanUnionConventiononPreventingandCombatingCorruption_11-07-2003__E__04.pdf>.
[186] *Ibid*.

6.1.8 UNCITRAL Model Law on Public Procurement

On July 1, 2011, the United Nations Commission on International Trade Law (UNCITRAL) published the UNCITRAL Model Law on Public Procurement (MLPP).[187] It has been designed as a tool for "modernizing and reforming procurement systems" and assisting countries in implementing legislation where none is currently in place.[188] It is an extensive, detailed model law (84 pages) and accompanied by a very detailed Guide (419 pages).[189]

The objectives of the MLPP are outlined in the preamble:

a) Achieving economy and efficiency;
b) Wide participation by suppliers and contractors, with procurement open to international participation as a general rule;
c) Maximizing competition;
d) Ensuring fair, equal and equitable treatment;
e) Assuring integrity, fairness and public confidence in the procurement process; and
f) Promoting transparency.[190]

The MLPP was intended to apply to all types of procurement and requires no threshold amount for its application to transactions. The MLPP also provides guidance in applying procurement law to security and defence contracts. The MLPP sets out the minimum requirements and essential principles for effective procurement legislation:

a) the applicable law, procurement regulations, and other relevant information are to be made publicly available (article 5);
b) requirements for prior publication of announcements for each procurement procedure (with relevant details) (articles 33–35) and ex post facto notice of the award of procurement contracts (article 23);
c) items to be procured are to be described in accordance with article 10 (that is, objectively and without reference to specific brand names as a general rule, so as to allow submissions to be prepared and compared on an objective basis);

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[187] *UNCITRAL Model Law on Public Procurement* (adopted 1 July 2011), online: <www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf>.
[188] United Nations Commission on International Trade Law, *Guide to Enactment of the UNCITRAL Model Law on Public Procurement* (United Nations, 2014) at iii, online: <www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/Guide-Enactment-Model-Law-Public-Procurement-e.pdf>.
[189] *Ibid*.
[190] *Ibid* at 3.

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d) requirements for qualification procedures and permissible criteria to determine which suppliers or contractors will be able to participate, with the particular criteria that will determine whether or not suppliers or contractors are qualified communicated to all potential suppliers or contractors (articles 9 and 18);

e) open tendering is the recommended procurement method and the use of any other procurement method must be objectively justified (article 28);

f) other procurement methods should be available to cover the main circumstances likely to arise (simple or low-value procurement, urgent and emergency procurement, repeated procurement and the procurement of complex or specialized items or services) with conditions for use of these procurement methods (articles 29–31);

g) a requirement for standard procedures for the conduct of each procurement process (chapters III–VII);

h) a requirement for communications with suppliers or contractors to be in a form and manner that does not impede access to the procurement (article 7);

i) a requirement for a mandatory standstill period between the identification of the winning supplier or contractor and the award of the contract or framework agreement, in order to allow any non-compliance with the provisions of the Model Law to be addressed prior to any such contract entering into force (article 22(2)); and

j) mandatory challenge and appeal procedures if rules or procedures are breached (chapter VIII).[191]

The MLPP is a framework law and does not include all the regulations necessary for implementation. However, it does provide insight into some important aspects of procurement law and guidance on implementing effective procurement laws and regulations.

6.2 US Law and Procedures

The US procurement system is considered by some to be one of the most sophisticated and developed in the world.[192] Even so, it is unable to prevent all corruption, as demonstrated by the case of a senior US Department of Defense acquisition official who pled guilty to criminal conspiracy regarding the negotiation of a US$23 billion acquisition from Boeing.[193]

[191] *Ibid* at 14–15.
[192] Glenn T Ware et al, "Corruption in Procurement" in Adam Graycar and Russell G Smith, eds, *Handbook of Global Research and Practice in Corruption* (Edward Elgar, 2011).
[193] *Ibid*.

US law on public procurement falls under the *Competition in Contracting Act* of 1984. The *Federal Acquisition Regulation* further details the rules of hosting and participating in public procurement. Although the Government Accountability Office (GAO) and the Court of Federal Claims have heard hundreds of protests under the Federal Acquisition Regulation, these cases have rarely resulted in a finding that there was improper motivation for deviating from the rules.

6.2.1 *Competition in Contracting Act*

The *Competition in Contracting Act* (*CICA*) was passed in 1984 to promote competition and reduce government costs of procurement.[194] *CICA* requires all procurements have a "full and open competition through the use of competitive procedures" (subject to some exceptions); the Act also places various requirements on all contracts over $25,000.[195] *CICA* governs all procurement contracts that do not fall under more specific procurement legislation. Exceptions to *CICA*'s "full and open competition" requirements[196] include:

1) single source contracts for goods or services;
2) cases of unusual and compelling urgency;
3) the maintenance of expertise or certain capacity;
4) requirements under international agreements;
5) situations with express authorization by statute;
6) national security interests; and
7) cases in which the head of the agency determines the exception is necessary and notifies Congress in writing.[197]

"Full and open competition" is fulfilled when "all responsible sources are permitted to submit sealed bids or competitive proposals."[198]

6.2.2 *Federal Acquisition Regulation*

The *Federal Acquisition Regulation* (*FAR*) took effect on April 1, 1984. Its purpose is to codify and publish uniform policies and procedures for all acquisitions by executive agencies.[199] The system is designed to efficiently deliver the product or service necessary to not only fulfill public policy objectives, but provide the best value while promoting the public's trust.

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[194] *Competition in Contracting Act*, 41 USC § 253 (1984).
[195] *Ibid*. However, requirements change based on the dollar value of the contract.
[196] For additional commentary on the "full and open competition" requirements, see generally Kate M Manuel, *Competition in Federal Contracting: An Overview of the Legal Requirements*, Congressional Research Service (30 June 2011), online: <https://fas.org/sgp/crs/misc/R40516.pdf>.
[197] *Competition in Contracting Act*, 41 USC § 253 (1984).
[198] 41 USC § 403(6) (2009).
[199] *Federal Acquisition Regulation*, 48 CFR § 1.101 (1983).

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FAR sets out detailed requirements with which executive agencies must comply when procuring contractors for a specific project.

According to section 9.103 of *FAR*, the US government will only contract with "responsible contractors." To be deemed "responsible," contractors must meet a set of standards contained in section 9.104, including a "satisfactory record of integrity and business ethics."[200] Contractors that fail to meet the standard of "presently responsible" can be debarred or suspended from public procurement. Causes for debarment include convictions for fraud, bribery, embezzlement or "any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor."[201] *FAR* also includes a catch-all provision that facilitates debarment for "any other cause of so serious or compelling nature that it affects the present responsibility of a Government contractor."[202] As pointed out by Barletta, causes for debarment might arise from conduct connected to contracts, or non-contractual conduct, such as environmental misdemeanours.[203] Officials in charge of debarment have wide discretion and may consider mitigating factors or remedial measures implemented by the contractor.[204] Debarment is government-wide and company-wide and generally lasts no more than three years.[205]

Suspensions are imposed pending investigations or legal proceedings when necessary to protect the Government's interest. The imposition of a suspension must be based on "adequate evidence."[206] Causes for suspension are similar to causes for debarment, except only adequate evidence of the commission of an offence, rather than a conviction, is required.

Part 3.10 of *FAR* introduces the Contractor Code of Business Ethics and Conduct. Section 3.1002 states that contractors must operate "with the highest degree of honesty and integrity" and have a written code of business ethics and conduct, along with a compliance training program and internal controls system that will promote compliance with that code of conduct. Other requirements for various types of contracts are laid out in section 52.203-13.

To promote accountability in decision making, the GAO operates a bid protest system. The bid protest system allows parties, who believe a federal agency offering the tender has failed

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[200] *Ibid*, § 9.104(d).
[201] *Ibid*, § 9.406-2(a)(5).
[202] *Ibid*, § 9.406-2(c).
[203] Thomas P Barletta, "Procurement Integrity and Supplier Debarment – A U.S. Perspective" (Address delivered at the Transparency International Canada Day of Dialogue, Toronto, 6 May 2015) [unpublished].
[204] *Federal Acquisition Regulation*, 48 CFR § 9.406-1 (1983).
[205] Barletta (6 May 2015).
[206] *Federal Acquisition Regulation*, 48 CFR § 9.407-1(b)(1) (1983).

to comply with procurement laws and regulations on a specific bid, to file a protest with the GAO in order to have their complaint resolved expeditiously.[207]

6.3 UK Law and Procedures

On June 23, 2016, the UK held a referendum to decide whether it should leave the European Union.[208] A majority of voters elected to leave the EU, an event commonly referred to as "Brexit." The full implications of this decision have yet to be determined. For the UK to formally leave the EU, it must invoke Article 50 of the Lisbon Treaty, which provides that "[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements" and gives the parties two years to agree on the terms of the exit.[209]

The government's assumption that it could trigger the Article 50 process without Parliament's approval was challenged successfully in the UK High Court of Justice.[210] The High Court issued its ruling on November 11, 2016, concluding that the Secretary of State does not hold the power under the Crown's prerogative to give notice of the UK's intention to leave the EU. Rather, the High Court held, the matter must be put to a vote in both Houses of Parliament before Article 50 of the Lisbon Treaty can be triggered.[211] The High Court's decision was affirmed by the Supreme Court in January 2017.[212] In March of 2017, however, Parliament passed a bill that allowed ministers to trigger Article 50.[213] On March 29, 2017, UK Prime Minister Theresa May triggered the exit process by sending a letter to EU Council President Donald Tusk. The two-year negotiation period will end on March 29, 2019 unless the remaining 27 EU member States agree to extend the deadline for talks.[214]

It is difficult to predict what the impacts of Brexit will be on the UK's procurement laws, especially since it is the first time in history that Article 50 has been triggered.[215] The UK will

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[207] US Government Accountability Office, "Bid Protests", online: <www.gao.gov/legal/bid-protests>.
[208] Alex Hunt & Brian Wheeler, "Brexit: All You Need to Know About the UK Leaving the EU", *BBC News* (12 December 2016), online: <www.bbc.com/news/uk-politics-32810887>.
[209] *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* [2007] OJ C306/01. Article 50 came into force in 2009 after amendments were made to the Lisbon Treaty of 2007.
[210] Hunt & Wheeler (12 December 2016).
[211] Alex Hunt & Brian Wheeler, "Brexit: All You Need to Know About the UK Leaving the EU", *BBC News* (12 December 2016), online: <www.bbc.com/news/uk-politics-32810887>.
[212] Hunt & Wheeler (12 December 2016).
[213] Anushka Asthana, Rowena Mason & Lisa O'Carroll, "Parliament passes Brexit bill and opens way to triggering article 50", *The Guardian* (13 March 2017), online: <https://www.theguardian.com/politics/2017/mar/13/brexit-vote-article-50-eu-citizens-rights-lords-mps>.
[214] "'No turning back' on Brexit as Article 50 triggered". *BBC News* (30 March 2017), online: <http://www.bbc.com/news/uk-politics-39431428>.
[215] Alex Hunt & Brian Wheeler, "Brexit: All You Need to Know About the UK Leaving the EU", *BBC News* (12 December 2016), online: <www.bbc.com/news/uk-politics-32810887>.

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have to decide how it will disentangle its own law from EU law. However, until the UK formally ceases to be a member of the EU, EU law will continue to apply in the UK. Moreover, the UK's exit from the EU will not generally affect the operation of policies that have been transposed into domestic law.

One law firm commenting on the potential impact of Brexit on the UK's procurement laws made the following observations:

> Once it leaves the EU, the UK would no longer need to comply with the EU's public procurement rules and could in theory select UK bidders to a greater extent. However, as a non-EU country, the UK may find it difficult to complain about public procurement rules being applied "unfairly" against UK companies tendering for EU work. Ultimately, irrespective of any trading relationship that is negotiated with the EU, it is likely that the UK would have rules similar to the existing public procurement regime.[216]

Another law firm explained the potential implications in the following terms:

> Depending on the exit model and the future trading relationship agreed between the UK and the EU, many EU imposed regulations may at first blush appear to "fall away".
>
> However, this overlooks the fact that many EU Regulations have either already been transposed into UK law, or stem from or are reflected in other public international law obligations (including WTO agreements and the UN conventions) which have been adopted and ratified by the UK.
>
> These international obligations will continue in force even after the UK exits unless the UK takes further steps to repeal/secede from these international agreements.[217]

UK procurement lawyers Smith and Benjamin added the following:

> Whilst the EU Treaty and EU Procurement Directives would no longer apply in the UK [after the UK formally withdraws from the EU], an 'out' decision would have no impact on the validity of the UK legislation put in place to transpose those directives (i.e. the Public Contracts Regulations 2015 and the … Utilities Contracts Regulations 2016 and Concession Contracts Regulations 2016). Instead, there is likely to be a drawn-out process of repeal and reform in sectors in which the UK has traditionally

[216] Linklaters LLP, "FAQs on the Impact of the UK's Vote to Leave the EU" (24 June 2016) at 3, online: <www.linklaters.com/pdfs/mkt/london/EU Ref Leave Vote FAQs.pdf>.
[217] Mills & Reeve LLP, "Brexit: How Will It Impact on UK Procurement and Construction Law?" (24 June 2016), online: <www.mills-reeve.com/brexit-how-will-it-impact-on-uk-procurement-and-construction-law/>.

> been dissatisfied with the EU position. Wholesale reform of the public procurement regime is unlikely to be top of the government's list.[218]

Others observed that the UK is unlikely to dismantle its domestic legislation implementing the *EU Directive*, discussed below, since the UK was influential in the drafting of the *Directive*.[219]

Against this backdrop the UK has at present two similar sets of regulations that govern public procurement: one for England, Wales, and Northern Ireland, and the other for Scotland. These regulations were enacted to ensure the UK's compliance with EU requirements, discussed in the next section. These regulations apply if the following pre-conditions are met:

1) **The body doing the buying is a contracting authority.** The definition of "contracting authority" is wide and includes central government, local authorities, associations formed by one or more contracting authorities, and other bodies governed by public law;
2) **The contract is for public works, public services, or public supplies.** Sometimes the contract will be a mixed contract (e.g., the supply and maintenance of computers). Where it is, a contracting authority must determine which element (e.g., the supply element or the service element) is the predominant element and, therefore, which set of rules will apply. This can be important to get right as the rules vary slightly depending on the type of contract (e.g., lower financial thresholds apply to services and supplies contracts than to works contracts); and
3) **The estimated value of the contract (net of VAT) equals or exceeds the relevant financial threshold.** The rules expressly prohibit deliberately splitting contracts to bring them below the thresholds. These thresholds are dealt with under the 2014 *EU Directive*, discussed below.

6.3.1 EU Directive

The *EU Directive on Public Procurement* (the *EU Directive*)[220] is a regulatory tool that promotes free trade and fair competition for procurement contracts throughout the European Union. It requires EU members to implement a regulatory regime that, in accordance with the *EU Directive*, promotes transparency, equal treatment, non-discrimination, mutual recognition,

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[218] Ruth Smith & Tom Benjamin, "Plus Ça Change … 5 Reasons Why Brexit Is Unlikely to Spell the End of Procurement Regulation in the UK", Mills & Reeve LLP (24 February 2016), online: <www.procurementportal.com/blog/blog.aspx?entry=480>.

[219] Colin Cram, "The Impact of Brexit on UK's £200bn Public Procurement Spend", *The Guardian* (13 June 2016), online: <https://www.theguardian.com/public-leaders-network/2016/jun/13/brexit-uk-200bn-public-procurement-eu-rules>.

[220] EC, *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance* [2014] OJ L 94/65, online: <eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32014L0024>.

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and proportionality.[221] In doing so, it helps create uniform law across the EU and also lowers barriers for companies hoping to gain contracts in other EU countries.

The *EU Directive* requires that the regime apply to public procurement contracts that are of greater value than, pre-VAT, €5,186,000 for public works contracts and €134,000 for public supply and services contracts awarded by central governments, €207,000 for public supply and services contracts awarded by sub-central governments, and €750,000 for specific public service contracts.[222] These thresholds are based on the *WTO Agreement on Government Procurement*. The *EU Directive* made several changes to previous public procurement provisions. Besides trying to adapt the rules to maximize efficiency and competition, the *Directive* strives to increase the number of contracts awarded to Small and Medium Sized Enterprises (SMEs); allow public purchasers to consider social policy in the tender they choose (such as the environmental impact of each tender); and increase measures to reduce conflicts of interest, favouritism, and corruption.[223]

6.3.2 *Public Contracts Regulations 2015*

The *Public Contracts Regulations 2015* (*PCR*)[224] introduced in Parliament on February 5, 2015 apply to contracts offered by Contracting Authorities in England, Wales, and Northern Ireland.[225] The majority of the *PCR* came into force on February 26, 2015; however, certain provisions, such as the requirement to advertise all offers of procurement online, will not come into force until a later date as set out in section 1 of the regulation (no later than October 18, 2018).

The *PCR* repealed and replaced the *Public Contracts Regulations 2006* and was drafted in response to the updated requirements in the *EU Directive on Public Procurement*. The principles of procurement are set out in section 18: treating economic operators equally,

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[221] *Ibid*, Article 18(2).
[222] *Ibid*, Article 4.
[223] EC, *Public Procurement Reform: Fact Sheet No 1: General Overview*, online: <ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/fact-sheets/fact-sheet-01-overview_en.pdf>.
[224] *Public Contracts Regulations 2015*, SI 2015/102.
[225] The *Public Contracts (Scotland) Regulations 2015* (PCRS) came into force on April 18, 2016. These regulations transposed the 2014 *EU Directive on Public Procurement* into domestic law in Scotland. Although broadly similar to the English *PCR*, the *PCRS* differ from its English counterpart in some respects. The reason for this discrepancy is that the *EU Directive* contains a number of mandatory provisions to which all member states must adhere, but also gives member states a degree of discretion on how to implement certain provisions. The Scottish government has taken a different approach to certain issues than that taken by policy makers in England and Wales. See Claire Mills, "Procurement Reform in Scotland: Update, January 2016", BTO Solicitors (15 January 2016), online: <www.bto.co.uk/blog/procurement-reform-in-scotland-–-update,-january-2016.aspx>. Scotland introduced further reforms to its public procurement regime through the *Procurement (Scotland) Regulations 2016*, which also came into force on April 18, 2016.

without discrimination and in a transparent manner.[226] The *PCR* also provides that Contracting Authorities are not to design a procurement process to artificially narrow competition or intentionally exclude it from certain provisions of the *PCR*.[227] The *PCR* imposes a duty on the Contracting Authority in relation to economic operators, and if this duty is breached and the breach causes loss, an economic operator can bring a claim under the *PCR*.[228] The *PCR* specifies the remedies that may be sought by economic operators. There are exclusions as to when the *PCR* applies, such as where the authority is buying for the defence and security sector, in which case the *Defence and Security Public Contracts Regulations 2011* may cover the situation.[229]

The *PCR* strives to improve the public procurement environment and make it easier for more companies to compete in procurement offers. Changes to the *PCR* include reducing red tape, opening the market to SMEs, clarifying that poor performance by a bidder will lead to that bidder's exclusion from future offers, allowing the creation of innovation partnerships, introducing a requirement for contracting authorities to demand explanation for abnormally low tenders, and introducing a requirement that the bid be rejected if it is low as a result of breaches to environmental, social or labour laws. It is thought that the changes to the *PCR* will allow for more flexibility and simplicity in procurement law.

6.3.3 *Public Services (Social Value) Act 2012*

The *Public Services (Social Value) Act 2012* (*PSA*)[230] received royal assent on March 8, 2012 and came into force on January 31, 2013. It creates a statutory requirement for public authorities in England and Wales "to have regard to economic, social and environmental well-being in connection with public services contracts."[231] The *PSA* applies only to public service contracts, not public works or supplies contracts. A 2014 review of the *PSA* found that, although implementation was under way, there were struggles in defining the measurement technique of social value and lack of clarity on what should be measured. These issues made it difficult to compare bids objectively.[232] In conducting this review, the government provided some guidance for public authorities on how to comply with the *PSA* and include *PSA* considerations in the tendering process. The *PSA* may be seen as a toothless initiative as there are no penalties within the *Act* for non-compliance. However, the *PSA* does provide for holistic consideration of the environmental, societal and economic impacts of tender

[226] *Public Contracts Regulations 2015*, SI 2015/102, s 18.
[227] *Ibid*.
[228] *Ibid*, s 90.
[229] UK, "Guidance: Public Procurement Policy" (6 October 2016), online: <https://www.gov.uk/guidance/public-sector-procurement-policy - public-contracts-regulations-2015>.
[230] *Public Services (Social Value) Act 2012* (UK), 2012, c 3.
[231] *Ibid*.
[232] UK, Cabinet Office, *Social Value Act Review* (Cabinet Office, 2015) at 11, online: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/403748/Social_Value_Act_review_report_150212.pdf>.

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submissions, rather than limiting consideration to the actual cost of the initial procurement project.

6.4 Canadian Law and Procedures

This section on Canadian law is restricted to the public procurement policy framework at the federal level. These federal laws and policies aim to not only ensure good governance and enforce the rule of law, but also to ensure compliance with Canada's international treaty obligations. As Canada is a federal state, federal laws and policies generally govern federal public procurement only. Any reference to "sub-federal procurement" refers to procurement that occurs below the federal level (i.e., provincial, municipal or MASH). Describing procurement laws and procedures only at the federal government level is a serious limitation. Federal procurement laws and procedures are in general far more detailed and stringent than most provincial and municipal procurement regimes. Improvement of these latter regimes is a pressing need in Canada.

6.4.1 Canada-US Agreement on Government Procurement (CUSAGP)

The CUSAGP came into effect on February 16, 2010.[233] Its primary goal, similar to NAFTA and the WTO-AGP, is to grant Canada and the US access to each other's public infrastructure industry.[234] However, CUSAGP is significant in that it represents the extension of sub-federal procurement commitments, something Canada would not agree to under the WTO.[235] Unlike the US, Canada still has not extended access to sub-federal procurement to other WTO signatories.[236] The Agreement provides an exemption to "Buy American" provisions for Canadian bidders and guarantees American access to provincial markets and contracts, with the exception of Nunavut.[237]

The core principles of CUSAGP address non-discrimination and transparency. For the purposes of transparency, entities subject to the Agreement are obligated to make their procurement policies readily accessible and to use competitive tendering processes except

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[233] *Agreement Between the Government of Canada and the Government of the United States of American on Government Procurement*, online: <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/gp-mp/agreement-accord.aspx?lang=eng>.

[234] For an overview of the CUSAGP, see Global Affairs Canada, "Canada-U.S. Agreement on Government Procurement", online: <tradecommissioner.gc.ca/sell2usgov-vendreaugouvusa/procurement-marches/agreement-accord.aspx?lang=eng>.

[235] Parliament of Canada, *Report on the Canada-US Agreement on Government Procurement*, online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4416059&Mode=1&Parl=40&Ses=3&File=18&Language=E>.

[236] *Ibid.*

[237] Global Affairs Canada, "Canada-U.S. Agreement on Government Procurement", online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/other-autre/us-eu.aspx?lang=eng/>.

in certain circumstances.[238] The exceptions cover the typical scenarios in which competitive tenders are not necessary, such as in the event of an emergency.

In Canada, the CUSAGP applies to procurement for construction services[239] in the provinces where the value of the services is greater than or equal to CAD$5 million.[240] For Crown corporations and municipalities, it applies to contracts valued at CAD$8.5 million or more.[241] Relatively few municipal contracts meet this monetary threshold.

6.4.2 Agreement on Internal Trade (AIT)

The AIT is an intergovernmental trade agreement that came into force in 1995 and has been signed by all provinces and territories except Nunavut.[242] Its purpose is "to foster improved interprovincial trade by addressing obstacles to the free movement of persons, goods, services and investments within Canada."[243] Chapter 5 of the AIT sets out procurement rules for entities in all signatory provinces and territories. AIT applies to purchase of goods contracts over $25,000, purchase of services contracts over $100,000 and purchase of construction contracts over $100,000. For the AIT to apply to purchases by municipalities, the province must subscribe to the MASH Annex. The MASH Annex applies to construction procurement where the value is in excess of $250,000.[244]

Under Chapter 5.P.5 of the AIT, each province is obligated to establish standard terms for tender documents and standardized procedures for complaint processes used by entities covered by the MASH Annex. The goal is to have these standard terms and procedures harmonized across the provinces.

The MASH Annex applies principles of non-discrimination, transparency and fair acquisition to MASH procurement. However, the anti-corruption provisions are basic and present a low threshold for compliance: discriminatory practices are not permitted (subject

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[238] *Agreement Between the Government of Canada and the Government of the United States of American on Government Procurement*, Appendix C, Part A, ss 7–9, online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/gp-mp/agreement-accord.aspx?lang=eng>.

[239] A "construction services" contract is defined under the agreement as "a contract which has as its objective the realization by whatever means of civil or building works": *ibid*, Annex 5. Procurement in this context is defined as "contractual transactions to acquire property or services for the direct benefit or use of the government": *ibid*.

[240] *Ibid*, Annex 2.

[241] *Ibid*, Appendix C, Part B. All municipalities and Crown corporations in BC are subject to the Agreement, though there is a list of Ontario ministries, agencies, and municipalities that are not covered by the Agreement.

[242] *Agreement on Internal Trade (Consolidated Version)* (2015), online: <www.ait-aci.ca/wp-content/uploads/2015/12/Consolidated-with-14th-Protocol-final-draft.pdf>.

[243] Internal Trade Secretariat, "Overview of the Agreement on Internal Trade", online: <www.ait-aci.ca/overview-of-the-agreement/>.

[244] *Ibid*, Annex 502.4.

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to exceptions),[245] provincial and MASH entities must make their procurement laws and procedures accessible,[246] and procurements within the ambit of AIT must occur via competitive tendering process (subject to exceptions).[247] Appendix C lists circumstances for exclusions, including emergencies and confidentiality, and Appendix D outlines circumstances in which sole supplier procurement is appropriate. Section F provides a broad exception to the non-discrimination provisions where a "legitimate objective" can be established.[248] The MASH Annex is also subject to Article 1600 of the AIT, which means that MASH sector procurement is subject to a provincial Committee on Internal Trade. Article 1600 obligates each province to establish a Committee on Internal Trade that supervises the implementation of the AIT, assists in dispute resolution arising out of the application of the AIT, and considers other matters relevant to the operation of the AIT. The non-judicial complaint process facilitated by the committees must be documented, and the provinces are obligated to attempt to resolve complaints.[249] Where the complaints fail to be resolved, they may be referred to an expert panel.[250]

Many provincial entities have not yet established the complaint procedures required under the AIT, and it is unclear when these procedures will be established given that there are no concrete consequences for failing to do so.[251] As stated in a report prepared for the Certified General Accountants Association of Canada (which has since been integrated into the Chartered Professional Accountants of Canada organization), "the dispute resolution provisions, which should be the glue of the [AIT], providing its integrity and credibility, are slow, complicated, expensive and apparently not respected by all governments."[252] This means that the MASH Annex to the AIT is, in many circumstances, toothless.

6.4.3 *Criminal Code*

Public procurement is also regulated or limited by a number of *Criminal Code* offences, including bribery of officers,[253] frauds on the government,[254] breach of trust of a public officer,[255] municipal corruption,[256] fraudulent disposal of goods on which money has been

[245] *Ibid*, Article 504.
[246] *Ibid*, Article 506.
[247] *Ibid*.
[248] *Ibid*, Article 404 (definition of "legitimate objective").
[249] *Ibid*, Article 513.
[250] *Ibid*.
[251] Marilyn Brown, "Building a Bid Dispute Protocol: Complaint Procedures under Trade Treaties" in Paul Emanuelli, ed, *Accelerating the Tender Cycle* (Northern Standard, 2012).
[252] Robert H Knox, "Canada's Agreement on Internal Trade: It Can Work If We Want It To" (Report prepared for the Certified General Accountants Association of Canada, April 2001) at 3.
[253] *Criminal Code*, RSC 1985, c. C-46, s 120.
[254] *Ibid*, s 121.
[255] *Ibid*, s 122.
[256] *Ibid*, s 123.

advanced,[257] extortion,[258] and secret commissions.[259] These offences are briefly described in Chapter 2, Section 2.5. Sections 121(1)(f) and 121(2) of the *Criminal Code* are specific offences in respect to federal and provincial procurement but do not cover municipal procurement offences. At the time of writing, these *Criminal Code* sections have not been used to prosecute unlawful procurement actions. Instead, procurement offences are prosecuted under the fraud and breach of trust offences in the *Criminal Code*, or the offence of "bid-rigging" under s. 47 of the *Competition Act*[260] (punishable by fine and/or a maximum of 14 years' imprisonment).

6.4.4 Overview of the Federal Policy Framework and Integrity Provisions

The policy framework for federal public procurement is set out in the *Financial Administration Act*[261] (and subordinate Government Contracts Regulations), the *Federal Accountability Act*,[262] the *Auditor General Act*,[263] and the *Department of Public Works and Government Services Act*.[264] Stobo and Leschinsky from the Canadian law firm Borden Ladner Gervais explain:

> The [*Financial Administration Act*] provides the legal framework for the collection and expenditure of public funds. The Government Contracts Regulations, which were enacted pursuant to the *Financial Administration Act*, also provide the conditions for entering into a contract and the general requirements for the acquisition of goods and services.
>
> Within the scope of this broad framework, the Treasury Board of Canada ("Treasury Board") has been delegated overall responsibility for establishing general expenditure policies as they pertain to the federal procurement process. In addition to setting general principles of contracting, the Treasury Board is also responsible for approving contracts entered into by federal contracting agencies when such contracts exceed certain dollar-value thresholds as established from time to time by the Treasury Board.

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[257] *Ibid*, s 389.
[258] *Ibid*, s 346.
[259] *Ibid*, s 426.
[260] RSC 1985, c C-34.
[261] *Financial Administration Act*, RSC 1985, c F-11.
[262] *Federal Accountability Act*, SC 2006, c 9, ss 308, 301, 306. This Act was largely the government's response to the Sponsorship Scandal and the Gomery Commission's Report that investigated the scandal: Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability: Recommendations* (Ottawa: Government of Canada, 2006), online: <www.parl.gc.ca/Content/LOP/researchpublications/prb0560-e.htm>. See also Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Who is Responsible? Fact Finding Report* (Government of Canada, 2005), online: <epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-02-10/www.gomery.ca/en/phase1report/default.htm>.
[263] *Auditor General Act*, RSC 1985, c A-17.
[264] *Department of Public Works and Government Services Act*, SC 1996, c 16.

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> [Public Works and Government Services Canada (PWGSC)] … is the principal purchasing agent of the federal government of Canada and is responsible for providing procurement sources for the majority of federal departments. The statutory basis and administrative framework of PWGSC is established by the *Department of Public Works and Government Services Act*.[265]

On July 3, 2015, PWGSC put in place a new "Integrity Regime" which replaced the previous "Integrity Framework."[266] The new Integrity Regime emphasizes the importance of fostering ethical business practices and reducing the risk of Canada's entering into contracts with suppliers convicted of an offence linked to unethical business conduct. On its website, PWGSC describes the basic structure of the new Integrity Framework and its application:

> The regime is applied across government through agreements between [PWGSC] and other federal departments and agencies.
>
> The regime applies to:
>
> - goods, services and construction contracts, subcontracts and real property agreements with a transaction value over $10,000
> - contracts that:
>   - are issued by a federal department or agency listed in schedule I, I.1 or II of the Federal Administration Act
>   - contain provisions of the Ineligibility and Suspension Policy
>
> It does not apply to contracts and real property agreements below $10,000. It also does not apply to transfer payments.
>
> …
>
> The regime is made up of three parts:
>
> 1. Ineligibility and Suspension Policy – sets out when and how a supplier may be declared ineligible or suspended from doing business with the government

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[265] Gerry Stobo & Derek Leschinsky, *Pocketbook on the Canadian Public Procurement Regime* (Borden Ladner Gervais, 2009) at 18, online: <blg.com/en/News-And-Publications/documents/publication_1799.pdf>. See also the following three publications by Paul Emanuelli: *Government Procurement* (Lexis-Nexis, 2012), *Accelerating the Tendering Cycle: A Legal Due Diligence Guide* (Northern Standard, 2012), and *The Laws of Precision Drafting: A Handbook for Tenders and RFPs* (Northern Standard Publishing, 2009). See also Robert C Worthington, *Desktop Guide to Procurement Law* (LexisNexis Canada, 2013).

[266] See Public Works and Government Services Canada, "About the Integrity Regime", online: <www.tpsgc-pwgsc.gc.ca/ci-if/apropos-about-eng.html>. See also John W Boscariol & Robert A Glasgow, "Canada Implements New Integrity Regime for Public Procurement", McCarthy Tétrault LLP (6 July 2015), online: <www.mccarthy.ca/article_detail.aspx?id=7126>.

2. Integrity directives – provide formal instructions to the federal departments and agencies that follow the policy
3. Integrity provisions – clauses that incorporate the policy into solicitations and the resulting contracts and real property agreements

…

These are the main reasons why a supplier will or may be ineligible to do business with the government. …

- The supplier or any of its affiliates have been convicted of certain offences under the *Criminal Code* or under these acts:
  - *Competition Act*
  - *Controlled Drugs and Substance Act*
  - *Corruption of Foreign Officials Act*
  - *Excise Tax Act*
  - *Financial Administration Act*
  - *Income Tax Act*
  - *Lobbying Act*
- The supplier entered into a subcontract with an ineligible supplier
- The supplier provided a false or misleading certification or declaration to Public Services and Procurement Canada
- The supplier breached any term or condition of an administrative agreement under the policy[267]

The following are the key features of the Integrity Regime:

1) a supplier convicted of a listed offence in Canada or abroad will remain ineligible for a period of ten years to enter into a procurement contract with the federal government;
2) a supplier can apply to have their ineligibility period reduced by up to five years if it addresses the causes of the conduct that led to its ineligibility;
3) a supplier will no longer be automatically penalized for the actions of an affiliate in which it had no involvement, which was the case under the previous Integrity Framework;
4) new tools are provided such as independent expert third-party assessments and administrative agreements that will specify required corrective actions and ensure their effectiveness;

[267] Public Works and Government Services Canada, "Government of Canada's Integrity Regime", online: <www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html>.

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5) the government is given the ability to suspend a supplier for up to 18 months if it has been charged with a listed offence or has admitted guilt; and
6) the Integrity Provisions also apply to the subcontractors of winning bidders.[268]

More information on the Integrity Regime, including further public consultations on amending it—and in particular, the role of debarment within the Integrity Regime—can be found in Chapter 7, Section 8.6. At the end of Section 8.6, there is also a discussion of the Canadian government's most recent discussions on altering the Integrity Regime, and in particular the rules on suspensions and debarments.

Part 5 of the *Federal Accountability Act* addresses public procurement and amends the *Auditor General Act*, the *Department of Public Works and Services Act* and the *Financial Administration Act*. It expands the class of funding recipients into which the Auditor General may inquire as to the use of funds under the *Auditor General Act* and provides for the appointment and mandate of a Procurement Auditor under the *Department of Public Works and Services Act*. The *Financial Administration Act* was amended to reflect a government commitment to fairness, openness and transparency in government contract bidding, as well as to provide a power to implement deemed anti-corruption clauses in government contracts.

6.4.5 Quebec's Solution to Public Procurement Corruption: Is It Enough?

The issue of corruption in Quebec's construction sector was thrust into the spotlight in 2009 after reports revealed widespread bid-rigging and collusion, causing public outrage. The Liberal Party, led by Premier Jean Charest, was in power at the time. As mentioned in Section 1.3, Charest, after some stonewalling, appointed the Charbonneau Commission to conduct a public inquiry into corruption in the awarding and management of public contracts in the province's construction industry. The Commission's report can be accessed online (though the full report is available only in French).[269] Evidence at the public inquiry revealed a thick web of corruption in the construction sector at the provincial and municipal level and a connection between this corruption and political party and election financing. The evidence also revealed that organized crime had infiltrated Quebec's construction industry.

In Quebec's 2012 elections, the Parti Québécois (PQ) under Pauline Marois was elected. Anxious to demonstrate the difference between the new government and the old, the PQ's first bill, put together in about six weeks, was the *Integrity of Public Contracts Act*.[270] The

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[268] Public Works and Government Services Canada, "Backgrounder on the New Government-Wide Integrity Regime", online: <https://www.tpsgc-pwgsc.gc.ca/ci-if/synopsis-backgrounder-eng.html>.
[269] France Charbonneau, "Rapport final de la Commission d'enquête sur l'octroi et la gestion des contrats publics dan l'industrie de la construction" (November 2015), online: <s3.documentcloud.org/documents/2599890/charbonneau-report-final-recommendations.pdf>. The English translation of the recommendations can be found online at <https://icclr.law.ubc.ca/wp-content/uploads/2017/06/9503929_001_EN_Rapport_final_CEIC_Tome3-1.pdf>.
[270] Bill 1, *Loi sur l'intégrité en matière de contrats public* [*Integrity in Public Contracts Act*], 40th Legis, 1st Sess, Quebec (SQ 2012, c 25) (received assent and entered into force December 7, 2012).

central feature of Bill 1 was a new system of pre-authorization for companies involved in public procurement. Under the provisions of Bill 1, companies must obtain a certificate of integrity from the Autorité des marchés financiers (AMF), Quebec's securities markets regulator, before entering into construction and service contracts or subcontracts involving expenditures of CAD$5 million or more, *Ville de Montréal* contracts covered by Orders in Council and certain public-private partnership contracts.[271] Beginning November 2015, the threshold for pre-authorization for public service contracts was lowered to CAD$1 million, and the Quebec government intends to eventually lower the threshold to CAD$100,000 for all public contracts (except those in the City of Montreal, which are subject to different thresholds).[272] The certificate will be automatically denied if any of a set of objective criteria are not met.[273] The decision also depends on subjective criteria, as the AMF has discretion to deny applications "if the enterprise concerned fails to meet the high standards of integrity that the public is entitled to expect from a party to a public contract."[274] The legislation provides some potentially relevant factors in making this determination. As pointed out by Steele, this provision is "startlingly subjective."[275]

Steele notes that there is "no obvious precedent" for these provisions in any other jurisdiction.[276] Looking at the legislative debates, no reference was made to other anti-corruption precedents, such as that of New York City. Based on New York's experiences, Steele argues that there is "serious doubt whether Bill 1 represents a sustainable anti-corruption agenda."[277] New York City experienced a similar corruption scandal in its construction sector in the 1980s, but has since instituted successful anti-corruption measures. Although New York's system includes a process of pre-authorization, this measure is combined with other reforms, such as a strengthened Department of Investigations and independent monitors for contract administration. In 2014, a witness invited to the Charbonneau Commission from New York indicated that pre-authorization is only a small

[271] Louis Letellier, "Application of An Act Respecting Contracting by Public Bodies" (Address delivered at the Transparency International Canada 5th Annual Day of Dialogue, Toronto, 6 May 2015) [unpublished].
[272] Linda Gyulai, "More Contract Bidders to Be Vetted under Provincial Decree", *The Montreal Gazette* (11 June 2015), online: <montrealgazette.com/news/local-news/more-contract-bidders-to-be-vetted-under-provincial-decree>.
[273] *An Act Respecting Contracting by Public Bodies*, CQLR 2012, c C-65.1, s 21.26. The objective criteria in s. 21.26 involve previous convictions for various offences. However, Bill 26 (enacted in April 2015) amended the *Act* by describing two situations in which the AMF need not automatically refuse to issue a certificate even though the objective criteria in s. 21.26 are met. See Bill 26, *An Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts*, 1st Sess, 41st Leg, Quebec, 2014, c 6, cl 26 (assented to 1 April 2015).
[274] *An Act Respecting Contracting by Public Bodies*, CQLR 2012, c C-65.1, s 21.27.
[275] Steele (2015) at 79.
[276] *Ibid* at 81.
[277] *Ibid* at 117.

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part of a successful anti-corruption system, adding that pre-authorization would be ineffective on its own or would even increase costs by reducing the pool of eligible bidders.[278]

However, New York's experience was not considered in the legislative debates. The debates also did not reference the international and national anti-corruption framework or anti-corruption literature. In addition, Steele criticizes the fact that "the Bill 1 debate is devoid of any real diagnosis of why or where the corruption is occurring."[279] Other issues that were not properly addressed include the subjectivity of the proposed provisions and the AMF's lack of resources to handle the large volume of verifications in issuing certificates of integrity.

Because of these gaps in the debate, Steele argues that Quebec's lawmakers had almost no objective evidence to support a belief that their anti-corruption legislation would work to stem corruption.[280] Yet no one opposed the bill. He suggests that the public outcry pushed legislators to simply "do something, and do it quickly," therefore focusing efforts on "building an edifice that sounds like it *might* work to stem corruption, rather than examining the evidence, in the literature and precedents from around the world, for what was *likely* to work."[281] While public outcry was placated, Steele suggests that, in reality, Bill 1 has had "an almost entirely nominal effect."[282]

6.4.6 Office of the Procurement Ombudsman

The Government of Canada has put in place a Procurement Ombudsperson.[283] As set out in subsection 22.1(3) of the *Department of Public Works and Government Services Act*, the mandate of the Procurement Ombudsman is to:

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[278] *Ibid* at 107–08.
[279] *Ibid* at 102.
[280] *Ibid* at 114.
[281] *Ibid* at 116 [emphasis in original].
[282] *Ibid* at 118. As of June 2015, 1,300 companies have been approved by the AMF and six or seven have been rejected. See Gyulai, (11 June 2015). SNC-Lavalin received approval to bid on public contracts in Quebec in February 2014: "SNC-Lavalin, WSP Green-Lit to Bid on Public Contracts in Quebec" *CBC News* (5 February 2014), online: <www.cbc.ca/news/canada/montreal/snc-lavalin-wsp-green-lit-to-bid-on-public-contracts-in-quebec-1.2524363>. For more on the realities of Bill 1 for companies, see Linda Gyulai, "Anti-Corruption Legislation Creates Niche Market for Private-Eye and Accounting Firms", *The Montreal Gazette* (17 July 2014), online: <montrealgazette.com/news/local-news/anti-corruption-legislation-creates-niche-market-for-private-eye-and-accounting-firms>. For the first decision on the legality of the AMF's refusal of authorization, see *9129-2201 Québec inc c Autorité des marchés financiers*, 2014 QCCS 2070, leave to appeal to QCCA ref'd 2014 QCCA 1383.
[283] Office of the Procurement Ombudsman, "Frequently Asked Questions", online: <http://opo-boa.gc.ca/faq-eng.html>. An ombudsman is an "independent, objective investigator of people's complaints against government and/or private sector organizations": Office of the Procurement Ombudsman, *Annual Report 2015–16* at 6. The Procurement Ombudsman is one of 14 ombudsmen for Canadian federal organizations.

a) review the practices of federal departments for acquiring materiel and services to assess their fairness, openness and transparency and make any appropriate recommendations to the relevant department for the improvement of those practices;
b) review any complaint respecting the award of a contract for the acquisition of goods below the value of $25,000 and services below the value of $100,000 where the criteria of Canada's Agreement on Internal Trade would apply;
c) review any complaint respecting the administration of a contract for the acquisition of materiel or services by a department, regardless of dollar value; and
d) ensure that an alternative dispute resolution process is provided, if both parties to the contract agree to participate.[284]

Current Procurement Ombudsman Lorenzo Ieraci has stated that the purpose of the Office of the Procurement Ombudsman is to "bridge gaps that sometimes materialize between Canadian suppliers and federal organizations."[285] Its objective is to promote fairness, openness, and transparency in federal government procurement. A primary function of the Procurement Ombudsman is to review the procurement practices of departments, including PWGSC, and publicly report on the results. In order to ensure its independence in carrying out this duty, the Procurement Ombudsman operates at arm's length from PWGSC.

The Office of the Procurement Ombudsman:

- works with suppliers and federal departments to clarify and address procurement issues;
- helps preserve the integrity of the federal procurement process by reviewing complaints from suppliers about the award or administration of a contract and making balanced recommendations;
- helps facilitate the resolution of contract disputes through alternative dispute resolution;
- reviews procurement practices in one or across a number of federal departments where recurring or systemic procurement issues are present;
- makes recommendations to strengthen fairness, openness, and transparency in federal procurement practices; and
- shares information on effective practices identified in the federal government and other jurisdictions to highlight leadership and reinforce positive initiatives in the field of procurement.[286]

[284] *Department of Public Works and Government Services Act*, SC 1996, c 16.
[285] Office of the Procurement Ombudsman, *Annual Report 2015–16* at 3.
[286] Office of the Procurement Ombudsman, "Frequently Asked Questions".

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7. EVALUATION OF PROCUREMENT LAWS AND PROCEDURES

7.1 OECD Review of Country Compliance

The OECD established the OECD Working Group on Bribery (Working Group), a peer-monitoring group, to evaluate each country's performance in implementing the OECD Anti-Bribery Convention. Phase 1 evaluated the country's legislation, phase 2 evaluated whether the country was applying their legislation and phase 3 evaluated the country's enforcement of the Convention. In each phase, the Working Group provided recommendations for the country to improve their compliance. The Working Group then published a follow-up on the recommendations of each phase to evaluate whether the country had implemented the recommendations.[287]

7.1.1 US Law and Procedure

The Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the US did not criticize the US's implementation of the Convention in respect of its public procurement regime. However, it did note that the US rarely chose to debar companies that were convicted of bribery of a foreign public official even though American laws provided that companies could be debarred from federal contracts for up to three years for convictions under domestic and foreign anti-bribery laws. Recommendation 4 suggested debarments be applied equally to companies convicted of domestic and foreign bribery.[288]

The Working Group's 2012 follow-up for the US described the actions taken to implement the OECD's recommendation on debarment. The follow-up report confirmed that there is a statutory mechanism for the debarment of persons convicted of violations of the *Arms Export Control Act*.[289] In addition, the report noted that although the *FCPA* does not impose mandatory statutory debarment, debarment was usually the result of indictment and/or conviction.[290]

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[287] For more information on the OECD monitoring process see OECD, "Country Monitoring of the OECD Anti-Bribery Convention", online: <www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm>.

[288] OECD, Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States* (2010), online: <www.oecd.org/unitedstates/UnitedStatesphase3reportEN.pdf>.

[289] *Arms Export Control Act of 1976* (Title II of Pub L 94–329, 90 Stat 729, enacted June 30, 1976, codified at 22 USC ch 39).

[290] OECD, Working Group on Bribery, *United States: Follow-Up to the Phase 3 Report and Recommendations* (2012) at 13, online: <www.oecd.org/daf/anti-bribery/UnitedStatesphase3writtenfollowupreportEN.pdf>.

7.1.2 UK Law and Procedure

The Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the UK advanced two main criticisms, contained in recommendations 3 and 6, of the UK's procurement regime. Recommendation 3 called for the UK to remove the requirement that persons convicted of bribery face permanent mandatory exclusion from future government contracts.[291] The UK updated its Code for Crown Prosecutors in January 2013 so that it no longer mentions mandatory exclusions from EU public procurement con-tracts.[292] Recommendation 6 called for the UK to implement easy access to a list of companies sanctioned for corruption charges, as the UK did not have a method in place of ensuring that exclusion from future government contracts was applied across the government.[293] This recommendation is still under consideration by the UK National Anti-Corruption Plan.[294]

7.1.3 Canadian Law and Procedure

The 2011 Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada found that the *CFPOA* was lacking because it did not include civil or administrative debarment sanctions for companies convicted under the Act.[295] The suggested sanction was exclusion from bidding on government contracts for a set period after conviction under the *CFPOA*.[296] Canada's domestic bribery laws already provided for this:

> Persons convicted under section 121 of the Criminal Code of bribing an official of the Government of Canada, government of a province, or Her Majesty in right of Canada or a province ("Frauds on the Government"), have no capacity to contract with Her Majesty or receive any benefit under a contract with Her Majesty, pursuant to subsection 750(3) of the Criminal Code, under Part XXIII, entitled "Sentencing."[297]

This provision applies only to charges of domestic bribery, and thus it does not capture *CFPOA* offences. However, the Working Group's follow up on Canada's sanctions for convictions under the *CFPOA* found that Canada had remedied this problem in July 2012,

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[291] OECD, Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom* (2012), online:< https://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf>.

[292] OECD, Working Group on Bribery, *United Kingdom: Follow-Up to the Phase 3 Report and Recommendations* (2014) at 11, online: <www.oecd.org/daf/anti-bribery/UnitedKingdomPhase3WrittenFollowUpEN.pdf>.

[293] OECD, Working Group on Bribery, *Phase 3 Report [UK]*, (2012).

[294] Sue Hawley, "Yawn and You'll Miss It: New EU Debarment Rules, Old Problems", *Corruption Watch* (4 March 2015), online: <www.cw-uk.org/2015/03/04/yawn-and-youll-miss-it-new-eu-debarment-rules-old-problems/>.

[295] OECD, Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada* , (2011), online:< https://www.oecd.org/canada/Canadaphase3reportEN.pdf.>.

[296] *Ibid*, recommendation 2.

[297] *Ibid* at 23.

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when PWGSC added convictions for foreign bribery under s. 3 of the *CFPOA* to the list of offences that would automatically result in debarment.[298] For more information on PWGSC's debarment policies, see Section 8.6 of Chapter 7.

7.2 Other Procurement Issues and Concerns

Procurement systems face the challenge of balancing the requirements placed on offering and bidding parties to ensure fairness and transparency with the size of the contract and the risk of corruption in the contract. Anti-corruption measures carry economic and intangible costs and procurement systems should strive to minimize those costs, as they are often borne by the public. The degree to which discretion should be regulated is another issue facing governments in designing procurement systems. Although unfettered discretion leaves space for corruption, some discretion is required in order to choose the best bid. As the projects being procured are often complex and encounter unforeseen issues, it is difficult to create a formula to calculate the full societal, environmental and economic cost of each proposal. Therefore, public officials must exercise some discretion in order to balance the costs and benefits of each project. Piga describes other problems associated with strict regulation of discretion:

> Reducing discretion has other drawbacks that are seldom considered in the fight against corruption. First, rigid procedures may shield procurement officials/politicians from responsibility for poor performance and failures ('not my fault, the rules' fault), while favoritism may be hidden by a wall of complex procedural rules. Second, if the agent is competent, discretion offers valuable flexibility, especially in complex procurement situations.[299]

Instead of removing discretion to prevent corruption, holding officials accountable for defects in the procurement process is viewed as a more efficient way of reducing corruption.[300]

Public procurement projects also face the potential problem of inaccurate estimations of costs and benefits. First, public officials may promote and support "low-ball" estimates of projects in order to gain public support for the project. Subsequently, as the project evolves, those initial estimates may prove to be wildly low. Recent studies showcase the role that "delusion, deception, and corruption" play in explaining underperformance with regard to cost estimates and benefit delivery of major infrastructure projects.[301] Research done by Flyvbjerg

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[298] OECD, Working Group on Bribery, *Canada: Follow-Up to the Phase 3 Report and Recommendations* (2013) at 6–7, online: <www.oecd.org/daf/anti-bribery/CanadaP3writtenfollowupreportEN.pdf>.
[299] Gustavo Piga, "A Fighting Chance Against Corruption in Public Procurement?" in Rose-Ackerman & Søreide, eds, (2011), 141 at 152.
[300] Ariane Lambert-Mogiliansky & Konstantin Sonin, "Collusive Market-Sharing and Corruption in Procurement" (2006) 15:4 Journal of Economics and Management Strategy 883 at 900.
[301] Bent Flyvbjerg & Eamonn Molloy, "Delusion, Deception and Corruption in Major Infrastructure Projects: Cases, Consequences, and Cures" in Rose-Ackerman & Søreide, eds, (2011), at 81.

and Molloy suggest that an important step in curbing corruption is focusing on accurate cost and benefits estimates at the planning and approval stage. They suggest that "planning fallacy," a psychological phenomenon that influences planners and project promoters to "make decisions based on delusional optimism rather than on rational weighing of gains, losses, and probabilities," contributes to the tendency of projects to run significantly over budget.[302] Planning fallacy, or "optimism bias," may result in the incorrect tender being chosen, as it rewards individuals for exaggerating the benefits of their design and underestimating the cost of the project.[303] Optimism bias can also be dangerous because when contracts are awarded for below their reasonable cost, contractors may cut corners by using inferior materials and compromising on quality in order to stay within the budget.[304]

Planners need to be aware of optimism bias in order to take steps to prevent it. Flyvbjerg and Molloy suggest that strategically implementing procedures to monitor and review forecasts can assist in reducing the prevalence of corruption and deception in public procurement.[305] Their suggestions include developing financial, professional or criminal penalties for "consistent and unjustifiable biases in claims and estimates of costs, benefits, and risks."[306] The Treasury of the UK addressed this issue by denying access to funding for infrastructure project proposals that do not show that they have accounted for optimism bias in their planning.[307]

As stated above, corruption that occurs in the planning and project development stages is of particular concern. Corrupt politicians may choose projects that do not provide significant, or any, benefit to the public because they know that certain projects allow them to extract more bribes from contractors, or because they owe a contractor a favour. This kind of deliberate manipulation during project planning is likely to facilitate corrupt acts throughout the project lifecycle.[308] As construction projects provide significant opportunity for corruption, countries may be infrastructure-heavy and yet have insufficient capacity to maintain and use the infrastructure. For example, a country may build hospitals that it cannot afford to staff or supply. As noted by the consulting firm Mott Macdonald, once a public need is found and officials determine that public funds will be allocated to meet this need, care must be taken in setting the parameters and budget for the project:

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[302] *Ibid* at 88.
[303] *Ibid* at 99.
[304] Wells (March 2015).
[305] Bent Flyvbjerg & Eamonn Molloy, "Delusion, Deception and Corruption in Major Infrastructure Projects: Cases, Consequences, and Cures" in Rose-Ackerman & Søreide, eds, (2011), at 104.
[306] *Ibid*.
[307] Mott MacDonald, *Review of Large Public Procurement in the UK*, study commissioned by Her Majesty's Treasury (London: HM Treasury, 2002), online: <www.parliament.vic.gov.au/images/stories/committees/paec/2010-11_Budget_Estimates/Extra_bits/Mott_McDonald_Flyvberg_Blake_Dawson_Waldron_studies.pdf>.
[308] *Ibid* at 2.

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> During the project preparation period, significant opportunities arise for the diversion of public resources to favour political or private interests. This stage of the project cycle is when some of the worst forms of grand corruption and state capture occur. But this is not all. Failures in project preparation (whether due to corruption, negligence, or capacity constraints) can also open up opportunities for corruption at later stages of the project cycle. For example, inadequate project preparation may lead to subsequent implementation delays that may require changes that can be manipulated to benefit individuals or companies. The preparation stage is especially likely to facilitate corrupt acts at a later stage when failures at this stage are deliberate.[309]

It is important to screen out projects with high costs and grossly negative rates of return as early as possible, as this is the most serious consequence of inadequate project screening.[310] Governments spend a significant amount of money on consulting during appraisal and planning of the project, and thus should ensure projects are feasible and valuable to the public prior to expending public funds for consulting.[311]

[309] *Ibid*.
[310] *Ibid* at 9.
[311] *Ibid*.

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CHAPTER 12

WHISTLEBLOWER PROTECTIONS

[This chapter, subject to some additions and deletions, was written and updated by Victoria Luxford under Professor Ferguson's supervision. Section 7.3 was written by Jeremy Henderson.]

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1. INTRODUCTION

Whistleblowing is one method of uncovering corruption in public and private sector organizations. Indeed, whistleblowing may be seen as "among the most effective … means to expose and remedy corruption, fraud and other types of wrongdoing in the public and private sectors."[1] Transparency International (TI) cites whistleblowing as one of the key triggers for effective corruption investigations.[2] Examples of prominent whistleblowers include Dr. Jiang Yanyong in China, who blew the whistle on the spread of the SARS virus contrary to explicit orders, and Allan Cutler in Canada, who "disclosed suspicions of fraud that led to the revealing of millions of misspent public funds in a sponsorship scandal, leading to the defeat of the Liberal party in the 2006 elections."[3] Whistleblowers have thus played pivotal roles in promoting political accountability and protecting public health and safety.

However, the benefits of whistleblowing can only be reaped if effective legal regimes are in place to safeguard reporting persons from retaliation, and to ensure that the appropriate parties act upon the disclosures in a timely and efficient manner. In the past ten to fifteen

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[1] Simon Wolfe et al, "Whistleblower Protection Laws in G20 Countries: Priorities for Action" (September 2014) at 10, online: <https://www.transparency.de/fileadmin/pdfs/Themen/Hinweisgebersysteme/Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for-Action.pdf>.

[2] Transparency International, "Whistleblower Protection and the UN Convention Against Corruption" (15 May 2013) at 2, online: <http://www.transparency.org/whatwedo/publication/whistleblower_protection_and_the_un_convention_against_corruption>.

[3] David Banisar, "Whistleblowing: International Standards and Developments" in Irma E Sandoval, ed, *Contemporary Debates on Corruption and Transparency: Rethinking State, Market, and Society* (World Bank, Institute for Social Research, UNAM, 2011) at 6–7, online: <http://ssrn.com/abstract_id=1753180>.

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years, the need to enact and enforce whistleblowing laws has become one of the most prominent issues, nationally and internationally, in the global fight against corruption. The call for effective whistleblowing laws has gathered steam in international conventions against corruption, and several countries have responded by creating new whistleblower laws or improving their existing whistleblower laws.[4]

This chapter will set out international obligations concerning whistleblower protection, then identify best practices, and finally explore the current state of public sector whistleblower protection primarily in the US, UK and Canada.

2. WHAT IS WHISTLEBLOWING?

The most widely used academic definition of whistleblowing originated in an article by Miceli and Near in 1985. They defined "whistleblowing" as "the disclosure by organization members (former or current) of the illegal, immoral or illegitimate practices under the control of their employers to persons or organizations that may be able to effect action."[5] This definition focuses only on the act of disclosure, rather than on whistleblowing as a process that needs to be examined before, during and after disclosure. Many academics have now embraced broader conceptions of whistleblowing. Banisar, for example, "treats whistleblowing as a means to promote accountability by allowing for the disclosure by any person of information about misconduct while at the same time protecting the person against sanctions of all forms."[6] In their study on public sector whistleblowing in Norway, Skiveness and Trygstad identify several problems with Miceli and Near's narrow definition of whistleblowing, and they advocate for a bifurcated definition which recognizes whistleblowing as a process:

> [W]e suggest a distinction between weak and strong whistle-blowing. We see the general definition of Miceli and Near as the first step in the whistle-blowing process, and we define this as 'weak whistle-blowing'. 'Strong whistle-blowing' focuses on *process* and on cases where there is no

[4] Robert G Vaughn, *The Successes and Failures of Whistleblower Laws* (Edward Elgar, 2012) at 243.
[5] Janet P Miceli & Marcia P Near, "Organizational Dissidence: The Case of Whistle-Blowing" (1985) 4 J Bus Ethics 1 at 4. Reasons for adopting this definition are discussed by Rodney Smith, "The Role of Whistle-Blowing in Governing Well: Evidence from the Australian Public Sector" (2010) 50:6 Am Rev Pub Admin 704 at 708, and include maintaining consistency with how whistleblowing has been defined by governments (including its definition within legislation), maintaining consistency with other academic work, and using a definition "that allows for a wide range of propositions about whistle-blowing to be tested."
[6] Banisar (2011) at 4.

> improvement in, explanation for, or clarification of the reported misconduct from those who can do something about it. [7]

Thus, when whistleblowing is examined as a process it necessitates laws or policies that provide a clear description (1) of what types of perceived wrongdoing should be disclosed, (2) to whom such disclosures should be made initially and subsequently (if the initial disclosure does not prompt an investigation), (3) how and by whom the alleged wrongdoing should be investigated, (4) the mechanisms and procedures that are in place to encourage persons to disclose wrongdoing while protecting the whistleblower from any disciplinary action or adverse consequence for reporting the wrongdoing, and (5) the steps to be taken if adverse consequences are, or appear to be, imposed on the whistleblower.

The question of what laws and practices produce the best whistleblowing regime is not one that is susceptible to a single answer. Section 4 of this chapter will review some features of whistleblowing regimes that arguably lead to more successful results. As will be seen, to be effective whistleblower laws must be examined in the overall context of a country's legal and political sophistication, as well as its social and economic realities

3. INTERNATIONAL LEGAL FRAMEWORK

This section will briefly review existing regional and global treaties against corruption mandates in regard to whistleblowing laws for member States. As will be seen, the standards for whistleblowing laws contained within these international agreements are rather weak and lacking in detail.

3.1 UNCAC

Article 33 of UNCAC provides for the protection of reporting persons (i.e., whistleblowers):

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[7] Marit Skivenes and Sissel C Trygstad, "When Whistle-Blowing Works: The Norwegian case" (2010) 63:7 Human Relations 1071 at 1077; the three problems that the authors identify with Miceli and Near's definition, in the context of their study, are "whistle-blowing concerns all forms of communication where critical voices are raised about wrongdoing in the presence of someone who can stop the misconduct …[,] the definition rests on employees' assessments of illegitimate, immoral and/or illegal situations and can thus cover many types of misconduct … [and] empirically, the definition does not seem to grasp how Norwegian employees and managers collaborate, nor how Norwegian working life is structured." See also Björn Fasterling, "Whistleblower Protection: A Comparative Law Perspective" in AJ Brown et al, eds, *International Handbook on Whistleblowing Research* (Edward Elgar, 2014) at 334 for a critique of Miceli and Near's definition: the author argues that the "definition is problematic because rather than disclosing illegal, immoral or illegitimate practices, the whistleblower discloses information that he or she believes will provide evidence or at least a substantiated indication of illegal, immoral or illegitimate practice. The disclosure can under no circumstances be independent of the whistleblower's own subjective judgment."

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> Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.[8]

This above Article is meant to cover individuals with "information that is not sufficiently detailed to constitute evidence in the legal sense of the word."[9] However, Article 33 is optional, not mandatory. A State need only "consider" adopting "appropriate measures" to protect whistleblowers, and the provision only provides protection from "any unjustified treatment" to those who acted "in *good faith* and on *reasonable grounds*" [emphasis added]. Thus, a State Party is free to deliberate, and then simply decide not to adopt any reporting protections.[10] Even with its obvious weaknesses, the protections offered under this section represent an expansion of previously recognized protections, and the UN in supporting documents has encouraged ratifying States to enact robust whistleblowing regimes under Article 33:

> The UN Office on Drugs and Crime's "Anti-Corruption Toolkit" notes that Article 33 is an advancement from previous agreements such as the 2000 Convention against Transnational Organized Crime which only protects witnesses and experts. The Toolkit extensively covers whistleblowing and recommends legal and administrative measures for reporting and protection including compensation, the creation of hotlines, and limits on libel and confidentiality agreements.[11]

In comparison, Article 32 of UNCAC provides for mandatory protection of witnesses, experts, and victims: it dictates that states "shall take appropriate measures … to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them."[12] Unfortunately, this mandatory protection does not protect whistleblowers from retaliation or intimidation unless they are "witnesses or victims" to the wrongdoing and they give "testimony" in the

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[8] *United Nations Convention Against Corruption* (UNCAC), 31 October 2003, art 33.

[9] United Nations Office on Drugs and Crime, "The United Nations Convention against Corruption: Resource Guide on Good Practices in the Protection of Reporting Persons" [UN Good Practices] (August 2015) at 6, online: <https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf>.

[10] Björn Fasterling & David Lewis, "Leaks, Legislation and Freedom of Speech: How Can the Law Effectively Promote Public-Interest Whistleblowing?" (2014) 153:1 Intl Labour Rev 71 at 76. The authors also suggest, at 76, that limiting protection in Article 33 to those who have "reasonable grounds" may be an unnecessary limitation of whistleblower protection: "It almost goes without saying that in some situations it will be difficult to distinguish between strong suspicions and reasonable grounds."

[11] Banisar (2011) at 13.

[12] *United Nations Convention Against Corruption* (UNCAC), 31 October 2003, art 32.

prosecution of wrongdoers. Most potential whistleblowers do not fall into this narrow group. Moreover, the ultimate objectives of whistleblowing laws are not simply to assist in the prosecution of an alleged wrongdoer, but also to play a preventative role. As TI observed, "the ideal situation is where a whistleblower raises concerns in time so that action can be taken to prevent any offence."[13]

Articles 32 and 33 are integral to the overall effectiveness of UNCAC. In fact, Arnone and Borlini argue that these provisions are essential to meeting all other objectives within UNCAC:

> Articles 32 and 33 … address the protection of witnesses, thereby complementing efforts regarding the prevention of public and private corruption, obstruction of justice, confiscation and recovery of criminal proceeds, as well as cooperation at the national and international levels. Even though the aim is far from easy to achieve, the underlying rationale is obvious: unless people feel free to testify and communicate their expertise, experience or knowledge to the authorities, all objectives of the Convention could be undermined.[14]

Without the protection offered in these provisions, countries attempting to operationalize UNCAC would be unnecessarily hobbled by difficulties in uncovering, investigating, and resolving corruption issues.

3.2 The OECD Convention

The OECD Convention itself does not specifically include provisions on whistleblowing. Nevertheless, various subsequent OECD instruments encourage the adoption of whistleblower protections. For example, in 1998 the OECD issued a *Recommendation on Improving Ethical Conduct in the Public Service*. That recommendation states that transparency and accountability in the decision-making process should be encouraged through "measures such as disclosure systems and recognition of the role of an active and independent media."[15] The 2003 *Recommendation on Guidelines for Managing Conflict of Interest in the Public Service* stipulates that States ought to "[p]rovide clear rules and procedures for whistle-blowing, and take steps to ensure that those who report violations in compliance with stated rules are protected against reprisal, and that the complaint mechanisms themselves are not abused."[16] The 2009 *Recommendation of the OECD Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* similarly recommends that member states

[13] Transparency International (15 May 2013) at 6.
[14] Marco Arnone & Leonardo S Borlini, *Corruption: Economic Analysis and International Law* (Edward Elgar, 2014) at 429.
[15] Public Governance Committee, *Recommendation on Improving Ethical Conduct in the Public Service*, 23 April 1998, C(98)70/FINAL.
[16] OECD, "Recommendation on Guidelines for Managing Conflict of Interest in the Public Service" (June 2003) at 12, online: <http://www.oecd.org/governance/ethics/2957360.pdf>.

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should put in place "easily accessible channels … for the reporting of suspected acts of bribery of foreign public officials in international business transactions to law enforcement authorities, in accordance with their legal principles."[17] Recommendations such as these show a recognition of the important role that whistleblowers can play in reducing corruption in the public service and in business. Finally, the OECD's CleanGovBiz "Toolkit on Whistleblower Protection" acknowledges that there is an increased risk of corruption where there is no protection of reporting, and it provides guidelines for implementation and suggestions for measuring effectiveness of legislation.[18] However, as Arnone and Borlini note, the whistleblower protections in OECD member states are far from uniform.[19]

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[17] Working Group on Bribery in International Business Transactions, "Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions" (26 November 2009) at IX, online: <http://www.oecd.org/daf/anti-bribery/44176910.pdf>.

[18] CleanGovBiz, "Whistleblower Protection: Encouraging Reporting" (July 2012), online: <http://www.oecd.org/cleangovbiz/toolkit/50042935.pdf>. These suggestions will be discussed below in connection with best practices in whistleblower protection legislation.

[19] See Arnone & Borlini, (2014) at 424. They state:

> Whistleblower protection is seen as a horizontal issue which confronts its Member States. In its Report the WGB has engaged rather frequently with the issue. For instance:
>
> > The Phase 3 report on the UK points out that the law does not apply to nationals working abroad on contracts made under a foreign law. The Phase 3 report on South Korea cited the enactment of the 2011 law as an important development, since the law extends protective measures to private-sector employees who report foreign bribery cases. The Phase 3 report on Japan noted the requirement for a review of its 2004 law after approximately five years. As the Act came into force in 2006, the review took place in March 2011. It was conducted by the Consumer Commission—made up of representatives from academia, the business community, the legal profession, media, etc. They concluded there was no need to amend the Act but that, due to the insufficiency of legislative information for the review, further research was recommended. The Phase 2 report on Chile notes the 2007 law establishing whistleblower protection in the public sector, encourages the authorities to expand it to state companies, and recommends that Childe enhance and promote the protection of private- and public-sector employees. According to the 2009 follow-up report of the recommendations of the Phase 2 report, this recommendation has been only partially implemented. See TI (2013:21).

3.3 Other Regional Conventions and Agreements

References to whistleblower protection can be found in a number of other regional conventions and agreements. For example, the first inter-governmental agreement to tackle whistleblower protection was the *Inter-American Convention against Corruption*. This Convention came into force on March 6, 1997, under the purview of the Organization of American States, a group of 35 member states in the Americas (including Canada and the US) formed in 1948.[20] The Convention suggests that signatories consider introducing or strengthening whistleblower protections within their own legal and institutional systems as a means of preventing corruption: Article III, section 8, provides that "state parties agree to *consider* the applicability of measures … [and] systems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal systems" [emphasis added].[21] The whistleblower provision is thus optional, not mandatory. The agreement emphasizes the role that each signatory's domestic legal context would play in the creation and maintenance of an effective whistleblower protection scheme. However, apart from Canada, the US and Peru, Arnone and Borlini report that the other OAS

For an in-depth illustration of the OECD follow-up mechanism see [Chapter 16 of *Corruption: Economic Analysis and International Law*]. Noticeably, this OECD anti-corruption initiative published guidance on whistleblower protection in 2012 (OECD, CleanGovBiz, 2012). Among other things, this document shows that "Australia, Canada, Ghana, Japan, South Korea, New Zealand, Romania, South Africa, the UK and the US are among the countries that have passed comprehensive and dedicated legislation to protect public sector whistle-blowers." It also records that legal protection for whistleblowers grew from 44 percent to 66 percent in OECD countries between 2000 and 2009. The OECD report *Government at a Glance 2015* (OECD, 2015) at 121, online: <http://www.oecd.org/governance/govataglance.htm/>, states that 88% of member countries have whistleblower protection laws. Out of 26 respondent countries to the OECD's survey, all have protections in place for public sector employees, while eight do not for private sector employees. One third of respondents provide incentives to whistleblowers. See the report at 120-121 for more detailed data.

[20] Organization for American States, "Who We Are" (2015), online: <http://www.oas.org/en/about/who_we_are.asp>. For information on signatories and ratification, see Department of International Law, "Signatories and Ratifications B-58: Inter-American Convention Against Corruption", online: Organization of American States <http://www.oas.org/juridico/english/sigs/b-58.html>.

[21] *Inter-American Convention Against Corruption*, 29 March 1996, OAS Treaties Register B-58 art III, point 8. The full text of the Convention can be found at Department of International Law, "Inter-American Convention Against Corruption" (29 March 1996), online: Organization of American States <http://www.oas.org/juridico/english/treaties/b-58.html>.

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Convention members have nonexistent, or weak, whistleblower laws.[22] Furthermore, a 2011 report of the Mechanism for Follow-up on the Implementation of the *Inter-American Convention against Corruption* indicated that the countries reviewed had not taken satisfactory steps to implement (or, in fact, to even *consider* implementing) whistleblower protections.[23]

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[22] Arnone & Borlini (2014) at note 9, state: "As detailed in Chapter 16 of this book, the Implementation of the Convention is overseen by the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC). The reports show that apart from Canada, the US and Peru, most OAS countries do not have specific whistleblower laws, but most have some protection for whistleblowers contained in criminal laws, procedural laws or labor laws. There is also a smaller group of countries without regulation on the subject. Reports frequently recommend measures of protection for whistleblowers where they are considered incomplete (e.g., Argentina, Brazil, Chile, Nicaragua, and Trinidad and Tobago). The latest reports on Bolivia and Paraguay call for the implementation of whistleblower systems, which have been enacted, but then left aside. The report finds that in Bolivia whistleblowers are often persecuted. On the other hand, Costa Rica argues that no whistleblower system is necessary as, surprisingly, there have never been any reprisals against whistleblowers. Notably, in 2010 the OAS agreed [to create] a model whistleblower law. This model law was updated and approved by the OAS Anti-Corruption Mechanism on 19 March 2013." The model law in question can be found at Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption, "Model Law to Facilitate and Encourage the Reporting of Acts of Corruption and to Protect Whistleblowers and Witnesses" (March 2013), online: Organization of American States <http://www.oas.org/juridico/PDFs/model_law_reporting.pdf>. However, there are problematic aspects of this model law. For example, firstly, the "law" appears to resemble an agreement (both stylistically and substantially) more than it does a model of legislation, and it is unclear how this "model" could easily be adopted by OAS countries that want to implement legislation. Secondly, the model law (at Article 8) imposes a positive obligation on "[a]ny person having knowledge of an act of corruption" to report to the appropriate authorities. It is unclear how such an obligation could be effectively introduced or enforced, especially if protection against reprisals continues to be weak or nonexistent. Finally, many of the provisions are vague, and it is unclear how the legislative goals will be met: Article 16, for example, states that "[p]rotection for persons reporting acts of corruption must safeguard their physical and psychological integrity and that of their family group, their property, and their working conditions, which could possibly be threatened as a result of their reporting an act of corruption." While the model law goes on to suggest that this may involve legal advice, confidentiality, protection from dismissal, or even police protection, there is little indication of how such broad goals will be operationalized within OAS countries.

[23] Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption, "Hemispheric Report: Third Round of Review" (15 September 2011), online: Organization of American States <http://www.oas.org/juridico/PDFs/IIIinf_hemis_en.pdf>. For example, the Report, at 47, suggested the following: "A: Adopt protective measures, aimed not only at the physical integrity of the whistleblower and their family, but also their employment situation. This measure was recommended to 24 of the countries that were reviewed in the Third Round; of these, 11 (46%) submitted no information on progress with respect to its implementation; 12 (50%) need to pay additional attention to it; and the remaining country (4%) has given it satisfactory consideration… D: Establish reporting mechanisms, such as anonymous reporting and identity-protected reporting. This measure was recommended to 18 of the countries that were reviewed in the Third Round; of these, nine (50%) submitted no information on progress with respect to its implementation and the remaining nine (50%) need to pay additional attention to it."

On the other hand, at least one regional Convention "requires" state members to have whistleblowing laws. The Council of Europe, a human rights organization with 47 member states (of which 28 belong to the European Union), produced the *Council of Europe Civil Law Convention on Corruption*, which came into force on November 1, 2003.[24] Article 9 states: "Each Party *shall provide* in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities" [emphasis added].[25]

Another regional agreement is the *Anti-Corruption Action Plan for Asia and the Pacific*, which was created out of the joint efforts of the Asian Development Bank and the OECD. It was endorsed on November 30, 2001.[26] Pillar 3 of the Action Plan specifically identifies the protection of whistleblowers as a critical element in encouraging public participation in combating corruption.[27] However, the provisions of the Action Plan are not mandatory: under Implementation, the Action Plan states that "[i]n order to implement these three pillars of action, participating governments of the region concur with the attached Implementation Plan and will *endeavour to comply* with its terms" [emphasis added].[28]

Two final examples involve organizations of African countries. First, the African Union is made up of the majority of African states and was launched in 2002.[29] The Preamble to the 2003 *African Union Convention on Preventing and Combating Corruption* recognizes the serious detrimental effects that corruption has on the stability of African States, as well as people in Africa.[30] It recognizes the potential of whistleblowing as a corruption prevention

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[24] Council of Europe, "The Council of Europe in Brief" (2014), online: <http://www.coe.int/en/web/about-us/who-we-are>. For a list of signatories to *the Civil Law Convention on Corruption*, see Council of Europe, "Civil Law Convention on Corruption" (1 April 2015), online: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174>.

[25] *Council of Europe Civil Law Convention on Corruption*, 4 November 1999, Eur TS 173 art 9. The full text of the Convention can be found at Council of Europe, "Civil Law Convention on Corruption" (4 November 1999), online: <http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm>.

[26] OECD, "3rd regional Anti-Corruption Conference for Asia and the Pacific", online: <http://www.oecd.org/site/adboecdanti-corruptioninitiative/regionalseminars/3rdregionalanti-corruptionconferenceforasiaandthepacific.htm>.

[27] OECD, "The Anti-Corruption Action Plan for Asia and the Pacific" (30 November 2001) at Pillar 3, online: <http://www.oecd.org/site/adboecdanti-corruptioninitiative/meetingsandconferences/35021642.pdf>. Countries endorsing the Action Plan can be found at 1.

[28] *Ibid* at 5.

[29] African Union, "AU in a Nutshell", online: <https://au.int/en/au-nutshell>.

[30] *African Union Convention on Preventing and Combating Corruption*, (11 July 2003), 43 ILM 5 [*AUCPCC*]. The Preamble emphasizes the negative consequences of corruption in Africa: "Concerned about the negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples." The full text of the Convention can be found online: <https://www.au.int/en/sites/default/files/treaties/7786-file-african_union_convention_preventing_combating_corruption.pdf>.

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mechanism, and seems to have a scope wide enough to encompass ordinary citizens within its protection. The language of these provisions is mandatory—"State Parties *undertake* to…:"

> 5. Adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities.
> 6. Adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals.
> 7. Adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences.[31]

It should be noted that clause 5 on protection of informants and witnesses requires "legislative" measures, while clause 6 on protection of citizens who report corruption from fear of reprisals does not require "legislative" measures and is satisfied if a State implements some form of non-legislative protective measures. In addition, as Arnone and Borlini argue, clause 7 may act as a deterrent to truthful whistleblowers, since it is wide enough to punish honest whistleblowers who "reasonably" suspect corrupt behaviour, which on further investigation is not proven.[32] Finally, the effectiveness of the Convention is weakened by the fact that there is no credible enforcement or evaluation mechanism: each state simply self-reports on its Convention compliance.[33]

Second, the South African Development Community is composed of 15 member states in the southern region of Africa. The 2001 *Southern African Development Community Protocol Against*

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[31] *Ibid*, art 5. Arnone & Borlini, (2014) at 425, argue that, although the language is obligatory, "no particular penalizing scheme can be inferred for failure to comply with these requirements."
[32] Marco Arnone & Leonardo S Borlini, *Corruption: Economic Analysis and International Law* (Edward Elgar, 2014) at 425-426.
[33] *AUCPCC*, (11 July 2003), 43 ILM 5 art 22(7). Kolawole Olaniyan, "The African Union Convention on Preventing and Combating Corruption: A Critical Appraisal" (2004) 4 Afr Hum Rts LJ 74 at 76, states that "the Convention lacks any serious, effective or meaningful mechanism for holding states accountable for the obligations they assume under it, or for resolving disputes among state parties, including a potential claim by one party that another is failing to properly carry out its obligations." However, Lucky Bryce Jato Jnr, "Africa's Approach to the International War on Corruption: A Critical Appraisal of the *African Union Convention on Preventing and Combating Corruption*" (2010) 10 Asper Rev Intl Bus & Trade L 79 at 93-94, suggests that the Advisory Board (created pursuant to Article 22(1)) could, potentially, exert some influence over effectively reviewing and encouraging development of anti-corruption policies, through its power to create its own rules of procedure: "unlike the practice with most peer-review monitoring mechanisms, which rely to some extent on 'country self-assessments based on a questionnaire' and allow room for subjective and unreliable results, the AU Advisory Board receives annual reports on the progress made in the implementation of the *AU Convention* from the *independent* national anti-corruption authorities or agencies created pursuant to the *AU Convention* by the State Parties. In addition, given its mandate to 'build partnerships,' the AU Advisory Board may invite submissions from civil society and private sector organizations".

Corruption, Article 4, encourages the creation and maintenance of "systems for protecting individuals who, in good faith, report acts of corruption."[34] This provision, like that of the African Union Convention, contains mandatory language.[35] Furthermore, both of these documents contain strongly worded provisions denouncing individuals who make false reports.[36] This is problematic because it may have a chilling effect on information disclosures:

> Such provision, the aim of which is to prevent a misuse of the Convention itself, might paradoxically well result in a general impasse of the investigation. What is more, in many countries the menace of such punishment is an effective deterrent to truthful whistleblowers who expose the guilty.[37]

The potential chilling effect of denouncing those who make false reports, coupled with the lack of oversight and monitoring of ratification and enforcement, makes it unlikely that these agreements will have any significant influence in causing member states to create effective whistleblower protection regimes.

4. "BEST PRACTICES" IN WHISTLEBLOWER PROTECTION LEGISLATION

4.1 Limitations of Best Practices

Various organizations and academics have developed suggestions for "best practices" and standards for whistleblower protection legislation. These best practices are suggestions as to how to most effectively draft whistleblower legislation and they provide ideas for countries attempting to develop or improve whistleblower legislation.[38] By way of an important introductory observation, Latimer and Brown note that effective whistleblower protection

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[34] *Southern African Development Community Protocol Against Corruption*, 14 August 2001 art 4 [*SADCPAC*]. The Protocol can be accessed at Southern African Development Community, "SADC Protocol Against Corruption" (14 August 2001), online: <http://www.sadc.int/files/7913/5292/8361/Protocol_Against_Corruption2001.pdf>.

[35] *Ibid*, art 4: "each State Party *undertakes* to adopt measures" [emphasis added].

[36] *Ibid.* Article 4(1)(f) of *SADPAC* suggests that there should be "laws that punish those who make false and malicious reports against innocent persons." The *AUCPCC*, (11 July 2003), art 5, clause 7, has almost identical requirements.

[37] Arnone & Borlini (2014) at 426.

[38] The role of best practices was highlighted by Transparency International, which suggests that UNCAC implementation reviews ought to provide special guidance regarding the implementation of Article 33, which "should take into consideration material developed by other institutions such as the Transparency International (TI) 'International Principles for Whistleblower Legislation' as well as best-practice materials, guiding principles and model legislation produced by the Organisation for Economic Co-operation and Development (OECD), Organization of American States (OAS) and others": Transparency International, (15 May 2013) at 5.

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can only exist in a democratic society that values accountability and transparency; in other words, "[a] precondition for whistleblower laws is the rule of law, including an independent legal system and independent judiciary."[39] This precondition will be met in varying degrees from country to country. In a similar vein, the efficacy of whistleblower protection will be dependent not only on what is found within the four corners of the applicable legislation, but more importantly how the appropriate bodies put legislative protections into practice.

It is also important to recognize that it is seldom, if ever, effective to simply transplant successful legislative regimes from one cultural setting to another[40] or from developed countries to developing countries.[41] Whistleblowing schemes in developed democracies may not be appropriate or effective in the "specific context of developing countries who do not always have an institutional framework in place that supports the rule of law and [where] a culture of transparency and accountability remains questionable."[42] Thus, in discussing best practices, it is crucial to take into account the cultural and institutional environments of the countries that are considering the adoption of whistleblower protection legislation. If such contextual factors are not taken into account, the efficacy of whistleblower legislation will be seriously undermined.[43] Brown warns that best practices models should be examined with a careful eye on the legal, administrative, and political context of each country:

> [T]he search for "ideal" or "model" laws is complicated by three problems: the diversity of legal approaches attempted by jurisdictions that have sought to prioritise whistleblower protection through special-purpose

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[39] Paul Latimer & AJ Brown, "Whistleblower Laws: International Best Practice" (2008) 31:3 UNSW LJ 766 at 769.

[40] For example, in Heungsik Park et al, "Cultural Orientation and Attitudes Toward Different Forms of Whisleblowing: A Comparison of South Korea, Turkey, and the U.K." (2008) 82 J Bus Ethics 929 at 937, the authors conclude that legislative and organizational responsiveness to cultural context may play a large role in the efficacy of whistleblower protection: "organizational systems for dealing with an employee's response to wrongdoing should be based on an understanding of the impact of nationality and cultural orientation on employees' preferred ways to blow the whistle. This has obvious implications for policy and practice, suggesting as it does that organizations seeking to improve the likelihood of employees reporting wrongdoing may need to tailor their policies and procedures to a country-specific context." See also Wim Vandekerckhove et al, "Understandings of Whistleblowing: Dilemmas of Societal Culture" in AJ Brown et al, eds, *International Handbook on Whistleblowing Researc*h (Edward Elgar, 2014).

[41] For example, in Sajid Bashir et al, "Whistle-Blowing in Public Sector Organizations: Evidence from Pakistan" (2011) 41:3 Am Rev Pub Admin 285 at 286, the authors suggest that "studies in developed countries cannot be generalized and may not necessarily have any applicable lessons for organizations in developing countries such as Pakistan because of the absence of a robust legal system and the cultural dimensions of being a closely knit society where everyone is related to someone significant through common sect, cast, or creed."

[42] Marie Chêne, "Good Practice in Whistleblowing Protection Legislation (WPL)" (1 July 2009) at 1, online: U4 Anti-Corruption Resource Centre <http://www.u4.no/publications/good-practice-in-whistleblowing-protection-legislation-wpl/>.

[43] *Ibid*. For example, the author, at 9, cites the impact of the use of informants in past authoritarian regimes as a factor that stigmatizes the actions of whistleblowers.

> legislation (sometimes inaccurately called 'stand-alone'); the frequent lack of evidence of the success of these approaches; and the lack of a common conceptual framework for understanding policy and legal approaches to whistleblowing across different legal systems, including those where whistleblower protection may be strong but not reflected in special-purpose legislation.
>
> …[N]otwithstanding international interest, there is no single 'ideal' or 'model' law that can be readily developed or applied for most, let alone all countries. This is due to the diverse and intricate ways in which such mechanisms must rely on, and integrate with, a range of other regimes in any given jurisdiction.[44]

4.2 Sources for Best Practices

What should a good whistleblower law look like? There are various sources that one can turn to in order to try to extract the best aspects or elements of a "good" whistleblower law. Some of the leading sources for determining best practices in regard to designing a sound and effective legal regime for whistleblowers include the following:

1. David Banisar, "Whistleblowing: International Standards and Developments" in Irma E Sandoval, ed, *Contemporary Debates on Corruption and Transparency: Rethinking State, Market, and Society* (World Bank, Institute for Social Research, UNAM, 2011), online: <http://ssrn.com/abstract_id=1753180>.
2. CleanGovBiz, "Whistleblower Protection: Encouraging Reporting" (July 2012), online: OECD <http://www.oecd.org/cleangovbiz/toolkit/50042935.pdf>.
3. Tom Devine & Shelley Walden, "International Best Practices for Whistleblower Policies" (13 March 2013), online: Government Accountability Project <https://www.whistleblower.org/sites/default/files/pictures/Best_Practices_Document_for_website_March_13_2013.pdf>.
4. Paul Latimer & AJ Brown, "Whistleblower Laws: International Best Practice" (2008) 31:3 UNSW LJ 766, online: <http://papers.ssrn.com/abstract_id=1326766>.
5. Transparency International, "Recommended Draft Principles for Whistleblowing Legislation" (2009), online: <https://www.transparency.org/files/content/activity/2009_PrinciplesForWhistleblowingLegislation_EN.pdf>.
6. Simon Wolfe et al., "Whistleblower Protection Laws in G20 Countries: Priorities for Action" (September 2014), online: <https://www.transparency.de/fileadmin/pdfs/Themen/Hinweisgebersysteme/Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for-Action.pdf>.

[44] AJ Brown, "Towards 'Ideal' Whistleblowing Legislation? Some Lessons from Recent Australian Experience" (2013) 2:3 E-J Intl & Comp Labour Stud 4 at 5 (and citing the work of Björn Fasterling (2014) at 334.

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7. United Nations Office on Drugs and Crime, "The United Nations Convention against Corruption: Resource Guide on Good Practices in the Protection of Reporting Persons" (August 2015), online: <https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf>.

4.3 General Characteristics of Best Practices

While the scope and significance of the appropriate elements of best practices are open to reasonable dispute, academics and organizations tend to focus on five broad areas: (1) scope and clarity of legislation, (2) mechanisms for disclosure, (3) protection of identity, (4) protection against retaliation, and (5) remedies available for wronged whistleblowers. This chapter will briefly discuss each of these areas in turn.

4.3.1 The Scope and Clarity of Legislation

The scope of whistleblower protection legislation, especially in regard to the range of people protected and the types of disclosures covered, is an area of central concern for organizations and academics. Banisar suggests that most legislation dedicated to whistleblower protection is too narrow, and that the efficacy of these laws is difficult to measure.[45] Best practices in whistleblowing legislation favour wide coverage; indeed, "in time there may be a case for whistleblowing laws to move to a full 'no loopholes' approach, targeting public sector and private sector whistleblowing with sector-blind principles and practices."[46] Closing the "loopholes" in legislation involves increasing the range of people who fall within legislative protection. Transparency International, for example, suggests that legislative protections should apply to all whistleblowers, regardless of whether they work in the public or private sector.[47] In addition, members of the public may be a "useful" information source, and they may require protection from intimidation or reprisals.[48] According to Devine, Legal Director of the Government Accountability Project, "[s]eamless coverage is essential so that accessible free expression rights extend to any relevant witness, regardless of audience, misconduct or context to protect them against any harassment that could have a chilling effect."[49]

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[45] Banisar (2011) at 2.

[46] Latimer & Brown (2008) at 775.

[47] Transparency International, (15 May 2013))at 13. See also Tom Devine, "International Best Practices for Whistleblower Statutes" in David Lewis & Wim Vandekerckhove, eds, *Developments in Whistleblowing Research* (International Whistleblowing Research Network, 2015) at 9, online: <http://www.track.unodc.org/Academia/Documents/151110 IWRN ebook 2015.pdf>, wherein he notes that whistleblower protection should protect all citizens who have relevant disclosures regardless of their formal employment status. He cites broad US whistleblower protection laws (primarily in the criminal realm) as a good example of legislation affording protection to all those who take part in or are impacted by the activities of an organization: "[o]verarching U.S. whistleblower laws, particularly criminal statutes, protect all witnesses from harassment, because it obstructs government proceedings."

[48] UN Good Practices (August 2015) at 9-10.

[49] Devine (2015) at 8.

Whistleblower protection also should provide protection against "spillover relation"; that is, it should protect those who are not whistleblowers, but who may be perceived as whistleblowers, have assisted whistleblowers, or are preparing to make a disclosure.[50] The UK's *Public Interest Disclosure Act 1998* (*PIDA*),[51] which protects workers in the public and private sectors as well as those working as independent contractors, is seen as a model of expansive coverage.[52] In a 2013 Report, TI emphasizes *PIDA*'s broad coverage:

> In 1998, the UK passed one of the most comprehensive whistleblower protection laws in the world: the Public Interest Disclosure Act. Known as PIDA, the law applies to the vast majority of workers across all sectors: government, private and non-profit. It covers a range of employment categories, including employees, contractors, trainees and UK workers based abroad.
>
> …
>
> Several countries have used PIDA as a template for their own laws and proposals, including Ireland, Japan and South Africa. [53]

In addition, the *types* of disclosures protected should be broad and should cover a wide range of wrongdoing; that is, "[p]rotected whistleblowing should cover "any" disclosure that would be accepted in a legal forum as evidence of significant misconduct or would assist in carrying out legitimate compliance functions."[54] The substance of the disclosure should be paramount, rather than the form of the disclosure or the category within which the disclosure is made to fit.[55] Here, again, *PIDA* is seen as a leading example, despite its use of enumerated categories of wrongdoing rather than a completely open-ended approach:

> Under PIDA, whistleblowers are able [to] disclose a very broad range of crimes and wrongdoing, including corruption, civil offences, miscarriages

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[50] *Ibid* at 9.

[51] *Public Interest Disclosure Act 1998* (UK), c 23 [*PIDA*].

[52] Mark Worth, "Whistleblowing in Europe: Legal Protections for Whistleblowers in the EU" (2013) at 10, online: Transparency International <https://www.transparency.de/fileadmin/pdfs/Themen/Hinweisgebersysteme/EU_Whistleblower_Report_final_web.pdf>. The author notes, at 10, that *PIDA* "is widely considered to be the strongest [law] in Europe and among the best in the world."

[53] *Ibid* at 83.

[54] Tom Devine & Shelley Walden, "International Best Practices for Whistleblower Policies" (13 March 2013) at 2, online: <https://www.whistleblower.org/sites/default/files/pictures/Best_Practices_Document_for_website_March_13_2013.pdf>. Similarly, Banisar suggests that "comprehensive whistleblowing laws generally have broad definitions of wrongdoing that apply to the revealing of information relating to criminal acts, to dangers to health or safety, and to abuses of power": Banisar (2011), at 25.

[55] Latimer & Brown (2008) at 785.

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> of justice, dangers to public health or safety, dangers to the environment, and covering up of any of these. [56]

The sectoral approach, which offers protection to disclosures in certain areas (such as public health) but not others, has been criticized as unnecessarily narrow. According to the OECD's CleanGovBiz guidelines, "[t]he enactment of a comprehensive, dedicated law as the basis for providing whistleblower protection is generally considered the most effective legislative means of providing such protection." [57] A piecemeal approach, wherein protection to different types of whistleblowers is provided for in different pieces of legislation, may similarly result in loopholes and a less effective disclosure regime overall.[58] This was one of the major criticisms in a TI review of whistleblower protection in European countries, where "research found that whistleblowing legislation in the countries covered by this report is generally fragmented and weakly enforced." [59] The Report recommends that a "single, comprehensive legal framework" be provided for the protection of whistleblowers. [60] Generally speaking, there seems to be a consensus that dedicated legislation is to be preferred in a whistleblower protection regime, and that broad coverage (in terms of those protected and the types of wrongdoing that may be disclosed) is vitally important.

A related best practices concern is the need to provide clarity in whistleblowing laws and policies, regardless of the scope and framework of the legal regime. Clarity of the legislation is considered to be of paramount importance, and a review of whistleblower protection in G20 countries (the "September 2014 G20 Report") repeatedly emphasizes the need for "clear" laws.[61] The public may not understand the meaning of terms such as "the public interest," and therefore clarity may require setting out a more detailed list of the types of wrongdoing covered by the legislation.[62] Lack of clarity in legislation, whether related to the breadth of coverage or the manner of required disclosure, can have significant impacts on the overall efficacy of the legal regime. For example, TI discusses how confusion regarding Latvian laws made investigating and acting upon disclosures difficult, if not impossible:

> In Latvia, the lack of a clear set of steps for receiving and responding to a disclosure has even been evidenced within the Ombudsman's Office, a government institution which oversees matters related to the protection of human rights and good governance. In 2007, nearly half of the

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[56] Worth (2013) at 83.
[57] CleanGovBiz (July 2012) at 6.
[58] *Ibid* at 9.
[59] Anja Osterhaus & Craig Fagan, "Alternative to Silence: Whistleblower Protection in 10 European Countries" (2009) at 3, online: Transparency International <https://transparency.hu/wp-content/uploads/2016/04/TI-Alternative-to-Silence-report-ENG.pdf>. The countries studied in the Report were Bulgaria, the Czech Republic, Estonia, Hungary, Ireland, Italy, Latvia, Lithuania, Romania and Slovakia, and the Report found that the only country with a dedicated and comprehensive piece of legislation was Romania.
[60] *Ibid* at 4.
[61] Simon Wolfe et al (September 2014) at 2.
[62] UN Good Practices (August 2015) at 22.

> Ombudsman's Office employees complained of alleged misconduct by the Office's director. The lack of clear reporting channels internally led to confusion about how to investigate and resolve the case. After pressure from non-governmental organisations, including the local TI chapter, the case was heard by a parliamentary body, which did not investigate the root of the claims. As a result, the case was ultimately dismissed.[63]

Whatever the preferred route, the prescribed mechanisms for disclosure ought not to be overly complicated or formalistic. As Banisar notes:

> An overly prescriptive law which makes it difficult to disclosure wrongdoing undermines the basic philosophy of promoting disclosure and encourages informal or anonymous releases. However, at the same time, a law that allows for unlimited disclosures will not encourage internal resolution and promote the development of a better internal culture of openness.[64]

4.3.2 Mechanisms for Disclosure

Certain disclosure procedures have also been identified as preferable. Based in part on Australian studies, TI recommends that internal reporting (the first line of reporting should be to the appropriate authorities *within* the organization) be encouraged through the establishment and maintenance of internal systems of disclosure, which offer the benefits of ease and accessibility to potential whistleblowers.[65] Key to the efficacy of such internal mechanisms is ensuring "a thorough, timely and independent investigation of concerns … [with] adequate enforcement and follow-up mechanisms."[66]

However, external means of disclosure should also be available and accessible, and it should be possible to disclose information to other bodies such as regulators or the media (albeit,

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[63] Osterhaus & Fagan (2009) at 11.

[64] Banisar (2011) at 26.

[65] Transparency International, "Recommended Draft Principles for Whistleblowing Legislation" (2009) at point 7, online: <https://www.transparency.org/files/content/activity/2009_PrinciplesForWhistleblowingLegislation_EN.pdf>.

[66] *Ibid*. Rodney Smith, "The Role of Whistle-Blowing in Governing Well: Evidence From the Australian Public Sector" (2010) 50:6 Am Rev Pub Admin 704 at 719, concludes that large-scale research into whistleblowing in the Australian public sector suggests that internal reporting is overwhelmingly popular amongst whistleblowers, even when there are external reporting agencies available: the study showed that "better outcomes … were associated with public sector organizations that publicized good whistle-blowing procedures, had well-trained managers and specialist staff, and that offered specialist support for whistle-blowers." External agencies became important in the relatively small amount of cases in which reprisals occurred.

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possibly along different tiers of disclosure).[67] This is because the circumstances of the particular case may make a certain avenue of disclosure more appropriate than another, and "a variety of channels need to be available to match the circumstances and to allow whistleblowers the choice of which channel they trust most to use."[68] TI states that "[i]f there is a differentiated scale of care in accessing these channels, it shall not be onerous and must provide a means for reporting on suspicion alone."[69] Similarly, Banisar recommends that internal disclosures should be encouraged and facilitated, but that "procedures should be straightforward and easily allow for outside organizations to seek the counsel of higher bodies, legislators and the media in cases where it is likely that the internal procedure would be ineffective."[70] The September 2014 G20 Report likewise called for:

> [C]lear rules for when whistleblowing to the media or other third parties is justified or necessitated by the circumstances… [and] clear rules for defining the internal disclosure procedures that can assist organisations to manage whistleblowing, rectify wrongdoing and prevent costly disputes, reputational damage and liability, in the manner best suited to their needs.[71]

The September 2014 G20 Report indicated that legislation in these areas needed to be more comprehensive. The stepped or tiered approach can be observed in *PIDA*:

> PIDA uses a unique "tiered" system by which whistleblowers can make their disclosures and be legally protected from retaliation. Employees can disclose information to their employer, regulatory agencies, "external" individuals such as members of Parliament, or directly to the media. However, the standards for accuracy and urgency increase with each tier, so whistleblowers must heed this in order to be legally protected.[72]

In an article comparing the UK and US legislative regimes, Mendelsohn argues that a model law would be explicit in its preference for internal or external disclosure, and she suggests that internal reporting ought to be preferred. However, she also argues that while internal reporting should be afforded "almost automatic protection," this does not mean that external

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[67] For example, in Paul Stephenson & Michael Levi, "The Protection of Whistleblowers: A Study on the Feasibility of a Legal Instrument on the Protection of Employees Who Make Disclosures in the Public Interest" (20 December 2012) at 5, online: Council of Europe <http://rm.coe.int/doc/0900001680700282>, the authors suggest that external routes (such as regulatory authorities and law enforcement) are required where internal reporting proves ineffective, and that "[g]oing to the press is – or should be – an option of last resort, albeit a vital one." The authors, at 29, explicitly recommend "a 'stepped approach,' with different grounds required at each stage… [and] if at any stage there is not response, then it is clear the whistleblower can go to the next level."

[68] OECD, "Committing to Effective Whistleblower Protection" (OECD, 2016) at 53, online: <http://dx.doi.org/10.1787/9789264252639-en>.

[69] Transparency International (2009) at point 8.

[70] Banisar, (2011) at 57. The OECD's CleanGovBiz (July 2012) similarly advocates for the encouragement of internal reporting, with external reporting acting as a last resort.

[71] Simon Wolfe et al (September 2014) at 2.

[72] Worth (2013) at 83.

reporting should be subject to a multitude of preconditions.[73] Furthermore, Mendelsohn's model law would allow for disclosures to the media only when reporting through internal and external channels has proven to be ineffective.[74]

After a disclosure is made, it may be appropriate to keep the reporting person informed of the outcome of the disclosure. A recent Report by the United Nations Office on Drugs and Crime (UNODC) indicated that not only must all reports be assessed according to their merits, but also that those who disclose information should be informed of decisions made on the basis of their report (e.g., whether the matter will be investigated).[75] Similarly, Devine recommended that the corrective action process should be transparent, and that the reporting person who disclosed the issue "should be enfranchised to review and comment on the draft report resolving alleged misconduct, to assess whether there has been a good faith resolution."[76]

4.3.3 Protection of Identity

Protection of identity is an area in which there is disagreement as to the appropriate best practice. There is widespread recognition of the need for ensuring whistleblower confidentiality; indeed, Devine suggests that channels of disclosure must protect confidentiality in order to ensure that the flow of information is maximized, and this includes not only name protection but also the protection of identifying information.[77] If the identity of a whistleblower must be revealed (e.g., because of the need for testimony in a criminal proceeding), the whistleblower should be provided with "as much advance notice as possible."[78] However, while there is general agreement with respect to the need for whistleblower confidentiality, there is controversy over the role of anonymous reporting.

TI suggests that not only should the identity of a whistleblower be protected (i.e., kept confidential), but that legislation should also allow for anonymous disclosure.[79] Similarly, Banisar argues that anonymity may have a place in a model whistleblower protection law, despite the general exclusion of anonymous disclosures from current legislation: for example, "[a]nonymity may be … useful (not to say essential) in some cases, such as in jurisdictions where the legal system is weak or there are concerns about physical harm or social ostricization."[80] The September 2014 G20 Report concluded that a central area of

[73] Jenny Mendelsohn, "Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing" (2009) 8:4 Wash U Global Stud L Rev 723 at 743.
[74] *Ibid* at 744.
[75] UN Good Practices (August 2015) at 72.
[76] Devine (2015) at 14.
[77] *Ibid* at 10. See also OECD, (2016) at 64, wherein it is noted that "[i]t is important that confidentiality extends to all identifying information."
[78] *Ibid* at 10. See also OECD, (2016) at 65, wherein the authors discuss the possibility of imposing sanctions for the disclosure of a whistleblower's identity.
[79] Transparency International (2009) at point 12.
[80] Banisar (2011) at 34.

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concern was the need for "clear rules that encourage whistleblowing by ensuring that anonymous disclosures can be made, and will be protected."[81]

In contrast, Latimer and Brown suggest that anonymous disclosures should be used only as something of a "last resort," given the perception that anonymity would discourage whistleblower accountability and might, in fact, encourage intentionally false reports.[82] Allowing anonymous disclosures might, therefore, increase the volume of disclosures so as to make reporting systems less effective and increase the difficulty of investigations.[83] Stephenson and Levi, in a Report commissioned by the Secretary General of the Council of Europe, similarly question the need for anonymous disclosures where confidentiality is protected:

> Legal and social problems stem from anonymous disclosures: anonymous information is rarely admissible as evidence in courts. There have been cases where, because the whistleblower has remained anonymous, another worker has been suspected and sacked… research results indicate that auditors attribute lower credibility and allocate fewer investigatory resources when the whistleblowing report is received through an anonymous channel.[84]

It has been suggested that it may be possible to address some of the concerns with respect to anonymous reporting (such as difficulty in assessing credibility and in seeking clarification) through the use of technology such as proxy e-mails, which allow two-way communication.[85]

4.3.4 Protection against Retaliation and Oversight of that Protection

Robust protection against retaliation is a cornerstone of effective whistleblower protection legislation. Effective protection from reprisal is required, as is a broad understanding of what reprisals might entail: "The law should cover all common scenarios that could have a chilling effect on responsible exercise of free expression rights."[86] A key element in ensuring the protection of whistleblowers is educating public employees on their rights and protections under whistleblower legislation, because "[w]histleblowers are not protected by any law if they do not know it exists."[87] Those in positions of power, who may be receiving protected disclosures or working with whistleblowers following disclosures, also need to be educated

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[81] Simon Wolfe et al (September 2014) at 20.
[82] Latimer & Brown (2008) at 774.
[83] OECD (2016) at 63.
[84] Stephenson & Levi (20 December 2012) at 32. The authors suggest, at 32, that anonymous reporting systems may be a first step in the whistleblowing process: "The whistle-blowers' confidence may develop as the exchange progresses: if the intelligence is to be used effectively they will need to identify themselves to the authorities at some stage."
[85] UN Good Practices (August 2015) at 50.
[86] Devine & Walden (13 March 2013) at 3. The authors also note, at 5, that whistleblowers must be protected from unconventional harassment, considering that "[t]he forms of harassment are limited only by the imagination."
[87] *Ibid* at 6.

on their responsibilities under the law. In addition, it is important that protection against retaliation not be limited to a short period of time following the disclosure, as reprisals may occur months or even years after the initial disclosure.[88]

Protection within legislation is crucial, but in order to provide whistleblowers with effective shelter from retaliation the legislation must actually be put into practice. The Government Accountability Project, a US-based non-governmental organization, notes that whistleblower laws may actually prove to be counterproductive if they do not have any teeth:

> While whistleblower protection laws are increasingly popular, in many cases the rights have been largely symbolic and therefore counterproductive. Employees have risked retaliation thinking they had genuine protection, when in reality there was no realistic chance they could maintain their careers. In those instances, acting on rights contained in whistleblower laws has meant the near-certainty that a legal forum would formally endorse the retaliation, leaving the careers of reprisal victims far more prejudiced than if no whistleblower protection law had been in place at all.[89]

Adequate oversight is required to ensure that the legislation is doing the work that it was designed for, and this may be accomplished through independent bodies, an ombudsperson, sectoral bodies, or courts and tribunals.[90]

4.3.5 Remedies and Rewards

When retaliation cannot be prevented and whistleblowers face reprisals, adequate and timely compensation is necessary. Compensation "must be comprehensive to cover all the direct, indirect and future consequences of the reprisal."[91] This may include reinstatement, compensation for lost wages, awards for suffering, or a range of other reparations. It would be beneficial not to limit the amount of compensation, and "[c]ompensation should be broadly defined to cover all losses and seek to place the person back in an identical position as before the disclosure."[92] An effective compensation scheme may require interim relief, given the high costs of time delays to whistleblowers seeking the remedies promised in the whistleblowing legislation.[93] In addition, it is important that whistleblower protection laws offer reporting persons a "realistic time frame" within which to assert their rights: Devine suggests a one year limitation period, in contrast to the 30-60 days contained in some pieces of legislation.[94]

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[88] OECD (2016) at 81.
[89] Devine & Walden (13 March 2013) at 1.
[90] Banisar (2011) at 38–43.
[91] Devine & Walden (13 March 2013) at 9.
[92] Banisar (2011) at 56.
[93] Devine & Walden (13 March 2013) at 9.
[94] Devine (2015) at 12.

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There has been significant debate over the role that rewards should play in model whistleblower legislation. In the US, discussed in more detail in Section 5.2, various pieces of legislation allow whistleblowers to collect cash rewards when the government recovers money as a result of the information disclosed. The value of the information is thought to outweigh any questions regarding the morality of the motivations behind disclosure. However, these moral questions have not been so easily dismissed by everyone in the field. Public Concern at Work, a UK-based non-governmental organization, did not recommend the introduction of financial incentives into *PIDA* for reasons related both to the underlying philosophy of encouraging reporting in this way as well as concerns regarding the practical implications of rewarding whistleblowers in this manner. The 2013 Report stated:

> The majority of respondents to our consultation (including whistleblowers) were not in favour of rewards. The reasons given were multiple and in summary were as follows:
>
> a) inconsistent with the culture and philosophy of the UK
> b) undermines the moral stance of a genuine whistleblower
> c) could lead to false or delayed reporting
> d) could undermine credibility of witnesses in future criminal or civil proceedings
> e) could result in the negative portrayal of whistleblowers
> f) would be inconsistent with current compensatory regime in the UK.
>
> The provision of a reward may well incentivise those who would not normally speak out. However, it may also encourage individuals to raise a concern only when there is concrete proof and monetary reward. This could reduce the opportunity to detect malpractice early and prevent harm. Additionally, it is difficult to use the model in sectors other than the financial sector, such as care or health.
>
> Rewards are not a substitute for strong legal protection. There is no reason why whistleblowers should not be recognised and rewarded in the workplace via remuneration structures, promotion or other recognition mechanisms including by society at large (e.g. the honours list).[95]

As a final point, whistleblower protection is untenable if it saddles a victim of retaliation with an unwieldy burden of proof. Thus, the "emerging global standard is that a whistleblower establishes a *prima facie* case of violation by establishing through a preponderance of the evidence that protected conduct was a "contributing factor" in challenged discrimination."[96] It may be possible to go even further and craft legislation that

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[95] Public Concern at Work, "The Whistleblowing Commission: Report on the Effectiveness of Existing Arrangements for Workplace Whistleblowing in the UK" (November 2013) at 14, online: Public Concern at Work <http://www.pcaw.org.uk/files/WBC Report Final.pdf>.

[96] Devine & Walden (13 March 2013) at 7

presumes that a detrimental act against a whistleblowing employee is, in and of itself, sufficient to shift the burden of proof to the employer to show that the act was not retaliatory.[97] Furthermore, it is important to consider how evidentiary rules may unduly burden whistleblowers seeking remedies for reprisals.[98] Finally, if mounting a claim of alleged retaliation is expensive and requires the assistance of a lawyer or other institutional advocate (such as an ombudsperson), then such assistance should be built into the scheme.

5. WHISTLEBLOWER PROTECTION IN THE US: A PATCHWORK OF LEGISLATION

The US has a long history of whistleblower protection legislation. Section 5.1 will give an overview of the protections available to whistleblowers in the public sector, focusing on those working in the federal public sector, and the following sections will briefly outline some of the protections available to private sector whistleblowers.

5.1 Whistleblower Protection in the Public Sector

The first whistleblower law in the US arguably appeared as early as 1863, with the introduction of false claims legislation.[99] However, the modern approach to whistleblower protection began in 1968 with the landmark case *Pickering v Board of Education*, which recognized the application of the First Amendment to protection of disclosures made in the public interest.[100] This was followed by the *Civil Service Reform Act of 1978*,[101] which "sought to vindicate these constitutional rights, but it substituted statutory standards for the vague balancing test under First Amendment law."[102] Unfortunately, the Office of Special Counsel and Merit Systems Protection Board, implemented by this legislation, did not prove to be very successful.[103] Today, the US has a plethora of laws on the local, state and federal levels that offer protection to whistleblowers. Although these laws purport to offer protection to

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[97] OECD, "G20 Anti-Corruption Action Plan Protection of Whistleblowers: Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation" (OECD, 2011), online: <http://www.oecd.org/daf/anti-bribery/48972967.pdf>, states at 25, that high burdens of proof have been "almost impossible to provide as long as the employer has not explicitly mentioned this as the reason for termination. For that reason, several legislations provide for a flexible approach to the burden of proof, assuming that retaliation has occurred where adverse action against a whistleblower cannot be clearly justified on management grounds unrelated to the fact or consequences of the disclosure."

[98] Fasterling (2014) at 336. The author argues, at 336, that "research should take burden of evidence rules into account when evaluating remedies."

[99] Vaughn (2012) at 4.

[100] *Pickering v Board of Education*, 391 US 563 (1968).

[101] *Civil Service Reform Act of 1978*, Pub L No 95-454, 92 Stat 1111.

[102] Vaughn (2012) at 5.

[103] Terry Morehead Dworkin, "US Whistleblowing: A Decade of Progress?" in David B Lewis, ed, *A Global Approach to Public Interest Disclosure* (Edward Elgar, 2010) at 46.

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whistleblowers in both the public and the private sector, there are problems "due to increased implementation difficulties, inefficiencies and regulatory burdens entailed in having multiple laws that have evolved in *ad hoc* ways over time."[104] A comprehensive, dedicated piece of legislation, such as *PIDA*, that covers both the public and the private sector at the federal level, with similar models at the state level, would be preferable in this sense. It would make it easier for whistleblowers to learn and understand their rights under the legislation, and it would likely decrease implementation and regulatory difficulties.

The legislation that is most relevant to disclosures in the federal public sector is the 1989 *Whistleblower Protection Act* (*WPA*)[105] (amended in 2012 by the *Whistleblower Protection Enhancement Act* (*WPEA*)).[106] The *Report of the Committee on Homeland Security and Governmental Affairs United States Senate to Accompany s. 743* underscores the important role of public sector whistleblowers, and explicitly recognizes the need for strong whistleblower protection legislation:

> The Whistleblower Protection Enhancement Act of 2012 will strengthen the rights of and protections for federal whistleblowers so that they can more effectively help root out waste, fraud, and abuse in the federal government. Whistleblowers play a critical role in keeping our government honest and efficient. Moreover, in a post–9/11 world, we must do our utmost to ensure that those with knowledge of problems at our nation's airports, borders, law enforcement agencies, and nuclear facilities are able to reveal those problems without fear of retaliation or harassment.
>
> …
>
> S. 743 would address… problems by restoring the original congressional intent of the WPA to adequately protect whistleblowers, by strengthening the WPA, and by creating new whistleblower protections for intelligence employees and new protections for employees whose security clearance is withdrawn in retaliation for having made legitimate whistleblower disclosures.[107]

Under the *WPA*, the employer bears the burden of showing that the detriment faced by an employee was not connected to their whistleblowing:

> The employee only has to establish that he – 1. disclosed conduct that meets a specific category of wrongdoing set forth in the law; 2. made the disclosure

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[104] Simon Wolfe et al (September 2014) at 63–64.

[105] *Whistleblower Protection Act of 1989*, Pub L No 101-12, 103 Stat 16 [*WPA*]. For further analysis, see Stephenson & Levi, (20 December 2012) at 22, note that the *WPA* was introduced following the 1986 Challenger space shuttle disaster.

[106] *Whistleblower Protection Enhancement Act of 2012*, Pub L No 112-199, 126 Stat 1465 [*WPEA*].

[107] US, Committee on Homeland Security and Government Affairs, 112th Cong, *The Report of the Committee on Homeland Security and Governmental Affairs United States Senate to Accompany s. 743* (US Government Printing Office, 2012) at 1, online: <http://fas.org/irp/congress/2012_rpt/wpea.pdf>.

> to the right type of party; 3. made a report that is either outside of the employee's course of duties or communicated outside the normal channels; 4. made the report to someone other than the wrongdoing; 5. had a reasonable belief of wrongdoing; 6. suffered a personnel action. If the employee establishes these elements, the burden shifts to the employer to establish that it would have taken the same action in absence of the whistleblowing.[108]

In 2011, the Merit Systems Protection Board released a Report that compared survey data of federal employees from 1992 with data from 2010. In regard to the rate of disclosures, the Report stated:

> While observing wrongdoing is the first step in the whistleblowing process, not everyone who sees wrongdoing chooses to tell anyone else what they have observed. To blow the whistle, someone has to make some noise. In 2010, respondents were slightly less likely to report that they did not tell anyone about the wrongdoing that they observed compared with survey data from 1992, but in both years, a strong majority of employees told someone ... [T]he percentage of respondents who told no one what they observed dropped from 40 percent in 1992 to 34 percent in 2010. In 2010, family, friends, and coworkers were less likely to be told about the wrongdoing than they were in 1992. However, this did not correspond to substantially more people reporting wrongdoing to management. Instead, it seems that venting to equally powerless people dropped, but the willingness of respondents to take action that could lead to change was not substantially changed.[109]

The Report went on to conclude:

> We have seen some progress in the Federal Government with respect to effectively utilizing Federal employees to reduce or prevent fraud, waste, and abuse. Since 1992, the percentage of employees who perceive any wrongdoing has decreased, and for those who perceive wrongdoing, the frequency with which they observe the wrongdoing has also decreased. Additionally, in comparison to 1992, respondents in 2010 were slightly more likely to report the wrongdoing and less likely to think they have been identified as the source of the report.[110]

The *WPEA* reinforced the *WPA* by closing loopholes in the legislation, increasing the scope of protected wrongdoing and shielding "whistleblower rights against contradictory agency

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[108] Stephenson & Levi (20 December 2012) at 22.
[109] US Merit Systems Protection Board, "Blowing the Whistle: Barriers to Federal Employees Making Disclosures" (November 2011) at 8, online: <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=662503&version=664475>.
[110] *Ibid* at 27.

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non-disclosure rules through an "anti-gag" provision."[111] The September 2014 G20 Report states that in recent years there has been a positive increase in the favourable resolution of whistleblower retaliation cases: "From 2007 to 2012, the number of new disclosures reported by federal employees increased from 482 to 1,148, and the number of whistleblower retaliation cases that were favorably resolved rose from 50 to 223."[112] While these numbers indicate positive movement in terms of increased disclosures, it is impossible to determine whether the percentage of favourable resolutions of reprisal claims has increased as well without knowing the total number of reprisal claims. A 2015 study concludes that the *WPEA*, on paper, shows some potential, but that it is an open question whether it will translate to more robust whistleblower protection in practice:

> It remains to be seen if the clarifications in the WPEA regarding disclosures will, in fact, clarify what is and is not a covered disclosure. It is also uncertain whether the courts will broaden their interpretation of the protections for whistleblowers under the WPEA. The expanded jurisdiction written into the Act is really a 2-year experiment to test that notion. The cancelling of the 1999 precedent that translates "reasonable belief" to require irrefutable proof is another issue that may be subject to narrowing by the courts.
>
> There seems to be inherent confusion in the WPEA regarding the dictate that whistleblowers cannot claim protections for disclosing valid policy decision, but can claim protections for disclosing the consequences of a policy decision. Furthermore, the Act creates specific legal protections for scientific freedom, providing WPA rights to employees who challenge censorship, and makes it an abuse of authority to punish disclosures about scientific censorship. This begs the question: when is it censorship and when is it a valid policy decision to maintain the need for information to be classified due to national security or some other compelling reason. The main point here is that the WPEA may not have actually enhanced any protections or clarified the various aspects of whistleblower protections—again, time will tell.[113]

A February 2015 Report from the US Merit Systems Protection Board, indicates that the increased protections offered by *WPEA* have led to a strain on available resources. The Report states:

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[111] Simon Wolfe et al (September 2014) at 64.

[112] *Ibid*.

[113] Shelley L Peffer et al, "Whistle Where You Work? The Ineffectiveness of the Federal Whistleblower Protection Act of 1989 and the Promise of the Whistleblower Protection Enhancement Act of 2012" (2015) 35:1 Rev Pub Personnel Admin 70 at 78–79. The study concludes, at 78, that the *WPA* "failed in its basic purpose–protecting employees." However, the study also highlights weaknesses of the *WPEA*, such as the lack of protection for national security workers and government contractors.

> The WPEA provided additional rights to whistleblowers and those who engage in other protected activity in the Federal Government. The law expanded the scope of protected disclosures, broadened MSPB's whistleblower jurisdiction, expanded options for granting corrective action, and permitted review of MSPB decisions by multiple Federal Courts of Appeals. These changes have increased the number of whistleblower cases filed with MSPB and increased the complexity of MSPB's processing of whistleblower cases. The changes also may lead to more and lengthier hearings in whistleblower cases and more addendum appeals (e.g., claims for compensatory and other damages or for attorney's fees) for whistleblower cases. The WPEA also requires MSPB to track and report more detailed information about whistleblower cases in its performance reports. MSPB needs additional permanent resources to enable it to meet the requirements of the WPEA.[114]

The February 2016 Annual Performance Results and Annual Performance Plan report from the US Merit Systems Protection Board, provided an update on these concerns, stating:

> Many whistleblower cases are being resolved formally or informally at the Office of Special Counsel. The more complex and contentious cases that remain unresolved are often the cases filed with MSPB. Thus, based on what we have seen so far, we still anticipate that the WPEA may lead to more and lengthier hearings in these cases and more addendum appeals.[115]

This report also provides recent data on the whistleblower appeals, from October 1, 2014 to September 30, 2015. During this time period, the Merit Systems Review Board received 583 initial appeals against reprisals from whistleblowers at its regional and field offices. Of these, 393 were individual right of action appeals (where "the individual is subject to a personnel action and claims that the action was taken in reprisal for whistleblowing, but the personnel action itself is not one that is directly appealable to the Board") and 190 were otherwise appealable actions (where the "appeal involves a personnel action that is directly appealable to the Board, such as a removal, demotion, or suspension of more than 14 days").[116] In cases involving individual rights of appeal, "the individual can appeal the claim of reprisal to the Board only if he or she files a complaint with OSC first, and OSC does not seek corrective action on the individual's behalf."[117] Of the 359 total individual right of action appeals

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[114] US Merit Systems Protection Board, "Annual Performance Report for FY 2014 and Annual Performance Report for FY 2015 (Final) and FY 2016 (Proposed)" (2 Feb 2015) at 1–2, online: <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1133484&version=1137981&application=ACROBAT>.

[115] US Merit Systems Protection Board, "Annual Performance Results for FY 2014 and Annual Performance Plan for FY 2016 (Final) and FY 2017 (Proposed)" (9 Feb 2016) at 38, online: <http://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1268947&version=1274024&application=ACROBAT>.

[116] *Ibid* at 45.

[117] *Ibid*.

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decided in regional and field offices, a 157 were dismissed for reasons including lack of jurisdiction and timeliness, 24 were dismissed for failing to exhaust (that is, seek corrective action) at OSC, 36 were withdrawn, 57 were adjudicated on the merits (with corrective action granted in 14 cases), and 85 were settled.[118] Of the 203 otherwise appealable action cases decided, 100 claims were dismissed, 56 were adjudicated on the merits (with corrective action granted in 3 cases) and 47 were settled.[119] These decisions can be appealed through filing petitions for review.[120]

5.2 Encouraging Whistleblowing through Rewards: The *False Claims Act*

The *False Claims Act* (*FCA*) [121] offers a unique understanding of how to encourage whistleblowing, as it allows private citizens to make claims on behalf of the government (*qui tam* actions) in cases of contract fraud; this has allowed the US government to recover $35 billion in public funds since 1986 (as of 2014).[122] The *FCA* represents a prioritization of information rather than so-called ethical motives, and offers a different kind of remedy to wronged whistleblowers:

> The FCA is much more effective than merely protecting the whistleblower from retaliation or even giving the whistleblower a private cause of action for retaliation …. It is arguably the most protective of whistleblowers because a successful whistleblower recovers enough to withstand losing a job or suffering a stalled career …. The law values information over motive, and blowing the whistle to gain a large recovery is fine as long as the information is novel and leads to successful prosecution.[123]

The ethical concern surrounding a whistleblower's motives has diminished in light of the *FCA's* positive outcomes:

> The concern that whistleblowers might be motivated by gain rather than a desire to help is… no longer a major ethical consideration. The desire by the government to recover money and correct wrongdoing now trumps concerns regarding whistleblower motive. A "pure" motive is seen as secondary to the public good created by whistleblowers, regardless of motive.[124]

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[118] *Ibid* at 46–47.
[119] *Ibid* at 45-46.
[120] *Ibid* at 47.
[121] *False Claims Act*, 31 USC §3729-3733.
[122] Simon Wolfe et al (September 2014) at 64.
[123] Dworkin (2010) at 44.
[124] Terry Morehead Dworkin & AJ Brown, "The Money or the Media? Lessons from Contrasting Developments in US and Australian Whistleblowing Laws" (2013) 11:2 Seattle J Soc Just 653 at 668.

Some whistleblowers under the *FCA* have received large sums of money: "FCA settlements and judgments have totaled over $17 billion and virtually all whistleblowers have recovered $1 million or more – even though the majority of suits are settled."[125] For example, in August 2015, a former sales representative for NuVasive, a medical device producer, was awarded $2.2 million under the FCA in relation to kickbacks paid by the company to doctors. A Wisconsin pharmacist was awarded $4.3 million in 2015 after she blew the whistle on PharMerica. She was fired after reporting that her employer was dispensing dangerous drugs without a prescription.[126] In an even larger settlement, a former sales representative for Endo Pharmaceuticals Inc. received a $33.6 million award after blowing the whistle on the company. She served as an undercover informant for the FBI for five years and waited nine years between her first complaint and the 2014 settlement.[127] In addition, it has been argued that US legislation such as the *FCA* "leads the way" when it comes to the protection of whistleblowers that are based in a different jurisdiction.[128]

Long time delays between blowing the whistle and receiving recovery amounts can put whistleblowers in disadvantageous financial situations.[129] For example, in the Endo Pharmaceuticals case mentioned above, nine years passed between the whistleblower's first complaint and the settlement.[130] Despite this, many states have introduced similar legislation with varying amounts of recovery awarded to the *qui tam* plaintiff.[131] The state-level legislation has seen similar levels of success as the federal legislation.[132] The debate surrounding the morality of offering rewards was discussed, above, in Section 4.3.5. The US is mostly alone among the three countries discussed in this chapter in offering rewards. Generally speaking, the ethical or public service motive for whistleblowing in Canada and the UK is still favoured over motives related to private gain. The same may be said for Canada, with one exception: whistleblower rewards were created under the Ontario Securities Commission in 2016.

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[125] Dworkin (2010) at 44.

[126] Richard L Cassin, "PharMerica Whistleblower Collects $4.3 Million", *The FCPA Blog* (21 May 2015), online: <http://www.fcpablog.com/blog/2015/5/21/pharmerica-whistleblower-collects-43-million.html>.

[127] Richard L Cassin, "Jackpot: Pharma Whistleblower Awarded $33 Million", *The FCPA Blog* (17 July 2015), online: <http://www.fcpablog.com/blog/2015/7/17/jackpot-pharma-whistleblower-awarded-33-million.html>. See also Richard L Cassin, "Three SEC Whistleblowers Split $7 Million Award", *The FCPA Blog* (23 January 2017), online: <http://www.fcpablog.com/blog/2017/1/23/three-sec-whistleblowers-split-7-million-award.html>.

[128] Richard Hyde & Ashley Savage, "Whistleblowing Without Borders: The Risks and Rewards of Transnational Whistleblowing Networks" in David Lewis & Wim Vandekerckhove, eds, *Developments in Whistleblowing Research* (International Whistleblowing Research Network, 2015) at 24, online: <http://www.track.unodc.org/Academia/Documents/151110 IWRN ebook 2015.pdf>.

[129] *Ibid*.

[130] Richard L Cassin, "Jackpot: Pharma Whistleblower Awarded $33 Million", *The FCPA Blog* (17 July 2015), online: <http://www.fcpablog.com/blog/2015/7/17/jackpot-pharma-whistleblower-awarded-33-million.html>.

[131] Hyde & Savage (2015) at 45.

[132] Dworkin & Brown (2013) at 668.

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5.3 A Brief Discussion of Federal Whistleblowing Protection in the Private Sector

In addition to the protections for public sector employees discussed above, the US is home to legislation protecting workers in the private sector. Two of these, the *Sarbanes-Oxley Act of 2002* (*SOX*)[133] and the *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010* (*Dodd-Frank Act*),[134] operate on the federal level. *SOX* was introduced in response to a number of scandals:

> Beginning in 2001, companies such as Enron, WorldCom, Global Crossing and Tyco became familiar names as accounting fraud and other business abuses became public …. Publicized abuses extended beyond accounting fraud, as reflected by Enron's manipulation of the energy markets in California, manipulation that stole millions of dollars from ratepayers and precipitated a crisis in that state …. Employees of these companies were aware of fraud and other abuses, but failed to come forward from fear of retaliation or found their warnings ignored. Some who came forward faced harassment. In response to the public outcry and the disclosed weaknesses in laws regulating corporate conduct, Congress enacted and George W. Bush signed the Sarbanes-Oxley Act of 2002.[135]

SOX applies to companies traded publicly, and it "calls for companies to establish a code of ethics and whistleblowing procedures."[136] This has international ramifications, as all countries traded publicly in the US must comply with the requirements of *SOX*. One of these requirements is that companies should have mechanisms allowing for anonymous disclosures, which many companies have complied with through the use of independent telephone hotlines.[137] This method of reporting has proven problematic in respect to difficulties maintaining anonymity and delays in following up on disclosures.[138]

In 2008, the global financial crisis prompted the enactment of the *Dodd-Frank Act*. Under section 922 of the *Act*, whistleblowers are entitled to a reward if they provide information for SEC enforcement actions that lead to sanctions exceeding $1 million, including enforcement actions for *Foreign Corrupt Practices Act* [*FCPA*] violations. Section 922 also protects those who provide information to the SEC from retaliation from employers. Disclosures "must rest upon a reasonable belief that the information relates to the violation of any consumer financial protection contained in the Dodd-Frank Act or any rule, order, standard, or prohibition prescribed or enforced by the Bureau [of Consumer Financial Protection]."[139] Awards under this legislation have been large; for example, an award of over

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[133] *Sarbanes-Oxley Act of 2002*, Pub L No 107-204, 116 Stat 745.
[134] *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, Pub L No 111-203, 124 Stat 1376.
[135] Vaughn (2012) at 150.
[136] Dworkin (2010) at 37.
[137] *Ibid*.
[138] *Ibid*.
[139] Vaughn (2012) at 156.

$30 million was approved in 2014 and awarded in 2015, with additional payments subsequently approved with respect to related actions.[140] Although some commentators, such as Martin,[141] predict that the Dodd-Frank act will increase the number of *FCPA* investigations, Koehler predicts that its impact on *FCPA* enforcement will be negligible.[142] As of January 2015, no whistleblower awards have been made under the *Dodd-Frank Act* in connection with the *FCPA*.[143] According to the SEC's report for the fiscal year of 2015, out of a total of 3923 tips, 186 (nearly 5%) related to the *FCPA*.[144]

In addition to these pieces of legislation, a number of other laws in the US protect whistleblowers in the private sector.[145] Vaughn argues that private sector whistleblower legislation in the US has both positive and negative aspects:

> Relief under recent whistleblower laws is extensive, including reinstatement, back pay, compensatory damages, attorney fees and litigation costs, and specifically includes expert witness fees. The similarity between recent laws illustrates the application of a common model for their content. This similarity offers some advantages by tying them together and creating a body of federal private-sector whistleblower laws. For example, this similarity could empower some future reform such as a uniform federal law applying blanket protection to all private-sector whistleblowers. The similarity, however, has some disadvantages. Because the pedigree of these common elements rests on aspects of the Whistleblower Protection Act of 1989, applicable to federal employees, and of the Sarbanes-Oxley Act, these laws may be limited by restrictive interpretations of relevant statutory terms by the Federal Circuit in relation to the Whistleblower Protection Act and by the Department of Labor in relation to the Sarbanes-Oxley Act.[146]

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[140] US Securities and Exchange Commission, "2015 Annual Report to Congress on the Dodd-Frank Whistleblower Program" (16 November 2015) at 10, online: <https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf>.

[141] Tim Martin, *International Bribery Law and Compliance Standards* (Independent Petroleum Association of America, 2013) at 21, online: <http://www.ipaa.org/wp-content/uploads/downloads/2013/08/IPAA_BriberyLawPrimer_v10.pdf>.

[142] Mike Koehler, "Potpourri" (24 November 2014), *FCPA Professor* (blog), online: <http://www.fcpaprofessor.com/potpourri-13>.

[143] *Ibid*.

[144] US Securities and Exchange Commission, (16 November 2015) at 21, 28.

[145] Vaughn, (2012), at 152, states that "[t]he whistleblower provision of SOX heralded a decade of congressional enactment of private-sector whistleblower laws." In addition, the author at 154–155 calls attention to the *American Recovery and Reinvestment Act*, which distributes funds to governments on the local and state level (and, through them, to private contractors) for use on public projects; under this legislation, "[e]mployees may disclose gross management, waste, fraud, and abuse of stimulus funds."

[146] *Ibid* at 159.

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6. WHISTLEBLOWER PROTECTION IN THE UK: *PUBLIC INTEREST DISCLOSURE ACT 1998*

In the UK, whistleblowers are protected by *PIDA*. The passage of this legislation was preceded by a number of serious disasters that may have been prevented if employees had come forward with information; this "has been confirmed by the findings of the official inquiries … which found that staff had been aware of dangers but had not mentioned them for fear of retaliation, or had raised concerns and then been dismissed or led to resign."[147] For example, in 1987 a ship sank, killing 193 people, because its bow doors had been opened while sailing. Employees had raised concerns on five occasions about the risk that this caused, but the warnings were not heeded by management.[148] Prior to such tragedies and the subsequent introduction of *PIDA*, the cultural attitude in the UK strongly favoured loyalty to an employer and contractual obligations over disclosure of employment-related issues.[149] The common law did not provide much in way of whistleblower protection, and what protection existed was superseded in many cases by the "implied duties of the employment relationship, which explicitly barred British employees from publicly discussing private employment matters."[150] Now, many years since the introduction of *PIDA*, whistleblowers in the UK are viewed more positively by individuals and by the media.[151]

As already noted, *PIDA* has been lauded as one of the most comprehensive pieces of whistleblower protection legislation in the world, and is often cited as a "model" law due to its comprehensive coverage and tiered disclosure system.[152] In Vandekerckhove's examination of European whistleblower protection, for example, *PIDA* was used as a model against which various European laws were measured.[153] This is because *PIDA's* "three-tiered model" of disclosure aptly captures a preference for internal disclosure, while still accounting for the necessity of external disclosure in some situations. In doing so, it provides protection for both internal and external whistleblowing against a sliding scale of requirements:

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[147] Lucy Vickers, "Whistling in the Wind? The Public Interest Disclosure Act 1998" (2000) 20:3 LS 428 at 429.

[148] Public Concern at Work (November 2013) at 7.

[149] Vickers (2000) at 429.

[150] Mendelsohn (2009) at 734.

[151] Public Concern at Work (November 2013) at 9.

[152] Thad M Guyer & Nikolas F Petersen, "The Current State of Whistleblower Law in Europe: A Report by the Government Accountability Project" (2013) at 12, online: Government Accountability Project <http://whistleblower.org/sites/default/files/TheCurrentStateofWhistleblowerLawinEurope.pdf>, for example, states that the UK "is clearly the leader in whistleblower protection in Europe. The UK was one of the first European states to legislate on the protection of 'whistleblowers' and its law was even described as 'the most far-reaching whistleblower law in the world.'"

[153] Wim Vandekerckhove, "European Whistleblower Protection: Tiers or Tears?" in David B Lewis, ed, *A Global Approach to Public Interest Disclosure* (Edward Elgar, 2010).

> This legislation offers protection for internally raising concerns within and outside of the hierarchical line. It also offers protection for blowing the whistle to a prescribed regulator if the internal route failed. Finally, if that too was unsuccessful, wider disclosures are protected as well.[154]

PIDA's three-tiered model thus offers a balance between the interests of the employer in maintaining confidentiality, and the interests of the public in having employees disclose information related to workplace malpractice or corruption.[155] When a worker makes an internal disclosure, there is a presumption of legislative protection against reprisal as long as the worker has acted in good faith.[156] However, there are more requirements in order to receive protection under *PIDA* when disclosure is made to an external regulator or to the media. In order to make a disclosure to an external source, it must be the case that the whistleblower "reasonably believes that the information disclosed, and any allegation contained in it, are substantially true."[157] The whistleblower must not have acted for the purposes of personal gain, and it must have been reasonable to make the disclosure.[158] *PIDA* thus imposes increasingly onerous requirements (especially in terms of level of knowledge and reasonableness of belief) the further that the whistleblower gets from internal disclosure. The Canadian *Public Servants Disclosure Protection Act* (*PSDPA*), discussed below in Section 7.2, also has differing requirements depending on the recipient of the disclosure, but they are not as onerous. For example, disclosure to the public under the *PSDPA* is governed by section 16:

> **16.** (1) A disclosure that a public servant may make under sections 12 to 14 may be made to the public if there is not sufficient time to make the disclosure under those sections and the public servant believes on reasonable grounds that the subject-matter of the disclosure is an act or omission that
>
> > (a) constitutes a serious offence under an Act of Parliament or of the legislature of a province; or
> >
> > (b) constitutes an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment.[159]

[154] *Ibid* at 17.
[155] Mendelsohn (2009) at 738.
[156] *Public Interest Disclosure Act 1998* (UK), c 23 [*PIDA*], s 43C.
[157] *Ibid* s 43G(1)(b).
[158] *Ibid* s 43G(1)(c) and (e).
[159] *Public Servants Disclosure Protection Act*, SC 2005, c 46, s 16.

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The requirements for similar disclosure under *PIDA* are lengthier, to say the least:

> **43G.** (1) A qualifying disclosure is made in accordance with this section if—
>
> (a) the worker makes the disclosure in good faith,
>
> (b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
>
> (c) he does not make the disclosure for purposes of personal gain,
>
> (d) any of the conditions in subsection (2) is met, and
>
> (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.
>
> (2) The conditions referred to in subsection (1)(d) are—
>
> (a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,
>
> (b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or
>
> (c) that the worker has previously made a disclosure of substantially the same information—
>
> (i) to his employer, or
>
> (ii) in accordance with section 43F.
>
> (3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—
>
> (a) the identity of the person to whom the disclosure is made,
>
> (b) the seriousness of the relevant failure,
>
> (c) whether the relevant failure is continuing or is likely to occur in the future,
>
> (d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,
>
> (e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

> (f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.
>
> (4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.[160]

Thus, while *PIDA* may benefit from greater clarity in its requirements (as compared to *PSDPA*), it imposes a very heavy burden on a whistleblower who makes a disclosure to a source beyond an employer, legal advisor, Minister of the Crown, or other prescribed person.

PIDA's coverage is exceptionally expansive: it protects employees in both the public and private sectors, and it is broad enough to capture private contractors.[161] In addition, the legislation covers a wide range of wrongdoing under the purview of a protected disclosure: a disclosure qualifies as protected where the person who makes the disclosure reasonably believes that a criminal offence has been or is likely to be committed, there has been a failure to comply with legal obligations, there has been or is likely to be a miscarriage of justice, there is a risk to health, safety, or the environment, or information relevant to one of these areas faces deliberate concealment.[162] However, critics have suggested that there are downsides to having an exhaustive list of wrongdoing. Instead, *PIDA's* reach could be broadened by conferring some discretion on the courts: "PIDA might have provided better protection if it had included a list of matters automatically covered together with a final catch-all provision covering matters that, in the opinion of the court, are in the public interest."[163] The types of reprisals that whistleblowers are protected against are similarly broad, with the legislation stating that "[a] worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by this employer done on the ground that the worker has made a protected disclosure."[164] If a worker experiences reprisal, claims are made directly to the UK Employment Tribunal, rather than to a specialized body.[165] Remedies for reprisal include reinstatement, unlimited compensation, or reengagement.[166] *PIDA's* track record, in practice, can be summarized as follows:

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[160] *Public Interest Disclosure Act 1998* (UK), c 23 [*PIDA*], s 43G.
[161] Simon Wolfe et al (September 2014) at 60.
[162] *Public Interest Disclosure Act 1998* (UK), c 23 [*PIDA*], s 43B.
[163] Vickers, (2000) at 434. Similarly, a recent Report put forward by Public Concern at Work, (November 2013) at 17, suggests that *PIDA* ought to be amended to include a "non-exhaustive list of the categories of wrongdoing, including gross waste or mismanagement of funds and serious misuse or abuse of authority."
[164] *Public Interest Disclosure Act 1998* (UK), c 23 [*PIDA*], s 47B(1).
[165] Guyer & Petersen (2013) at 13.
[166] Vickers (2000) at 432.

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> In the first ten years of PIDA's operation, the number of claims made under it annually increased from 157 in 1999 to 1761 in 2009. This is still a small proportion (under 1%) of all claims made to Employment Tribunals. Over 70% of these claims were settled or withdrawn without any public hearing. Of the remaining 30%, less than a quarter (22%) won. There is only partial information on awards: in the known cases, the average compensation was £113,000 (the largest single award was over £3.8m) and the total known compensation was £9.5m.[167]

Despite the broad scope of *PIDA* and its excellent reputation, a recent review of the legislation by the non-profit Public Concern at Work identified a number of opportunities for improvement.[168] Among these recommendations were the implementation of a Code of Practice, and the simplification of the legislative language. A Code of Practice would help to clarify the rights of whistleblowers and the appropriate procedural steps that whistleblowers should take when disclosing information internally:

> Such a code of practice must clearly set out principles enabling workers to raise concerns about a danger, risk, malpractice or wrongdoing that affects others without fear of adverse consequences. Any such arrangements must be proportionate to the size of the organisation and the nature of the risks faced. A code of practice should set out the requirements for arrangements covering the raising and handling of whistleblowing concerns and should include a written procedure for the raising of concerns. This procedure should include: clear assurances about protection from reprisal; that confidentiality will be maintained where requested; and should identify appropriate mechanisms for the raising of concerns, as well as, identifying specific individuals with the responsibility for the arrangements.[169]

Public Concern at Work called for more research to be done by the government regarding the possibility of creating an ombudsman or similar independent agency. Such an agency may be able to raise public awareness, conduct investigations into alleged reprisals and conduct strategic litigation, among other things.[170]

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[167] Stephenson & Levi (20 December 2012) at 20.

[168] Public Concern at Work (November 2013). See also David Lewis, "Ten Years of Public Interest Disclosure Legislation in the UK: Are Whistleblowers Adequately Protected?" (2008) 82 J of Bus Ethics 497 at 504 for a number of recommendations for reform.

[169] Public Concern at Work (November 2013) at 13.

[170] *Ibid* at 25.

7. WHISTLEBLOWER PROTECTION IN CANADA

7.1 The Development of the Common Law Defence

Prior to the introduction of dedicated whistleblower legislation, whistleblowers had to rely on protection provided by common law; in the employer-employee context, it was necessary to balance the duty an employee owed to their employer and an employee's right to freedom of expression. Slowly the balance began to shift, at least in theory, from prioritizing the duty of loyalty to one's employer, to protecting reasonable, good faith disclosures of alleged wrongdoing in the employer's organization. In *British Columbia v BCGEU*, arbitrator J.M. Weiler considered a matter wherein employees, who had taken an oath of office, publicly disclosed information that was critical of their public sector employer.[171] The arbitrator considered past decisions in the public sector context, and determined:

> These awards do not go so far as to prevent an employee, at the risk of losing his job, from making *any* public statements that are critical of his employer. An absolute "gag rule" would seem to be counter productive to the employer for it would inhibit any dissent within the organization. Employee dissidents can be a valuable resource for the decision-makers in the enterprise.[172]

However, Weiler went on to note that public criticism of this sort (that is, "going public") should be something of a last resort after internal processes have been exhausted.[173] This decision recognized that the disclosure of information may, in fact, benefit the public sector employer: "Neither the public nor the employer's long-term best interests are served if these employees, from fear of losing their jobs, are so intimidated that they do not bring information about wrongdoing at their place of employment to the attention of those who can correct such wrongdoing."[174]

A few years later, in *Fraser v Public Service Staff Relations Board*, the Supreme Court of Canada considered a case wherein the appellant faced disciplinary measures and eventually lost his position at the Department of Revenue Canada after criticizing governmental policy (specifically, metric conversion) in a letter to the editor published in a newspaper. The Court outlined three contexts in which it would be possible for a public servant to act against their duty of loyalty:

> As the Adjudicator indicated, a further characteristic is loyalty. As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada,

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[171] *British Columbia (Attorney General) v BCGEU*, [1981] BCCAAA No 9, 1981 CarswellBC 1176 (WL) [*BCGEU*].
[172] *Ibid* at para 39.
[173] *Ibid* at para 42.
[174] *Ibid* at para 43.

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> not the political party in power at any one time. A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. And indeed, in some circumstances, a public servant may actively and publicly express opposition to the policies of a government. **This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability**. But, having stated these qualifications (and there may be others), it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major Government policies. In conducting himself in this way the appellant, in my view, displayed a lack of loyalty to the Government that was inconsistent with his duties as an employee of the Government [emphasis added].[175]

Following this decision, different factors were identified within the jurisprudence as relevant considerations when determining if a public servant's conduct fit within one of the categories enumerated by the Supreme Court.[176]

After the introduction of the *Canadian Charter of Rights and Freedoms*, and the enshrinement of freedom of expression therein, the Federal Court stated that "[t]he common law duty of loyalty as articulated in *Fraser* sufficiently accommodates the freedom of expression as guaranteed by the *Charter*, and therefore constitutes a reasonable limit within the meaning of section 1 of the *Charter*."[177]

7.2 Federal Legislation: The *Public Servants Disclosure Protection Act*

This section focuses on federal whistleblower legislation. A description of provincial whistleblower laws is beyond the scope of this chapter. It should be noted, however, that a number of provinces have developed legislation to protect provincial public sector employees. This provincial whistleblower protection legislation falls under three general categories: the labour board and ombudsman model (present in Manitoba, New Brunswick, and Nova Scotia), the labour board and integrity commissioner model (present in Ontario and Quebec), and the integrated model exclusive to the integrity commissioner (present in Saskatchewan and Alberta).[178] In Quebec, in its *Rapport de la Commission d'enquête sur l'octroi*

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[175] *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455, 1985 CarswellNat 145 at para 46 (WL).
[176] "The Basics of Whistleblowing and Reprisal" (February 2012) at 5, online: Public Servants Disclosure Protection Tribunal Canada <http://www.psdpt-tpfd.gc.ca/ResourceCentre/ArticlesAnalyses/BasicsWhistleblowing-eng.html>.
[177] *Haydon v R*, [2001] 2 FC 82, 2000 CarswellNat 2024 at para 89 (WL).
[178] "A Comparison of Disclosure Regimes in Canada" (October 2013) at 2, online: Public Servants Disclosure Protection Tribunal Canada <http://www.psdpt-tpfd.gc.ca/ResourceCentre/ArticlesAnalyses/DisclosureRegimes-eng.html>.

et la gestion des contrats publics dans l'industrie de la construction, the Charbonneau Commission recommended improving the support and protection of whistleblowers by protecting confidentiality regardless of the method of reporting, providing support to whistleblowers, and offering financial support if necessary.[179] The Commission recognized that wrongdoing can be difficult to detect without the assistance of *lanceurs d'alerte*, and that people may not report wrongdoing due to a fear of reprisals.[180] The Commission noted the limitations of current whistleblower protections, which are limited in scope and may be difficult to understand, and advocated for a more general system of whistleblower protection.[181] Several of these concerns were addressed in *An Act to Facilitate the Disclosure of Wrongdoings related to Public Bodies*, which came into force on May 1, 2017.

Federal public sector employees have been governed by the *Public Servants Disclosure Protection Act* (*PSDPA*) since it came into force on April 15, 2007.[182] The *PSDPA* reflects the principles that have developed through the case law, but offers a more structured and robust approach to the protection of reporting persons; in other words, the legislation "maintains the integrity of the "whistleblower" defence from the jurisprudence and builds upon it."[183] The Preamble sets out the guiding values underlying the legislation:

> Recognizing that
>
> the federal public administration is an important national institution and is part of the essential framework of Canadian parliamentary democracy;
>
> it is in the public interest to maintain and enhance public confidence in the integrity of public servants;
>
> confidence in public institutions can be enhanced by establishing effective procedures for the disclose of wrongdoings, and by establishing a code of conduct for the public sector;
>
> public servants owe a duty of loyalty to their employer and enjoy the right to freedom of expression as guaranteed by the *Canadian Charter of Rights and Freedoms* and that this Act strives to achieve an appropriate balance between those two important principles;

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[179] France Charbonneau & Renaud Lachance, "Stratagèmes, causes, conséquences et recommandations" in *Rapport final de la Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction* (November 2015) at 111, online: Gouvernement du Québec <https://www.ceic.gouv.qc.ca/fileadmin/Fichiers_client/fichiers/Rapport_final/Rapport_final_CEIC_Tome-3_c.pdf>. [only available in French]

[180] *Ibid* at 109.

[181] *Ibid* at 110-111.

[182] *Public Servants Disclosure Protection Act*, SC 2005, c 46.

[183] *El-Helou v Courts Administration Service*, 2011 PT 01 at para 45 [*El-Helou No. 1*].

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> the Government of Canada commits to establishing a Charter of Values of Public Service setting out the values that should guide public servants in their work and professional conduct[184]

The *PSDPA* dictates the parameters of what qualifies as a protected disclosure.[185] This means that if a public sector worker "blows the whistle" on issues that are outside of the purview of a protected disclosure, he or she will not have recourse to the legislation. Section 8 of the legislation enumerates the "wrongdoings" for which disclosure is protected, including contravention of legislation, misuse of public funds, gross mismanagement, acts or omissions creating "substantial and specific" danger to health and safety of people or the environment, breach of codes of conduct established under the *PSDPA* and counseling a person to commit one of these wrongdoings.[186] This definition signifies a legislative attempt to itemize the kinds of conduct that would be considered corrupt or undesirable within a public sector institution, and the provision makes it clear that not just *any* disclosure will trigger legislative protection. This is problematic, as whistleblowers must (1) have enough knowledge of the legislative protection to know whether the wrongdoing of which they have knowledge falls within the purview of the legislation and (2) have enough knowledge of the wrongdoing *itself* to know if it falls within one of these categories. Thus, this approach is overly restrictive, and the legislation would be improved by a broader or open-ended understanding of wrongdoing.

The *PSDPA* covers those working in the federal public sector, but it does not extend to protect disclosures by those working in the Canadian Forces, the Communications Security Establishment, or the Canadian Security Intelligence Service.[187] However, these excluded groups are required to create internal disclosure mechanisms under section 52 of the *PSDPA*, which states:

> As soon as possible after the coming into force of this section, the person responsible for each organization that is excluded from the definition of "public sector" in section 2 must establish procedures, applicable to that organization, for the disclosure of wrongdoings, including the protection of

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[184] *Public Servants Disclosure Protection Act*, SC 2005, c 46, Preamble.

[185] Legislation often uses terms such as "protected disclosure" rather than the colloquial "whistleblowing." One reason for this may be, as suggested in David Lewis, AJ Brown & Richard Moberly, "Whistleblowing, Its Importance and the State of the Research" in AJ Brown et al, eds, *International Handbook on Whistleblowing Research* (Edward Elgar, 2014) at 3, that the term whistleblower has "negative historical connotations, in many settings, alongside or overwhelming any positive ones, particularly in countries where oppressive governments have encouraged citizens to denounce the activities of political opponents."

[186] *Public Servants Disclosure Protection Act*, SC 2005, c 46, s 8.

[187] *Public Servants Disclosure Protection Act*, SC 2005, c 46, s 2(1).

> persons who disclose the wrongdoings. Those procedures must, in the opinion of the Treasury Board, be similar to those set out in this Act.[188]

Again, only those disclosures that qualify will warrant the protection of the legislation.

The *PSDPA* also outlines the appropriate methods of disclosure. Section 12 provides for internal disclosure, s. 13 allows external disclosure to the Commissioner, and s. 16(1) provides for limited circumstances under which the disclosure may be made to the public. This system was summarized by the Public Servants Disclosure Protection Tribunal in their first interlocutory decision, *El-Helou v Courts Administration Service* (*El-Helou No. 1*), as follows:

> The Act creates a much broader system for disclosure protection within the public service at several junctures and at different levels: internally to a supervisor or the departmental Senior Officer (section 12) of a department or agency; externally to the Commissioner (section 13); or where there is not sufficient time to disclosure a serious offence under Canadian legislation or an imminent risk of a substantial and specific danger, the disclosure may be made to the public (subsection 16(1)).[189]

This tiered system of disclosure attempts to operationalize the best practices principles discussed, above, in Section 4.3.2. Internal disclosure is prioritized, but procedures and requirements are in place for disclosures externally and to the media.

Section 19 prohibits reprisals against public servants, and section 19.1 lays out the process through which a public service employee can complain about an alleged reprisal. "Reprisal" is a defined term within section 2 of the *PSDPA* to include actions such as disciplinary measures, demotion, employment termination, or "any measure that adversely affects the employment or working conditions of the public servant."[190] The *PSDPA* relies on a central agency, the Office of the Public Sector Integrity Commissioner appointed under section 39, to "receive reports from public servants of wrongdoing, to investigate them and to make recommendations to correct them."[191] The *PSDPA* also mandated the creation of the Public Servants Disclosure Protection Tribunal to adjudicate claims of reprisals that the Commissioner deems appropriate; arguably, "[t]he existence of an independent tribunal with quasi-judicial powers to adjudicate reprisals is reflective of Parliament's intention of emphasizing and addressing the gravity of retaliation against individuals who come forward to report suspected wrongdoing."[192] Section 21.7 lays out the potential remedies that

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[188] *Ibid*, s 52. Section 53 also provides some limited and discretionary protection to these groups: "The Governor in Council may, by order, direct that any provision of this Act applies, with any modifications that may be specified in the order, in respect of any organization that is excluded from the definition of 'public sector' in section 2."

[189] *El-Helou v Courts Administration Service*, 2011 PT 01 at para 47 [El-Helou No. 1].

[190] *Public Servants Disclosure Protection Act*, SC 2005, c 46, s 2.

[191] Latimer & Brown (2008) at 779.

[192] OECD (2016) at 152.

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the Tribunal is able to order. Remedies include reinstating the whistleblower's employment, rescinding measures taken by the employer and paying compensation to the complainant.[193] However, it is problematic that these remedies represent a closed list; in other words, the Tribunal has limited power to respond to the specific circumstances of the case, and must find an appropriate remedy from within the list. Furthermore, the remedies listed focus on rescinding detrimental actions, reinstating an employee, or paying compensation. If the reprisal faced by the complainant cannot be easily reduced to a dollar value (if, for example, the employee has been harassed or has missed opportunities for promotion), then it is unclear how the Tribunal could fashion an appropriate remedy.

In *El-Helou No. 1*, the Tribunal affirmed the potential strength of this legislation: "The Tribunal recognizes that it must play its role to ensure that this new legislative scheme not be 'enfeebled'."[194] This approach was developed in *El-Helou v Courts Administration Service* (*El-Helou No. 3*), where the Tribunal noted that the goal of the legislation and of the adjudicative function of the Tribunal ought to be on the substantive content of the disclosure and the alleged reprisal, and not on the possible procedural defects of an Application. The Tribunal highlighted the principles of natural justice:

> It is in this context that an examination of the Act must be conducted. In considering the Act as a whole and the part of the Act pertaining to complaints of reprisal, it becomes clear that **Parliament focussed on the substance of the complaint**, and not on who may or may not have been identified as potential respondents in the original complaint. In addition, as discussed below, the processes for reprisal complaints demonstrate Parliament's intention to ensure that notice be provided to potential respondents, whether or not they were named in a complaint. This requirement of notice ought not to be considered as merely a procedural formality, but rather, as an important step in ensuring fairness to all of those affected by an investigation and, possibly, an Application before the Tribunal. In the course of an investigation, other parties might be identified and Parliament wanted to ensure that the principles of natural justice could be addressed as a complaint progressed [emphasis added].[195]

In line with this approach, the Tribunal in *El-Helou v Courts Administration Service* (*El-Helou No. 4*) recognized that it may be appropriate to adopt more relaxed standards regarding the admission of evidence. This represents the Tribunal's desire to deal with the substance of the reprisal, rather than evidentiary or procedural issues that may prevent a complainant from accessing justice. The Tribunal stated:

> In addition, there is flexibility in the Act as to how the Tribunal admits evidence, which strongly suggests that opinion evidence and hearsay could be subject to more relaxed standards. Nonetheless, **the Tribunal would**

[193] *Public Servants Disclosure Protection Act*, SC 2005, c 46, s 21.7.
[194] *El-Helou v Courts Administration Service*, 2011 PT 01 at para 49 [*El-Helou No. 1*].
[195] *El-Helou v Courts Administration Service*, 2011 PT 03 at para 29 [*El-Helou No. 3*].

> **need to ensure fairness in its proceedings for all the parties, and adopt a focused approach to its proceedings and the tendering of evidence**. In this manner, it can assure that its time and resources are utilized judiciously.
>
> The Tribunal recognizes that it must weigh evidence carefully, given the serious consequences of the proceedings. Nevertheless, the provisions of the Act pertaining to a more flexible approach to the admissibility of evidence guide the Tribunal, and suggest that **a formalistic approach ought not to be adopted**. This general stance is also supported by Supreme Court of Canada jurisprudence. Given the requirements of a hearing and the mandate of the Tribunal, it must be cautious in any request that asks that it rule in an anticipatory fashion on the admissibility of evidence [emphasis added].[196]

The Federal Court and the Federal Court of Appeal have begun to grapple with certain sections of the *PSDPA* through judicial reviews of decisions made under the legislation. For example, in *Agnaou v Canada (Attorney General)*, the Federal Court of Appeal allowed the appeal of a whistleblower against a decision of the Deputy Public Sector Integrity Commissioner and declared his complaint of reprisal to be admissible.[197] In reaching its decision, the Court commented on the purpose of the *PSDPA* and the role of the Commissioner within the scheme set out in the legislation, stating:

> The Commissioner clearly has very broad discretion to decide not to deal with a disclosure or not to investigate under section 24 of the Act. This stems not only from the grammatical and ordinary sense of the terms used, but also from the context, such as the type of reasons that the Commissioner may rely on to justify his decision. For example, under paragraph 24(1)(*b*), the Commissioner may decide not to commence an investigation because the subject-matter of the disclosure or the investigation is not sufficiently important, and under paragraph 24(1)(*f*), he or she may decide that there is a valid reason for not dealing with the subject-matter of the disclosure or the investigation. This suggests a considered analysis rather than a summary review. The Act sets no time limit for deciding this question, or for filing a disclosure after a wrongdoing has been committed.
>
> It is also clear that although the person making a disclosure has a certain interest in the case, the purpose of the Act is to denounce and punish wrongdoings in the public sector and, ultimately, build public confidence in the integrity of federal public servants. The public interest comes first, and it is the Commissioner's responsibility to protect it. This explains why, for example, the Commissioner may decide that the subject-matter of the disclosure is not sufficiently important; conversely, he or she may expand an investigation and consider wrongdoings uncovered in the course of that

[196] *El-Helou v Courts Administration Service*, 2011 PT 04 at paras 73-74 [*El-Helou No. 4*].
[197] *Agnaou v Canada (Attorney General)*, 2015 FCA 29.

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> investigation without the need for any disclosure to have been made (section 33 of the Act).
>
> The role of the Commissioner is crucial. The Commissioner is the sole decision-maker throughout the process. He or she has the power not only to refuse to investigate, but also to recommend disciplinary action against public servants who engage in wrongdoings. Among other things, the Commissioner may also report on "any matter that arises out of an investigation to the Minister responsible for the portion of the public sector concerned or, if the matter relates to a Crown corporation, to its board or governing council" (section 37 of the Act).[198]

The Court also highlighted the differences between the Commissioner's discretion in deciding whether to deal with the subject matter of disclosures, as discussed above, and the Commissioner's discretion with respect to complaints of reprisals. The Court stated:

> Parliament has established a very different process for reprisal complaints. In fact, this process is similar to the one provided for in the CHRA. There too, the public interest is a major concern. The disclosure of wrongdoings must be promoted while protecting the persons making disclosures and other persons taking part in an investigation into wrongdoings. However, as is often the case for complaints filed under the CHRA, reprisals complained of have a direct impact on the careers and working conditions of the public servants involved. The Act provides that a specific tribunal shall be established to deal with such matters, and that the Tribunal will be able to grant remedies to complainants, as well as impose disciplinary action against public servants who commit wrongdoings, where the Commissioner recommends it.
>
> In the process applicable to these complaints, the role of the Commissioner is similar to that of the Commission. Like the Commission, he or she handles complaints and ensures that they are dealt with appropriately. To do so, the Commission reviews complaints at two stages in the process before deciding whether an application to the Tribunal is warranted to protect the public servants making disclosures.
>
> …
>
> Like Justice Rothstein (then of the Federal Court) in *Canada Post Corporation,* who had before him a decision dismissing a complaint under section 41 of the CHRA, I find that at the admissibility stage, the Commissioner must not summarily dismiss a reprisal complaint unless it is plain and obvious that it cannot be dealt with for one of the reasons described in subsection 19.1(3) of the Act. This interpretation respects Parliament's intention that complaints be dealt with in a particularly expeditious manner (within

[198] *Ibid* at paras 59-61.

> 15 days) at this first stage in the process. It is also consistent with the principle generally applied when a proceeding is summarily dismissed, thereby depriving the complainant of his or her right to a remedy. Finally, a cursory review of the complaint at this preliminary stage also avoids duplicating the investigation and repeating the exercise set out in subsection 20.4(3) of the Act.[199]

In *Therrien v Canada (Attorney General)*, the Federal Court dismissed an application for judicial review of the Commissioner's decision not to investigate allegations of wrongdoing.[200] In this case, the whistleblower made disclosures both internally and publically regarding alleged pressures by Service Canada to deny or limit claims for Employment Insurance; her employment was ultimately terminated, and her reliability status was revoked.[201] The Court upheld the Commissioner's decision not to investigate the complaints because they were already the subject of a grievance process, and under s. 19.3(2) the Commissioner is directed not to deal with such complaints.[202]

In *Canada (Attorney General) v Canada (Public Sector Integrity Commissioner)*, the Federal Court considered s. 23(1) for the first time.[203] This section indicates that the Commissioner cannot deal with a disclosure if the subject-matter of that disclosure is already being dealt with by "a person or body acting under another Act of Parliament."[204] In reaching its conclusion, the Court emphasized the need to consider the entirety of the Act and the context of the legislation, stating:

> The parties have focused on the phrases in subsection 23(1) but not necessarily in the context of the *PSDPA*. Given the importance of whistleblower legislation to "denounce and punish wrongdoings in the public sector" the phrase "dealing with" must take its meaning from this context. The phrase cannot be interpreted so broadly as to frustrate the scheme and purpose of the legislation. Simply bringing the wrongdoing to the attention of the CEO is but one aspect of the purpose of an investigation. Public exposure is mandatory whenever an investigation leads to a finding of wrongdoing.
>
> The legislation addresses wrongdoings of an order of magnitude that could shake public confidence if not reported and corrected. When the Commissioner is "dealing with" an allegation of wrongdoing, it is something that, if proven, involves a serious threat to the integrity of the public service. That is why, before an investigation is commenced, there is

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[199] *Ibid* at paras 62-63, 66.
[200] *Therrien v Canada (Attorney General)*, 2015 FC 1351.
[201] *Ibid* at paras 3-5.
[202] *Ibid* at para 18.
[203] *Canada (Attorney General) v Canada (Public Sector Integrity Commissioner)*, 2016 FC 886.
[204] *Public Servants Disclosure Protection Act*, SC 2005, c 46, s 23(1).

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> a period of analysis to determine there is some merit to the disclosure. That is also why the investigators are separate from the analysts.
>
> The focus of the disclosure provision of the *PSDPA* is to uncover past wrongs, bring them to light in public and put in place corrections to prevent recurrence.
>
> …
>
> The *PSDPA* is remedial legislation. As such, section 12 of the Interpretation Act, RSC 1985, c.I-21 requires it to be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". Parliament cannot have intended that subsection 23(1) be read so broadly that a procedure undertaken months after the Commissioner begins to deal with a disclosure, led by another body for a different purpose, headed toward the qualitatively different outcome of a private report, regardless of the finding, and examining only recent, very different, evidence should be sufficient to prevent the Commissioner from determining whether a serious past allegation of wrongdoing occurred and, if so, exposing it.[205]

The Court ultimately found that the Commissioner made a reasonable decision in not ending the investigation into the alleged wrongdoing when informed that Transport Canada was dealing with the same incidents (that is, the actions of the Ottawa Air Section of the RCMP Air Services Branch in making false log entries).

A final example is *Gupta v Canada (Attorney General)*, wherein the Federal Court of Appeal considered a judicial review of the Commissioner's decision not to investigate a whistleblower's allegations that he faced reprisals and the threat of reprisals following a disclosure of wrongdoing.[206] The Court dismissed the whistleblower's appeal, finding that the Commissioner was reasonable in deciding that some of the appellant's allegations of reprisals were out of time according to s. 19.1(2) of the *PSDPA* and in deciding not to grant an extension of time; in addition, the Court found it was reasonable to conclude that some of the allegations did not meet the definition of reprisals under the legislation.[207] When considering the limitation period in the *PSDPA*, the Court stated:

> The language of this subsection is clear – the sole criterion to determine whether a complaint is filed on time is one of knowledge or imputed knowledge of specific incidents of reprisal. The allegation that the most recent act of reprisal is part of an ongoing chain of reprisals does not bring the earlier events into the 60-day time limit.[208]

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[205] *Canada (Attorney General) v Canada (Public Sector Integrity Commissioner)*, 2016 FC 886 at paras 105-107, 113.
[206] *Gupta v Canada (Attorney General)*, 2016 FCA 50.
[207] *Ibid* at para 2.
[208] *Ibid* at para 5.

However, the Court did acknowledge that a victim of reprisal who is "reasonably confused or unaware of the nature of the conduct against her or him" would not be captured by the limitations period, as the 60-day period begins when the victim "ought to have known" about a reprisal.[209] In addition, a victim may be able to make a compelling case for the extension of time to file a complaint if the reprisals were a sequence of connected events; in this case, those were not the facts.[210]

The *PSDPA* is overdue for the five year review mandated under s. 54.[211] Such a report would provide crucial information on the effectiveness, in practice, of the legislation, and it is therefore crucially important that this legislatively-mandated review be conducted. A 2011 Report that examined the legislation's effectiveness in its first three years by the Federal Accountability Initiative for Reform (FAIR),[212] a Canadian non-governmental organization, was scathing in its review of the federal legislation:

> When FAIR testified to Parliament we predicted that the legislation would fail, but we could not have imagined how badly. A combination of flawed legislation and improper administration created a system that in three years uncovered not a single finding of wrongdoing and protected not a single whistleblower from reprisals. The Commissioner appointed to protect government whistleblowers resigned in disgrace following a report by the Auditor General condemning her behaviour. The credibility of the entire system is currently in tatters: it needs a complete overhaul.
>
> …
>
> The basic approach of the Act – creating a complete new quasi-judicial process just for whistleblowers – is misguided and suspect, creating a secretive, unaccountable regime, hermetically sealed off from our courts and from the media. Experience has shown that watchdog agencies constituted like this are invariably protective of the establishment and indifferent or even hostile to whistleblowers.
>
> …
>
> The text of the law is a bloated, unwieldy mess. It creates a labyrinth of complex provisions, full of ambiguities, exceptions and repetition, which almost no-one can claim to understand fully. It stands in stark contrast to

[209] *Ibid* at para 7.
[210] *Ibid* at para 8.
[211] *Public Servants Disclosure Protection Act*, SC 2005, c 46, s 54.
[212] The website for the Federal Accountability Initiative for Reform has been inactive since Executive Director David Hutton stepped down. The website included "3,000 pages of valuable whistleblower resource material … [including] original reference works such as 'The Whistleblower Ordeal' and 'How Wrongdoers Operate'." See Allan Cutler, Sean Bruyea & Ian Bron, "Adieu to a Friend, Ally in Accountability Wars" (22 July 2014), online: Canadians for Accountability <http://canadians4accountability.org/2014/07/22/adieu-to-a-friend-ally-in-accountability-wars/>.

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> the brevity, simplicity and clarity that we find in whistleblower legislation that has proven to be effective.[213]

FAIR identifies the narrow scope of the law (applying only to workers in the federal public sector), restriction of reporting avenues and exclusion from the courts, restrictions contained in the definition of wrongdoing, weak provisions for the investigation and correction of wrongdoing, and likelihood of complaint rejection as among the failures of the *PSDPA*.[214] However, given the relative youth of the legislation at the time of this review, more up-to-date studies are required to determine if the *PSDPA* has outgrown any of these potential weaknesses. In addition, it is possible to interpret the lack of any finding of wrongdoing differently; that is, it could be interpreted as a sign that little wrongdoing has actually occurred. In a 2010 article, for example, Saunders and Thibault state:

> There are so few real cases of wrongdoing that the public sector as a whole remains woefully unpracticed in working through an actual disclosure. Indeed, in the first two years after Canada's latest whistleblower legislation came into effect, not a single case of wrongdoing was uncovered. In the absence of practice, there are no lessons learned, no "sharpening of the saw" that normalizes the act of disclosure.
>
> …
>
> The limited volume of disclosures since the introduction of stronger mechanisms could mean one of two things. It could mean that the legislation has deterred wrongdoers who are convinced that the code of silence, which still lingers within the public service, will not hold in the face of disclosure protection. Alternatively, it could mean that there really are not many instances of wrongdoing to expose.[215]

The September 2014 G20 Report echoes many of FAIR's negative findings, albeit in less colourful language. The Report notes that:

> As of May 2014 there were four active cases before the Public Servants Disclosure Protection Tribunal, where retaliation victims can seek remedies and compensation. Three of the cases involve long-term employees of Blue Water Bridge Canada [a Crown corporation subsequently renamed Federal Bridge Corporation Limited] who were all fired on 19 March 2013, including the vice president for operations. The PSIC says the former CEO misused public money and violated the code of ethics when he gave two managers severance payments worth $650,000.

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[213] FAIR, "What's Wrong with Canada's Federal Whistleblower Legislation: An Analysis of the *Public Servants Disclosure Protection Act* (PSDPA)" (24 February 2011) at 2.
[214] *Ibid* at 5–13.
[215] Kelly L Saunders & Joanne Thibault, "The Road to Disclosure Legislation in Canada: Protecting Federal Whistleblowers?" (2010) 12:2 Pub Integrity 143 at 156.

> In five of six cases that the Integrity Commissioner has referred to the Tribunal, he has declined to ask the Tribunal to sanction those responsible for the reprisals. **In the one case in which the Commissioner called for sanctions, he has since reversed himself and now says there were no reprisals.** The whistleblower's lawyer has initiated a judicial review to contest this reversal.
>
> In April 2014 Canada's Auditor General found "gross mismanagement" in the handling of two PSIC cases. The audit criticized 'buck-passing' by top managers, slow handling of cases, the loss of a confidential file, poor handling of conflicts of interest, and the inadvertent identification of a whistleblower to the alleged wrongdoer [emphasis added].[216]

A review of UNCAC implementation by TI, conducted in October 2013, emphasizes the critical need for a review of the Canadian legislation.[217] The review notes that the *PSDPA* does not make public interest the foremost concern in the protection of whistleblowers, and instead emphasizes the balance of rights between duty to one's employer and an employee's freedom of expression.[218] Furthermore, the Transparency International review notes that access to justice issues are implicated in Canada's statutory regime:

> Whistleblowers often have to bear their own legal costs, while accused wrongdoers will typically have access to the financial and legal resources of the organization. The review also raises questions about the implementation of the *PSDPA*, raising concerns regarding the Commissioner's power to adequately investigate claims of reprisal, the first Commissioner's failure to investigate allegations of reprisals against

[216] Simon Wolfe et al (September 2014) at 29.
[217] Transparency International Canada, "UNCAC Implementation Review Civil Society Organization Report" (October 2013) at 15.
[218] *Ibid.*

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> her own staff, and statistics that show few inquiries by whistleblowers receive full investigations.[219]

In 2015, research into the whistleblowing culture in the federal public sector in Canada found that when focus group participants were shown a short informative video about information disclosure, the "most frequently identified aspect of the video to which participants reacted negatively or which created some degree of concern was the prospect of appearing before a tribunal of judges in the case of reprisals."[220]

The 2014-2015 Annual Report produced by the Treasury Board of Canada, in compliance with s. 38.1 of the *PSDPA*, "includes information on disclosures made according to internal procedures established under the Act, as reported to the Office of the Chief Human Resources Officer (OCHRO) by the senior officers for disclosures or the chief executives of public sector organizations."[221] Yet, the Annual Report does **not** discuss claims of reprisals, or disclosures made of the Office of the Public Sector Integrity Commissioner of Canada.[222] The report contains information regarding disclosures received under the *PSDPA*—which organizations received disclosures, and how these disclosures were acted upon, covering the

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[219] *Ibid* at 16–18. Regarding investigatory powers, the review states at 16 that "[u]nder the PSDPA, the Integrity Commissioner has full powers under Part II of the *Inquiries Act* to investigate disclosures of wrongdoing [s 29]. However, when investigating complaints of reprisals against a whistleblower, the Commissioner is not given comparable powers [ss 19.7-19.9]." In regard to the first Commissioner's tenure, the Report states at 17–18:

> In 2010, the Auditor General reported that the first Public Sector Integrity Commissioner, Christiane Ouimet, failed to finalize or implement operational guidance to enable investigations to be conducted. The Commissioner's Office failed to robustly investigate complaints: from 2007 to 2010, the Commissioner's Office received 228 disclosures of wrongdoings or complaints; out of these only seven received a formal investigation of the 86 closed operational files, in "many cases" the decision to not formally investigate or otherwise dismiss disclosures of wrongdoing and complaints was not supported by the material in the Commissioner's file. In addition, the Auditor General's investigation found that the Commissioner had engaged in retaliatory action against employees whom the Commissioner believed had complained about her. A new Commissioner was appointed in December 2011.

The review notes, at 18, that between 2007-2013 the Commissioner "[r]eceived 1365 inquiries and 434 disclosures; Began 55 investigations; Completed 34 investigations; Found 5 instances of wrongdoing; and Sanctioned 0 wrongdoers" [emphasis removed].

[220] Phoenix SPI, "Exploring the Culture of Whistleblowing in the Federal Public Sector" (December 2015) at 21, online: <http://epe.lac-bac.gc.ca/100/200/301/pwgsc-tpsgc/por-ef/office_public_sector_integrity_commissioner/2016/2015-12-e/report.pdf>.

[221] Treasury Board of Canada Secretariat, *Annual Report on the Public Servants Disclosure Protection Act 2014-15*, Catalogue No BT1-18/2015E-PDF (Ottawa: Treasury Board of Canada, 2015) at 1 [*Annual Report*]. The full text is available online at *Annual Report on the Public Servants Disclosure Protection Act 2014-15* (26 January 2016), online: Treasury Board of Canada <https://www.tbs-sct.gc.ca/psm-fpfm/ve/psdp-pfdar/psdpa-pfdar-1415-eng.pdf>.

[222] *Ibid* at 1.

146 active federal organizations that are governed by the *PSDPA*.[223] In 2014-2015 there were 200 internal disclosures made in 36 organizations, compared to 194 disclosures in 2013-2014 and 207 disclosures in 2012-2013.[224] In response to these disclosures, organizations carried out 78 investigations and found wrongdoing in 13 cases; 8 organizations reported that they had taken corrective measures in response to disclosures.[225] The Annual Report does not contain information in regard to the specific investigations or findings of wrongdoing by organizations; however, the statistics may not reflect the actual number of individual whistleblowers making internal disclosures, as "[s]ometimes a disclosure will contain several allegations of wrongdoing … the report captures the number of potential incidents of wrongdoing to be investigated, which is a higher number than the number of public servants making disclosures."[226] When organizations did not act on disclosures of wrongdoing, they reported that it was generally because "[t]he individual making the disclosure was referred to another, more appropriate, recourse mechanism because of the nature of the allegation(s); and [t]he disclosure did not meet the definition of wrongdoing under section 8 of the Act."[227] In the 2013-2014 Annual Report, it was noted that there has been improvement in the areas of education and awareness:

> Based on information submitted by organizations, an increase in awareness activities and efforts has been observed for this reporting period. **Organizations are becoming more and more active in promoting the PSDPA**. They do so in different ways, such as awareness sessions intended for employees, managers and executives. In addition, written information is made available through emails to employees, internal websites, pamphlets and posters. Some organizations invite speakers, such as the Public Sector Integrity Commissioner, to give presentations to employees on the PSDPA. Many organizations also reported that a section of their organizational code of conduct is dedicated to disclosures under the PSDPA [emphasis added].[228]

It is difficult to determine what these numbers tell us about the success or failure of the *PSDPA*, beyond the fact that individuals are making internal disclosures of wrongdoing. Without data as to the number of individuals who *perceive* wrongdoing in the workplace, it is impossible to determine whether a high percentage of public sector workers actually blow the whistle on wrongdoing. The number of disclosures received under the *PSDPA* has

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[223] *Ibid* at 2.
[224] *Ibid*.
[225] *Ibid* at 2.
[226] *Ibid* at 3.
[227] *Ibid*.
[228] Treasury Board of Canada Secretariat, *Annual Report on the Public Servants Disclosure Protection Act 2013-14*, Catalogue No BT1-18/2014E-PDF (Ottawa: Treasury Board of Canada, 2014) at 1 [*Annual Report*]. The full text is available online at *Annual Report on the Public Servants Disclosure Protection Act 2013-2014* (27 August 2014), online: Treasury Board of Canada <https://www.canada.ca/en/treasury-board-secretariat/services/values-ethics/disclosure-protection/annual-report-public-servants-disclosure-protection-act-2013-2014.html>.

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ranged from a high of 291 in 2010-2011 to a low of 181 in 2008-2009.[229] These numbers may indicate that fewer public sector workers disclose wrongdoing in some years, or the numbers may demonstrate that less wrongdoing has occurred in those years.

Information on reprisals, and further information on disclosures of wrongdoing, is reported by the Office of the Public Sector Integrity Commissioner of Canada, and the recent numbers seem to indicate a positive trend when compared to the early years of the regime:

> The number of investigations launched has grown significantly since 2007. In 2013-2014, the Office investigated 23 cases (wrongdoing and reprisal). Understandably, not all investigations result in founded cases of wrongdoing or reprisal complaints being referred to the Public Servants Disclosure Protection Tribunal. All allegations of misconduct are however taken extremely seriously by PSIC staff and the Commissioner, and dealt with as expeditiously and fairly as possible.
>
> As of December 2014, the Office tabled 11 cases of founded wrongdoing before Parliament.
>
> The Office referred seven cases of reprisals to the Public Servants Disclosure Protection Tribunal since 2011-2012.
>
> In 2012-2013 and in December 2014, the Office also had two successful conciliations to bring about the settlement of cases, as agreed to by both parties.[230]

7.3 Securities Regulation in Canada: The Ontario Securities Commission Whistleblower Program

On July 14, 2016, the Ontario Securities Commission (OSC) launched a new enforcement initiative called the Office of the Whistleblower. This program is the first paid whistleblower program by a securities regulator in Canada, and largely resembles the Whistleblower Program of the United States Securities and Exchange Commission (SEC).[231] The Whistleblower Program allows eligible whistleblowers to report information regarding possible violations of Ontario securities law anonymously and, if the information results in

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[229] *Ibid* at 2.

[230] "Results" (9 August 2016), online: Office of the Public Sector Integrity Commissioner of Canada <http://www.psic.gc.ca/eng/results>.

[231] Briefly described in Section 5.3 of this chapter. See, generally, "Frequently Asked Questions" (21 July 2010), online: US Securities and Exchange Commission – Office of the Whistleblower <https://www.sec.gov/about/offices/owb/owb-faq.shtml>. The SEC Whistleblower Program was launched following the passage of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, [*Dodd-Frank Act*] in July 2010. See also Steve Szentesi, "The Time Has Come to Reward Competition Act Whistleblowers", *Canadian Lawyer* (23 January 2017), online: <http://www.canadianlawyermag.com/6309/The-time-has-come-to-reward-Competition-Act-whistleblowers.html>.

an enforcement action, receive an award of up to $5 million.[232] This section describes in detail the features of the OSC Whistleblower Program, drawing attention to those features that elicited commentary prior to and following the launch of the initiative. This section will also compare features of the OSC and SEC whistleblower programs, drawing attention to significant differences between their eligibility criteria and award determination structures.

7.3.1 Confidentiality

The OSC Whistleblower Program allows individuals to submit information related to potential violations of Ontario securities law to the Commission online or by mail. Anonymous submissions may be made through the program by retaining a lawyer who submits information on a whistleblower's behalf.[233] Before the OSC can submit an award to an anonymous whistleblower, the whistleblower will generally be required to provide their identity to the Commission to confirm that they are eligible to receive an award.[234] While the OSC policy includes a general commitment to make all reasonable efforts to keep a whistleblower's identity (and any potentially identifying information) confidential, there are specific exceptions. For example, during certain administrative proceedings under section 127 of the *Securities Act* (e.g., an order to terminate registration), disclosure of the whistleblower's identity may be required to allow the respondent an opportunity to make full answer and defence.[235]

The OSC Whistleblower Program also outlines the Commission's general policy of responding to requests for information relating to a whistleblower's identity (or other possibly identifying information) under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*).[236] While the Commission takes the position that information requests with respect to identifying information should be denied because specific *FIPPA* provisions protect such information, the ultimate decision to disclose in this context is made by the Information and Privacy Commissioner of Ontario or a court of competent jurisdiction.[237]

Taken together, the Commission's policies regarding the confidentiality of whistleblowers speak to the limits of whistleblower initiatives generally. A dedication to reasonable efforts to maintain confidentiality is important, but due to the nature of administrative law and

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[232] "OSC Launches Office of the Whistleblower" (14 July 2016), online: Ontario Securities Commission <http://www.osc.gov.on.ca/en/NewsEvents_nr_20160714_osc-launches-whistleblower.htm>.

[233] Ontario Securities Commission, "OSC Policy 15-601: Whistleblower Program" (14 July 2016), online: <http://www.osc.gov.on.ca/documents/en/Securities-Category1/20160714_15-601_policy-whistleblower-program.pdf> ("Policy Document"), s 3.

[234] *Ibid*, s 4.

[235] *Ibid*, s 11(a).

[236] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31.

[237] *Ibid*, s 12. The OSC cites two specific *FIPPA* provisions in support of its position that identifying information with respect to whistleblowers should be protected from disclosure under the *FIPPA*: section 14(1)(d) (protection of confidential sources of information in a law enforcement context) and section 21(3)(b) (protection of personal information compiled as part of an investigation into possible violations of the law).

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freedom of information legislation, confidentiality is far from guaranteed in all circumstances. In other words, despite the protections afforded by the OSC Whistleblower Program, whistleblowers are taking some risk of having their identities ultimately disclosed as a result of the information they submit to the Commission. Whether this risk of disclosure will dissuade would-be whistleblowers from making submissions is yet to be seen.

7.3.2 Eligibility Criteria for Whistleblower Awards

The OSC Whistleblower Program sets out criteria that both information and whistleblowers must fulfill before the Commission will consider issuing an award.

The criteria that information received from whistleblowers must meet in order to be award-eligible are designed to ensure that awards are only given for novel information that leads to an enforcement action. The information must relate to a serious violation of Ontario securities law, be original information, be voluntarily submitted, be "of high quality and contain sufficient timely, specific and credible facts" relating to an alleged violation of securities law, and be "of meaningful assistance to Commission Staff in investigating the matter and obtaining an award-eligible outcome."[238] To be eligible for a whistleblower award, all of these criteria must be met.[239] Consequently, if, for example, a whistleblower voluntarily provides original information related to a violation that is not of meaningful assistance to the Commission in its investigation, the information will not be eligible for a reward. Simply put, these conditions restrict the availability of whistleblower awards to information that has a direct and tangible impact on an investigation or proceedings.

Section 14(3) of the Policy Document lists disqualifying criteria that will render a piece of information ineligible for a whistleblower award. These criteria reflect several policy goals underlying the OSC Whistleblower Program. If information is misleading, untrue, speculative, insufficiently specific, public or not related to a violation of Ontario securities law, it is ineligible for a whistleblower award. These requirements reflect the purpose of the program, which is to obtain high-quality information regarding potential violations of securities law. Further, information subject to solicitor client privilege is ineligible for a whistleblower award, given the broad systemic interest in maintaining solicitor client privilege. Lastly, information obtained by a means that constitutes a criminal offence will be ineligible for an award, as the Commission does not want to encourage or be complicit in theft, fraud or other illegal means of acquiring information. These common-sense disqualifying criteria ensure that whistleblowers are encouraged to submit only information that is legally obtained and can be sufficiently relied upon to advance an investigation or proceedings.

Section 15 of the Policy Document describes categories of individuals who would "generally be considered ineligible for a whistleblower award."[240] Many of these categories refer to roles that render a person ineligible for an award, such as counsel for the subject of the

[238] *Ibid*, s 14(1).
[239] *Ibid*, s 14(2).
[240] Ibid, s 15(1).

whistleblowing submission or an employee of the Commission or a self-regulatory body. Other provisions disqualify a whistleblower from award eligibility on the basis of their conduct as a whistleblower. For example, section 15(1)(a) excludes individuals from eligibility if they "without good reason refused a request for additional information from Commission Staff."[241]

It should be noted that awards would generally not be given to "those who obtained or provided the information in circumstances which would bring the administration of the [Whistleblower Program] into disrepute."[242] This general language removes the incentive for individuals to engage in disputable activities in pursuit of a financial award, and limits eligibility of awards to those who voluntarily submit original, high-quality information without resorting to illegal means to acquire that information.

While individuals who fall into the categories listed under section 15(1) of the policy will generally be ineligible to receive a whistleblower award, section 15(2) recognizes limited exceptions regarding certain categories. Per section 15(2), a whistleblower who would generally be ineligible under sections 15(1)(d)-(h) may be eligible for awards under certain circumstances. These categories describe individuals who are generally ineligible because of their relationship with the subject of the whistleblower submission.[243] If a whistleblower who falls into these categories has a reasonable basis to believe that disclosure is necessary to prevent future or continuing substantial injury to the financial interests of the entity or investors, they may be eligible for an award. Further, if one of the excluded whistleblowers has a reasonable basis to believe the subject of the submission is engaged in conduct that will impede investigations, they may be eligible for a whistleblower award.

One unique and controversial feature of the OSC's whistleblower eligibility criteria is the lack of a requirement that whistleblowers avail themselves of internal reporting and compliance systems before contacting the OSC Program. While the Commission "encourages whistleblowers who are employees to report potential violations … through an internal compliance and reporting mechanism," this action is not a prerequisite to award eligibility. The decision not to require whistleblowers to report potential violations internally reflects the Commission's belief that "there may be circumstances in which a whistleblower may appropriately wish not to report" to an internal compliance mechanism.[244]

The decision to not include an internal reporting requirement has been criticized by the financial sector, which fears that the OSC Program (and the enticement of financial rewards)

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[241] *Ibid*.

[242] *Ibid*, s 15(1)(o).

[243] These provisions exclude the following categories, respectively, from award eligibility subject to the exceptions under s 15(2) of the Ontario Securities Commission, "OSC Policy 15-601: Whistleblower Program" (14 July 2016),: d) legal counsel for the subject employer, e) providers of auditing/external assurance services to the subject of the submission, f) investigators or inquiry participants, g) directors or officers of the subject of the submission, and h) Chief Compliance Officers (or functional equivalents) for the subject of the submission.

[244] Ontario Securities Commission (14 July 2016), s 16(1).

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could undermine the sector's internal compliance and reporting programs. Critics, in particular issuers, have concerns that the OSC Program is structured such that employees will be tempted to bypass internal compliance systems in pursuit of a financial award.[245] These critics point to the US Securities and Exchange Commission (SEC) Whistleblower Program, which requires a period of time to elapse following the internal reporting of information before a whistleblower will be eligible for a SEC whistleblower award.[246] Some fear that the lack of an internal reporting requirement will "disqualify registrants and reporting issuers from being able to self-identify, self-remediate and self-report in order to qualify for credit for cooperation."[247] While the OSC has attempted to assuage these concerns by considering participation in internal compliance processes as a factor that may increase an award's amount, it is unclear that this satisfies the concerns of issuers.

Another element of whistleblower award eligibility that is regarded as controversial is the issue of culpable whistleblower eligibility. The OSC program does not disqualify whistleblowers from awards on the basis of their unclean hands, but rather lists culpability as a factor that can decrease the amount of the award offered.[248] For the purposes of calculating that the $1 million threshold of "award eligible outcomes" has been met, any voluntary payments by or payments ordered against entities whose liability is "based substantially" on the conduct of the whistleblower will not be taken into account. Likewise, any portion of sanctions that are awarded against a whistleblower will be subtracted from the award that he or she is otherwise eligible to receive.

For the purpose of comparison, consider the position of the SEC with respect to culpable whistleblowers. Under the SEC Whistleblower Program, whistleblowers are precluded from award eligibility if they have been convicted of a securities-related criminal offence.[249] While the OSC regime does not absolutely preclude this class of whistleblower from receiving an award, it does limit the circumstances in which an individual can benefit from their own complicity. As described above, culpability will have an impact on both the determination of an "award eligible income" and the amount of any award given. Further, the submission of information by the whistleblower to the Commission does not preclude the possibility of action being taken against the whistleblower.[250] Together, these measures ensure that the program does not unduly restrict the Commission with respect to the actions it can take against culpable whistleblowers. Rather, it allows Commission staff to evaluate cases as they arise and

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[245] John Tuzyk & Liam Churchill, "Issuers Apprehensive of OSC's Proposed Whistleblower Program" (August 07 2015), online: Blakes, Cassels & Graydon LLP <http://www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=2161>.

[246] *Ibid*.

[247] Jordan Deering and Linda Fuerst, "OSC Releases Further Changes to Proposed Whistleblower Program" (October 2015), online: Norton Rose Fulbright LLP <http://www.nortonrosefulbright.com/knowledge/publications/133609/osc-releases-further-changes-to-proposed-whistleblower-program>.

[248] Ontario Securities Commission (14 July 2016), s 17.

[249] Jennifer M Pacella, "Bounties for Bad Behavior: Rewarding Culpable Whistleblowers under the Dodd-Frank Act and Internal Revenue Code" (2015) 17 U Pa J Bus L 345 at 355.

[250] Ontario Securities Commission (14 July 2016), s 17.

make an appropriate determination regarding award eligibility and other enforcement actions in the circumstances.

7.3.3 Whistleblower Award Formula

An award eligible outcome can only occur when an order made under section 127 of the *Securities Act* or section 60 of the *Commodities Futures Act* requires the guilty party to pay more than $1 million in voluntary payments to the Commission or in financial sanctions imposed by the Commission. If an eligible outcome results from a submission of income from an eligible whistleblower, an award of between 5% and 15% can be paid.[251] If the sanctions imposed and/or voluntary payments made amount to over $10 million dollars, the maximum that will be awarded is generally $1.5 million.[252] However, if over $10 million dollars is, in fact, collected, the whistleblower may receive an award between 5% and 15% of the total, to a maximum of $5 million.[253]

The fact that most awards under the OSC Whistleblower Program are not contingent on the actual collection of monetary sanctions has drawn ire regarding where the cost of the program will ultimately fall. The OSC program allows for the possibility of a whistleblower receiving an award of up to $1.5 million without any money actually being collected by the Commission. Commentators have, again, drawn a comparison to the SEC Whistleblower Program, which requires tips to result in the collection of monetary sanctions before a whistleblower is eligible for an award. By not tying awards to collection, some commentators fear that the Program's costs will ultimately be borne by compliant issuers (and, ultimately, their shareholders) through increased fees.[254] Whether these concerns will materialize remains to be seen, but it should be noted that any awards greater than $1.5 million are contingent on collection of funds. Further, given the modest caps (discussed below) on the maximum awards available, the risk that the Whistleblower Program will pass costs onto issuers and investors is necessarily limited.

Section 25 of the Policy Document outlines the factors that ought to be considered by the Commission in determining the award amount. Factors that may increase the amount of a whistleblower award include: the timeliness of the report, the significance of the information provided, the degree of assistance provided, the impact of the information on the investigation/proceeding, efforts to remediate harm caused, whether the whistleblower participated in internal compliance systems, unique hardships experienced by the whistleblower, and contributions made to the Commission's mandate.[255] Factors that may decrease the amount of a whistleblower award include: any erroneous or incomplete information, the whistleblower's culpability, any unreasonable delay in reporting, refusing

[251] *Ibid*, s 18(1).
[252] *Ibid*, s 18(4).
[253] *Ibid*, s 18(5).
[254] Cristian Blidariu, et al, "OSC Proposes Large Financial Awards for Whistleblowers" (February 04 2015), online: Canadian Securities Regulatory Monitor <http://www.securitiesregulationcanada.com/2015/02/osc-proposes-large-financial-awards-for-whistleblowers/>.
[255] Ontario Securities Commission (14 July 2016) s 25(2).

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to assist the Commission or interfering with its investigation, and interfering with internal compliance mechanisms.[256] This broad range of factors allows Commission staff to tailor whistleblower awards such that they are appropriate in all of the circumstances of a particular case and justly compensate a whistleblower who provides actionable information to the Commission.

The OSC Whistleblower Program range of 5% to 15% of imposed sanctions (and the $1.5 million cap if sanctions are not collected) is relatively low compared to the SEC Whistleblower Program, which offers awards in the range of 10% to 30% of monetary sanctions collected. While this higher range can be attributed, in part, to the requirement of collection under the SEC regime, the OSC Program's financial incentives are arguably relatively modest. Further, the caps on award amounts under the OSC Program forestall excessively large payments being made, whereas the SEC Program (which does not include an award cap) is structured in a way that allows very large payments to be made in the event of a large financial penalty being collected.[257]

7.3.4 Anti-Reprisal Provisions

Coincident with the introduction of the OSC Whistleblower Program, the *Securities Act* (Ontario) was amended to introduce new anti-reprisal provisions for employees who provide information or cooperate with the Commission or other specified regulatory bodies. Part XXI.2 of the *Securities Act*, brought into force on 28 June 2016, consists of two major components: anti-reprisal protections and contract voiding provisions.[258]

First, Part XXI.2 prohibits reprisals against employees by employers in certain circumstances. Section 125.5(2) defines a reprisal, for the purposes of this Part, as "any measure taken against an employee that adversely affects his or her employment." The section further includes a non-exhaustive list of reprisals, including termination of employment, demotion, disciplining, or suspending of an employee, imposition of penalties on the employee, threat of any of the above reprisals, or intimidation or coercion of an employee in relation to their employment.

The anti-reprisal provisions at ss. 121.5(1)-(2) protect employees who provide information regarding potential violations of Ontario securities law, seek advice about providing such information, or express an intention to provide such information. The information can refer to activity that has occurred, is ongoing, or is "about to occur" and the employee's belief of

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[256] *Ibid*, s 25(3).

[257] US Securities and Exchange Commission, "2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program" (November 2016) at 10, online: <https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2016.pdf>. The largest award amount given by the SEC whistleblower program at the time of the 2016 Annual Report was USD 30 million, approximately 8 times the maximum possible award of CAD 5 million under the OSC program.

[258] These amendments to the *Securities Act* were enacted under the *Jobs for Today and Tomorrow Act (Budget Measures)*, SO 2016, c 5 – Bill 173, schedule 26.

a violation must be reasonable. Further, these provisions are not limited to information provided to the Commission itself, but also information provided to the employer, a law enforcement agency, or a "recognized self-regulatory organization."[259] In other words, the reach of Part XXI.2 goes beyond participants in the OSC Whistleblower Program and protects employees more generally from reprisals by their employers.

The second major feature of Part XXI.2, the contract voiding provision, is found in s. 121.5(3). This subsection dictates that a provision of an agreement (including confidentiality agreements) between employers and employees is "void to the extent that it precludes or purports to preclude" the employee from providing information, cooperating with, or testifying before the Commission or a recognized self-regulatory organization. In other words, s. 121.5(3) prohibits employers from requiring their employees to give up their right to provide information regarding potential misconduct to regulatory bodies, including the Commission. The specific inclusion of confidentiality agreements in this section highlights a legislative commitment to prioritize the disclosure of information about potential violations of securities law by employees.

7.3.5 The Future of Whistleblower Awards

Evaluations of the effectiveness of the OSC Whistleblower Program are premature, as the agency has yet to announce an award. While the program is clearly still in its nascent stages, regulators appear hopeful that the increased protection and potential for financial compensation available to potential whistleblowers will promote increased transparency for investors and a culture of accountability within Ontario's financial sector. As of September 2016, OSC Chair and CEO Maureen Jensen stated that the Whistleblower Program has resulted in more than 30 tips that the Commission is investigating.[260] Given its first-in-the-nation status, the success of the OSC program could potentially drive the expansion of paid whistleblower protection regimes in Canada, both within the financial sector and beyond it.[261]

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[259] The *Securities Act*, section 21.1, allows the Commission to recognize self-regulatory organizations (SROs) when "it is satisfied that to do so would be in the public interest". There are currently two SROs recognized by the Commission: The Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association of Canada (MFDA), see: <http://www.osc.gov.on.ca/en/Marketplaces_sro_index.htm>.

[260] The Canadian Press, "OSC Boss 'Worried' about Non-Standard Reporting, Touts Whistleblower Program", *The Toronto Star* (September 27 2016), online: <https://www.thestar.com/news/canada/2016/09/27/osc-boss-praises-whistleblower-program.html>.

[261] It should be noted that the *Autorité des marchés financiers* (AMF), which regulates securities in Quebec, also launched a whistleblowing program in 2016. The AMF's regime does not, however, offer rewards to whistleblowers, citing "a review of various whistleblower programs around the world, including in the United Kingdom and Australia", which did not convince the AMF of the effectiveness of financial incentives. See Authorité des Marchés Financiers, "AMF Launches Whistleblower Program" (June 20 2016), online: <https://www.lautorite.qc.ca/en/press-releases-2016-pro.html_2016_amf-launches-whistleblower-program20-06-2016-00-0.html>.

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8. CONCLUSION: WHERE DO WE GO FROM HERE?

An overview of best practices in whistleblower protection and legislation in the US, UK and Canada prompts an important question: what constitutes "success" in whistleblower protection? Best practices are a measure against which we may judge the scope and comprehensiveness of legislation, but it is impossible to draw conclusions about the true efficacy of whistleblower protection legislation without data as to how the legislation is being enforced. In this sense, best practices are of limited use in determining the efficacy of whistleblower protection, and enacting a law that reflects best practices on paper may not accurately reflect whether whistleblowers are adequately protected in practice.

There is a critical need for research and analysis as to how the law is actually being applied. This has been noted by critics such as Lewis, Brown and Moberly, who call attention to academia's focus on the whistleblower as an individual rather than on the institutional response to disclosure:

> The vast bulk of whistleblowing research to date has focused on whistleblowers: what makes them report, what they report, how many and how often whistleblowers come forward, and what happens to them. But to understand whistleblowing in context, and especially how whistleblowing can be made more effective, it must be recognized that whistleblower and non-whistleblower behavior, characteristics and outcomes are only one part of the puzzle. Increasingly important is the behavior of those who receive whistleblowing disclosures, and what they do about them. Indeed, while the study of whistleblower behavior and outcomes may remain a necessary and often fascinating focus, from a public policy perspective it is the response to disclosures which is actually the more important field of study – but which is in its relative infancy.[262]

Furthermore, the authors emphasize the need for research that will shed light on the extent that whistleblower legislation is being effectively utilized:

> Most researchers, policy makers and managers know that legislation, in and of itself, is a blunt instrument for influencing organizational and behavioral change. The question of whether such legislative objectives are being implemented, or what strategies for whistleblower support and protection would be best supported and promoted by legal regimes, depends on knowledge of what actions are actually being taken by organizations and regulators to support whistleblowers in practice. Moreover, these questions depend on how whistleblowers are supported by managers and regulators

[262] Lewis, Brown & Moberly (2014) at 19.

> in a proactive sense, once the disclosure is made, and not simply in reaction to any detrimental outcomes they may begin to suffer.[263]

"Successful" whistleblower laws will help to prevent and resolve wrongdoing by encouraging those who witness wrongdoing to disclose information, while also protecting whistleblowers from reprisals in any form. This is what whistleblower protection legislation in the US, UK and Canada purports to do; however, the words of the legislation alone cannot give us a complete picture of the effectiveness of whistleblower protection in these countries. In all three countries, there is a dearth of research regarding the implementation and operation of these whistleblower regimes, and this makes it difficult to accurately evaluate these laws. Regular reviews of the legislation are required to determine the impact that the laws have had on encouraging reporting and protecting whistleblowers (such as the overdue review of *PSDPA*, discussed above in Section 7.2). Ideally, such reviews would be conducted by neutral third party observers.

One potential measure of success is the impact that whistleblower legislation has on encouraging public sector employees who witness wrongdoing to disclose this information. Research methods such as surveys can help us to understand how many employees witness wrongdoing, and of these how many actually submit reports. Changes in reporting rates may help us to evaluate the impact of legislation on information disclosure. Such data has been collected in the US by the Merit Systems Protection Board, discussed above in Section 5.1. Another example of a large-scale survey was conducted in Australia: it suggests that 71% of Australian public sector workers observed one of the enumerated types of wrongdoing.[264] Of those respondents who observed wrongdoing, "[t]hose who reported the wrongdoing amounted to 39 per cent … or 28 per cent of all respondents. As shown, almost all these respondents also regarded the wrongdoing that they reported as being at least somewhat serious; very few said they had reported matters they regarded as trivial."[265] Similar survey data of Canadian public sector employees might help to gauge awareness of the protections offered in the *PSDPA* as well as rates of reporting among those who witness wrongdoing, and qualitative focus group research conducted in 2015 is a good first step in this regard.[266]

Careful attention also needs to be paid to access to justice issues; that is, are the systems that are being set up in the legislation actually protecting whistleblowers, and are they *accessible* to those who have faced retaliation as a result of disclosing information? In Canada, the track record of the Public Servants Disclosure Protection Tribunal is ambiguous, at best, in regard to the success of the *PSDPA* in protecting whistleblowers from reprisals. Of the only seven reprisal cases listed on the Tribunal website, five were settled between the parties or through mediation, and one appears to be in limbo with a number of interlocutory decisions but no

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[263] *Ibid* at 31.

[264] AJ Brown, Evalynn Mazurski & Jane Olsen, "The Incidence and Significance of Whistleblowing" in AJ Brown, ed, *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations* (ANU E Press, 2008) at 28, online: <http://epress.anu.edu.au/whistleblowing_citation.html>.

[265] *Ibid* at 31.

[266] Phoenix SPI (December 2015) at 21.

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outcome.[267] This means that the Tribunal has yet to actually make a decision, let alone one with the practical effect of protecting a whistleblower. In the UK, as mentioned above in Section 6, claims that are adjudicated by the Employment Tribunals have a far from even chance of being successful: "Over 70% [of claims made in *PIDA's* first ten years]… were settled or withdrawn without any public hearing. Of the remaining 30%, less than a quarter (22%) won."[268] Thus, settlements are common in both the UK and Canada. It is difficult to assess whether the outcomes of these settlements represent successes or failures for the whistleblowers who have faced reprisals; it may be, in fact, that public sector employers readily accede to settlements where complainants have strong reprisal cases. Therefore, more in-depth research is required to understand these outcomes and what these numbers tell us regarding the efficacy of whistleblower protection laws.

Overall, while more and different types of research are needed to adequately evaluate whistleblower protections, it is clear that there has been positive movement in the recognition and protection of whistleblowers in the past ten to fifteen years. Internationally, agreements and conventions such as UNCAC place whistleblower protection at the forefront of the global fight against corruption. In Canada, the *PSDPA* represents the country's first legislative effort to protect federal public sector whistleblowers, and a plethora of other laws have been introduced worldwide in response to the global movement against corruption. In order to ensure that this global legislative movement fulfills its potential, these laws must be utilized by whistleblowers and their protections must be enforced by the relevant institutions and authorities.

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[267] Public Servants Disclosure Protection Tribunal, "Decisions & Orders", online: <http://www.psdpt-tpfd.gc.ca/Cases/DecisionsOrders-eng.html>. It should also be noted that some of these interlocutory decisions have been appealed to the Federal Court; see, for example, *El-Helou v Canada (Courts Administration Service)*, 2012 FC 1111, and *El-Helou v Canada (Courts Administration Service)*, 2015 FC 685.

[268] Stephenson & Levi (20 December 2012) at 20.

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CHAPTER 13

CAMPAIGN FINANCE LAWS: CONTROLLING THE RISKS OF CORRUPTION AND PUBLIC CYNICISM

[This chapter was written by Madeline Reid as a directed research and writing paper under the supervision of Professor Ferguson.]

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1. INTRODUCTION

Campaigning for public office takes money. Election campaigns are becoming increasingly expensive[1] and evidence shows that higher spending correlates with electoral success.[2] The need for cash produces various threats to democratic systems, the first being corruption. Politicians may be inclined to reward wealthy campaign backers with favours, influence, or access. Campaign finance also carries other implications for equality and fairness. Unregulated financing may give well-resourced members of society disproportionate influence over electoral debate, electoral outcomes, and elected officials. In addition, without regulation, candidates and parties may face an unfair disadvantage if they lack personal wealth or wealthy supporters. Finally, campaign financing is often disastrous for public confidence. Cynicism creeps in when politicians accept hefty donations or benefit from expensive campaign advertising funded by corporations or wealthy individuals. Scandals

[1] Ingrid van Biezen, "State intervention in party politics: The public funding and regulation of political parties" in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) at 200–201.

[2] OECD, *Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture* (OECD Publishing, 2016) at 22.

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are common and further erode public confidence. For example, Canada's 2003 spate of campaign finance reform was likely an attempt to cushion the worst impacts of the sponsorship scandal, which erupted after Quebec advertising firms who had donated to the federal Liberal Party received lucrative government contracts in return for little work.[3]

Campaign finance laws can help address the risks of corruption, inequality, unfairness, and public cynicism. Lawmakers may attempt to reduce these risks by promoting transparency, reducing politicians' reliance on large donors, and encouraging the financing of campaigns through small outlays from a wide range of individuals. Disclosure requirements, contribution limits, and other measures may further these goals. Public funding of election campaigns is another option. Canada, the UK, and the US each provide some form of partial public funding. Private fundraising, however, remains indispensable to parties and candidates in all three countries.

Regulation generally targets not only parties and candidates but also third-party campaigners. Third-party campaigners fund their own advertising and other activities in support of a candidate or party. If parties and candidates are regulated and third parties are not, private money will simply be funnelled to unregulated third-party groups. Even with full public funding of parties and candidates, the use of private money in third-party campaigns would require regulatory attention.

Lawmakers face various stumbling blocks when designing campaign finance regimes. Campaign finance laws may infringe constitutional guarantees such as freedom of expression, freedom of association, and voting rights. Courts may, however, be willing to allow infringements of constitutional rights for the sake of equality, fairness, public confidence, and the prevention of corruption. Lawmakers must also ensure regulations do not entrench incumbents by, for example, imposing spending limits that disadvantage challengers.[4] Other difficulties include anticipating loopholes and defining the scope of regulated activities. Finally, lawmakers face the challenge of determining how to apply old regulatory approaches to new digital campaigning techniques.

Canada, the US, and UK each take a different approach to the regulation of campaign finance, although all three impose transparency requirements for parties, candidates, and third-party campaigners. At the federal level, Canada caps both contributions and spending. Corporations and other organizations are prohibited from making contributions to parties and candidates. The federal regime also provides some public funding to parties and candidates. The UK limits spending, but political contributions are uncapped. Further, unlike in Canada, corporations, labour unions, and other entities are permitted to make

[3] Lisa Young, "Shaping the Battlefield: Partisan Self-Interest and Election Finance Reform in Canada" in Robert G Boatright, ed, *The Deregulatory Moment? A Comparative Perspective on Changing Campaign Finance Laws* (University of Michigan Press, 2015) at 111.

[4] Yasmin Dawood, "Democracy, Power, and the Supreme Court: Campaign Finance Reform in Comparative Context" (2006) 4:2 Intl J Con L 269 at 272.

donations to parties and candidates. In the US, freedom of speech jurisprudence has defeated various pieces of the federal campaign finance regime, including spending caps. Caps on contributions to candidates have survived, along with a ban on corporate and union donations. Although transparency requirements in the US apply to parties, candidates, and third parties, transparency is weak for some types of institutional third-party campaigners.[5]

In this chapter, I will begin by summarizing how election campaigns are financed and how campaign finance may be regulated. Next, I will discuss rationales for campaign finance regulation and the challenges involved in designing regulatory measures, followed by a discussion of the regulation of third-party campaigners. Finally, I will briefly note the paucity of provisions directed at campaign financing in UNCAC and the OECD Convention on Foreign Bribery and then examine in some detail the campaign finance laws in each of Canada, the UK, and US. For each country, I will first discuss the leading cases on freedom of expression and campaign finance. I will then describe each country's regulatory regime and common criticisms of those regimes.

2. HOW ELECTION CAMPAIGNS ARE FINANCED

2.1 Direct Contributions or Loans to Candidates and Political Parties

Campaigns may be financed by direct contributions to candidates or political parties. Contributions can take the form of cash, goods and services, or loans. In the US, if a political party or third party coordinates spending with a candidate, this spending is viewed as a contribution to the candidate.

2.2 Public Funding

The state may fund political parties and candidates through grants, reimbursement of election expenses, tax deductions for donors, allocation of free or discounted broadcasting time, or other subsidies.

2.3 Independent Expenditures by Third Parties

Individuals and entities other than political parties and candidates may wish to fund advertising and other initiatives to support or oppose the electoral success of a party or candidate. This is referred to as third-party campaigning or outside spending. Individuals and organizations may choose to contribute to a third-party campaigner instead of a

[5] 52 USC § 30104(c),(f); 11 CFR §§ 114.10(b)(1)–(2), 109.10(e)(1)(vi), 104.20(b), 104.20(c)(7)–(9). See also Diana Dwyre, "Campaign Finance Deregulation in the United States: What Has Changed and Why Does It Matter?" in Robert G Boatright, ed, *The Deregulatory Moment? A Comparative Perspective on Changing Campaign Finance Laws* (University of Michigan Press, 2015) at 61.

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candidate or party. Third-party campaigners include individuals, corporations, labour unions, non-profit interest groups, or other organizations, such as the ubiquitous political action committee, or "PAC," in the US. Third-party campaign activities sometimes expressly support or oppose a candidate or party. In other instances, third parties advertise about an issue associated with a candidate or political party, often termed "issue advertising." Third-party campaigning can be entirely independent from parties and candidates, or third parties may work "in the shadow of political parties" or "in close concert with them."[6]

2.4 Self-funding

Wealthy candidates for public office may wish to finance their own campaigns with personal resources. Canada imposes limits on candidate self-funding,[7] but in the US, jurisprudence on freedom of speech precludes such limits.[8]

3. OVERVIEW OF TYPES OF CAMPAIGN FINANCE REGULATION

In this section, I will describe the tools used to regulate campaign finance. The regulatory approaches described below are often applied not only to general elections but also to nomination contests, leadership campaigns, and referendums.

Campaign finance regulation should be complemented by other laws promoting integrity in politics, such as rules on lobbying, conflict of interest, and whistleblower protection.[9] Without these rules, the improper influence of money could simply be redirected from campaign finance to other activities like lobbying.[10]

3.1 Transparency Requirements

Justice Brandeis wrote in 1913 that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman."[11] Campaign finance regimes often attempt to prevent corruption through the disclosure of political contributions and spending. Disclosure may discourage large donations and deter politicians from rewarding donors or supportive third-

[6] Anika Gauja & Graeme Orr, "Regulating 'third parties' as electoral actors: Comparative insights and questions for democracy" (2015) 4:3 Interest Groups & Advocacy 249 at 251.
[7] *Canada Elections Act*, SC 2000, c 9, s 367(6),(7).
[8] *Buckley v Valeo*, 424 US 1 at 54 (1976); *Davis v Federal Election Commission*, 554 US 724 (2007).
[9] OECD (2016) at 16.
[10] *Ibid*.
[11] Quoted in Dwyre (2015) at 59.

party campaigners with favours.[12] Disclosure of contributions and third-party spending also helps to facilitate informed voting, as awareness of the "interested money behind a candidate may give voters insight into what interests the candidate will promote if elected."[13] Critics of disclosure requirements argue that revealing the identity of donors represents an unacceptable incursion on donors' privacy interest.[14]

3.2 Spending and Contribution Limits

Campaign finance regimes may attempt to curb demand for political money by imposing ceilings on spending by candidates, political parties, and third parties. The supply of political money can be limited by imposing ceilings on donations. Donation caps address corruption and equality concerns by encouraging candidates, parties, and third-party campaigners to seek small donations from a broad range of donors.

3.3 Public Funding

Some campaign finance regimes provide public funding to political parties and candidates. Public funding is intended to dilute the influence of wealthy supporters and level the playing field for small or new parties,[15] although legislation sometimes favours large parties and incumbents by calibrating funding to electoral performance.[16] Public funding also compensates for falling party incomes and increasing campaign costs.[17] The cost of election campaigns has skyrocketed owing to expensive mass media techniques and the

[12] For example, in the UK, the introduction of disclosure requirements led to embarrassment and scandal, causing some changes in behaviour on the part of parties and donors: see Section 9.3, below; see also KD Ewing, "The Disclosure of Political Donations in Britain" in KD Ewing & Samuel Issacharoff, eds, *Party Funding and Campaign Financing in International Perspective* (Hart Publishing, 2006) at 67.

[13] Dwyre (2015) at 35, 59. See also Anika Gauja, *Political Parties and Elections: Legislating for Representative Democracy* (Ashgate Publishing, 2010) at 178.

[14] Dwyre (2015) at 62.

[15] Van Biezen (2012) at 200–201.

[16] For example, in *Figueroa v Canada (Attorney General)*, 2003 SCC 37, the Supreme Court of Canada struck down a law stipulating that parties must endorse at least fifty candidates in a general election to access public funding. In the Court's view, this requirement was an unjustifiable infringement of the right to vote in section 3 of the *Charter of Rights and Freedoms* because it "exacerbates a pre-existing disparity in the capacity of the various political parties to communicate their positions to the general public": para 54. The Court emphasized that all parties have something meaningful to contribute to electoral debate, not simply those who are a "genuine 'government option'": para 39.

[17] Van Biezen (2012) at 200–201.

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professionalization of parties.[18] Meanwhile, revenues are declining because of falling party membership.[19]

Another means of reducing reliance on large donations is to allocate free broadcasting time to political parties and candidates. For example, the UK has imposed a blanket ban on paid political advertising on television and radio and provides free airtime to political parties during elections.[20] The scheme aims to reduce demand for money during election campaigns, level the playing field between competitors, and prevent distortion of electoral debate by the wealthy.[21] The question remains whether such measures are becoming irrelevant in the age of digital campaigning.

Opponents of public funding argue that taxpayers should not be forced to fund parties with whom they disagree.[22] They also point out that public funding of political parties diminishes their participatory character by replacing "labour and fund-raising efforts once provided by party members and interested citizens."[23]

4. RATIONALES FOR CAMPAIGN FINANCE REGULATION

4.1 Corruption and the Appearance of Corruption

If an individual or entity spends large sums supporting a politician's election campaign, the politician may feel obliged to repay the favour. Corruption could come in the form of *quid pro quos*, such as the provision of contracts, licenses, or tax breaks in exchange for large political donations.[24] Campaign financing may also produce more subtle yet pernicious forms of corruption. First, politicians often provide wealthy backers with special access.[25] As noted by the dissenting justices in *Citizens United v Federal Election Commission*, access is a

[18] *Ibid*.
[19] *Ibid*.
[20] *Communications Act 2003* (UK), c 21. The ban is discussed further in Section 9.2.2 and 9.3, below.
[21] Eric Barendt, *Freedom of Speech,* 2nd ed (Oxford University Press, 2005) at 485.
[22] Young (2015) at 119.
[23] Gauja (2010) at 162–63. See also Navraj Singh Ghaleigh, "Expenditure, Donations and Public Funding under the United Kingdom's *P.P.E.R.A. 2000* – And Beyond?" in KD Ewing & Samuel Issacharoff, eds, *Party Funding and Campaign Financing in International Perspective* (Hart Publishing, 2006) at 56.
[24] OECD (2016) at 23.
[25] For example, Sheldon Adelson and his wife donated $93 million to third-party campaigners in the American general election in 2012; in 2014, three Republican governors attended a donor conference in Las Vegas where each met one-on-one with Adelson: Jordan May, "'Are We Corrupt Enough Yet?' The Ambiguous Quid Pro Quo Corruption Requirement in Campaign Finance Restrictions" (March 2015) 54:2 Washburn LJ 357 at 357–58.

precondition for influence in the legislative process.[26] Privileged access may also lead to public cynicism. Second, monetary support for a candidate's campaign could taint the candidate's judgement once elected and give wealthy supporters undue influence over lawmakers. There are many opportunities for influence and distortion throughout the legislative process, starting with the decision to introduce bills or amendments in the first place.[27] Issacharoff observes that, after the election, lawmakers may be influenced by gratitude to large donors and a desire to secure "future support in order to retain the perquisites of office."[28] This can produce a kind of "clientelism," in which private interests capture the powers of the state and obtain "legislation in the private interest."[29] Yet the subtlety of such influence may allow politicians to "feel as if nothing improper has occurred."[30] Aside from effective governance issues, the potential for the wealthy to exert undue influence on the legislative process raises obvious equality concerns.[31]

It may be impossible to separate the influence of large donors and supportive third-party campaigners over lawmakers from the influence of principles, constituents, and other factors.[32] An example of this difficulty is provided by *McCormick v United States*, in which the US Supreme Court overturned an elected official's conviction for corruption and struck down the law criminalizing his conduct.[33] The defendant politician had a long-standing reputation for favouring legislation beneficial to foreign doctors. He was charged with corruption after he accepted money from foreign doctors for his election campaign and subsequently sponsored legislation favourable to them. Because this was not a clear *quid pro quo,* the Court held that the defendant's actions did not constitute corruption. Dembitskiy criticizes this decision for its failure to address the appearance of corruption, which may be present even where an elected official is guided by their own principles, not their donors.[34]

Publicly funded election campaigns help address the risk of corruption, but comprehensive public funding requires public support and political will. If election campaigns continue to be financed wholly or partly through private funds, many argue that corruption can be

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[26] *Citizens United v FEC,* 588 US 310 at 455 (2009).
[27] John P Sarbanes, "Power and Opportunity: Campaign finance reform for the 21st century" (2016) 53:1 Harvard J on Leg 1 at 6. Although some studies claim that monetary support does not influence policy outcomes in the US, Sarbanes argues that these studies focus on votes and ignore the potential for influence and distortion at earlier stages in the legislative process.
[28] Samuel Issacharoff, "On Political Corruption" (November 2010) 124:1 Harvard LR 118 at 126.
[29] *Ibid* at 127.
[30] Sarbanes (2016) at 12.
[31] The equality rationale for campaign finance regulation is discussed further in Section 4.2, below.
[32] OECD (2016) at 22.
[33] *McCormick v United States,* 500 US 257 (1991).
[34] Vladyslav Dembitskiy, "Where Else is the Appearance of Corruption Protected by the Constitution? A Comparative Analysis of Campaign Finance Laws after *Citizens United* and *McCutcheon*" (2016) 43 Hastings Constitutional L Quarterly 885 at 886.

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reduced by encouraging smaller donations from more sources.[35] This approach also accords with the argument that contributions are a valid form of participation in electoral debate.[36] In the US, micro-donations have become increasingly important in elections.[37] For example, President Trump raised as much from small donors (contributing $200 or less) as Clinton and Sanders combined.[38] Ninety-nine percent of the $229 million raised by Sanders came from individual donors.[39] In 2008, 38% of contributions to major party candidates seeking nomination came from micro-donors, compared to 25% in 2000.[40] From the perspective of corruption, fairness, equality, and public confidence, this trend is promising. On the other hand, some point out that reliance on small individual donations could lead politicians to cater to groups of small donors on the fringes, as opposed to cultivating the electoral support of voters who are more centrist but unlikely to make a donation.[41]

The prevention of corruption is accepted by courts in Canada, the UK, and US as a legitimate justification for the burdens on freedom of expression involved in campaign finance regulation. The US Supreme Court has further held that preventing corruption or the appearance of corruption is the *only* possible justification for the limits on political speech caused by contribution limits, spending limits, and other campaign finance laws. However, judicial definitions of "corruption" vary. The majority of the US Supreme Court has defined corruption narrowly to include only direct *quid pro quo* exchanges, not undue influence and access. However, direct *quid pro quos* are almost impossible to prove and are already captured by bribery laws.[42] The dissenting judges of the US Supreme Court in *Citizens United v Federal*

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[35] Issacharoff (November 2010) at 118, 137. Quebec's *financement populaire* embodies this approach. At both the provincial and municipal levels, campaign finance scandals have led to the imposition of low contribution caps in the hopes of achieving the "popular financing" of political parties; the scheme is supplemented by public funding: see Maxime Pelletier, "Municipal Political Reform in Quebec: The Myth of 'Popular Finance'" (Fall 2014) 43 J of Eastern Township Studies 63. Pelletier observes that only a small percentage of voters in Quebec makes political contributions and suggests that popular finance will remain a pipe dream if few citizens are interested in donating money to parties and candidates.

[36] Sarbanes (2016) at 11.

[37] Richard L Hasen, "The transformation of the campaign financing regime for US presidential elections" in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) 225 at 229.

[38] Fredreka Schouten, "President Trump shatters small-donor records, gets head start on 2020 race", *USA Today* (21 February 2017), online <https://www.usatoday.com/story/news/politics/onpolitics/2017/02/21/president-trump-shattered-small-donor-records/98208462/>.

[39] Katelyn Ferral, "One Person, one Algorithm, one vote", *The Capital Times* (4 January 2017) 24.

[40] Hasen (2012) 225 at 229.

[41] Young (2015) at 124.

[42] Sarbanes (2016).

Election Commission argued in favour of viewing corruption as a "spectrum," noting that "the difference between selling a vote and selling access is a matter of degree, not kind."[43]

Even under a broader conception of corruption, the anticorruption rationale for campaign finance regulation fails to justify some types of regulation.[44] Courts must therefore turn to other justificatory theories if such regulations infringe constitutional rights. For example, spending limits for candidates and parties do little to prevent reliance on big donors, although such limits reduce the amount of money needed by candidates and parties.[45] In the US, courts view the anticorruption rationale as insufficient to justify restrictions on third-party independent expenditures. According to the majority of the US Supreme Court, the lack of coordination between the third party and the candidate reduces the value of the expenditure to the candidate, therefore reducing the risk of *quid pro quo* exchanges.[46] However, others argue that the absence of coordination does not prevent candidates from feeling grateful to third parties who have spent vast sums supporting their candidacies, or from wishing to maintain their support for future elections.[47]

4.2 Equality, Fairness, and Participation

Campaign finance regulations are sometimes motivated by the desire to promote equality and fairness in the electoral system. This egalitarian model of campaign finance can be contrasted with the libertarian model. The libertarian model responds to fears that "a regulated marketplace of ideas may result in the entrenchment of the powerful," whereas the egalitarian model responds to concerns that "an unregulated marketplace of ideas may result in the entrenchment of the wealthy."[48] The egalitarian model of campaign finance has been accepted as a valid legislative choice by the Supreme Court of Canada.[49] The majority of the US Supreme Court, on the other hand, has settled on the libertarian model.[50]

Various goals are tied to the equality and fairness rationale. First, many argue that campaign finance must be regulated to prevent the wealthy from drowning out other speakers and setting the issue agenda of electoral debate.[51] Otherwise, under-resourced viewpoints will be lost and under-resourced citizens will be barred from meaningful participation in debate,

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[43] *Citizens United v FEC*, 588 US 310 at 448 (2009).
[44] Barendt (2005) at 482.
[45] *Ibid*.
[46] Issacharoff (November 2010) at 123.
[47] See, e.g., Hasen (2012) 225 at 237.
[48] Dawood (2006) at 290.
[49] *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 62.
[50] The libertarian model is discussed further in Section 5.1 of this chapter on freedom of expression and campaign finance.
[51] See, e.g., Janet L Hiebert, "Elections, Democracy and Free Speech: More at Stake than an Unfettered Right to Advertise" in K D Ewing & Samuel Issacharoff, eds, *Party Funding and Campaign Financing in International Perspective* (Hart Publishing, 2006) at 269.

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leading to cynicism. In the House of Lords' decision in *Animal Defenders International v the United Kingdom*, Lord Bingham pointed out that, if "the playing field of debate" is not level, views "may come to be accepted by the public not because they are shown in public debate to be right but because, by dint of constant repetition, the public have been conditioned to accept them."[52] The Supreme Court of Canada has similarly emphasized that, "[t]o ensure a right of equal participation in democratic government, laws limiting spending are needed to ... ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others."[53]

Second, many argue that unregulated campaign finance allows the wealthy to have a disproportionate impact on electoral outcomes.[54] Various studies suggest that the candidate who spends the most is more likely to win the election.[55] This is sometimes seen as a form of corruption, but a corruption of voters and the electoral system rather than elected officials.[56] Third, as discussed above in the context of the anticorruption rationale, campaign finance regulation seeks to ensure the wealthy do not have disproportionate influence over policy outcomes after the election. Finally, the equality and fairness rationale calls for regulation to level the playing field for parties and candidates. Unregulated campaigns may give candidates with personal wealth or wealthy supporters an unfair advantage. For example, in the US, the so-called "wealth primary" screens out candidates with insufficient financial heft, which bodes poorly for racial and gender diversity in public office.[57]

In attempting to ensure the wealthy do not wield disproportionate influence over debate, electoral outcomes, and post-election policy, the egalitarian model responds to concerns that wealthy donors and third-party campaigners are unrepresentative of wider society. In the US, studies have found the donor class to be "underrepresentative of most Americans."[58] Most donors are "wealthier and older than average Americans, and they are more likely to be white and male than the general population."[59] Gilen and Page found that the policy preferences of wealthy donors differ from non-donors and people of colour.[60] For example, an American study in 2016 found that 44% of donors giving $5,000 or more supported the *Affordable Care Act*, compared to 53% of American adults. Likewise, 39% of donors

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[52] *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport,* [2008] UKHL 15 (BAILII) at para 28.

[53] *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, 151 DLR (4th) 385 at para 47.

[54] Raymond J La Raja, *Small Change: Money, Political Parties, and Campaign Finance Reform* (University of Michigan, 2008) at 1.

[55] Sarbanes (2016) at 9.

[56] Issacharoff (November 2010) at 122.

[57] Sarbanes (2016) at 8.

[58] Hasen (2012) 225 at 238.

[59] Sean McElwee, *D.C.'s White Donor Class* (Demos, 2016) at 1, online: <http://www.demos.org/publication/dc%E2%80%99s-white-donor-class-outsized-influence-diverse-city>.

[60] Martin Gilens & Benjamin I Page, "Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens" (2014) 12 Perspectives on Politics 564.

contributing $1,000 or more supported the Waxman-Markey clean energy bill, compared to 63% of non-donors.[61] Even if the policy preferences of the wealthy sometimes align with those of the general public, Sarbanes argues we should not be distracted from the problematic nature of the outsized impact of the wealthy in policy outcomes.[62]

4.3 Informed Voting

Campaign finance regulation is often touted as a means of facilitating informed voting. Measures such as spending and contribution caps prevent well-resourced speakers from drowning out other speakers, thus making space for the effective dissemination of more information and viewpoints. Courts in Canada and Europe have upheld campaign finance regulations on the basis of the informed voting rationale. They interpret constitutional voting rights to include the right to an informed vote.[63] On the other hand, others argue that informed voting is better served by relaxing campaign finance and allowing unfettered dissemination of information. For example, the majority of the US Supreme Court views spending restrictions as a dangerous limitation on the quantity of information accessible to voters.[64]

4.4 Public Confidence

Various studies in the US, UK, and Canada show falling public confidence in the electoral system, risking the "decay of civic engagement."[65] In a study by vanHeerde-Hudson and Fisher in the UK, public opinion was characterized by the perception that "there is just 'too much money' in politics" and the belief that wealthy donors have undue influence over politicians.[66] In a 2012 survey in the US, 77% of respondents thought members of Congress were more likely to act in the interests of those who spent money supporting their election campaigns than they were to act in the public interest.[67] A 2014 poll indicated that three in

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[61] Sean McElwee, Brian Schaffner, & Jesse Rhodes, "Whose Voice, Whose Choice? The Distorting Influence of the Political Donor Class in Our Big-Money Elections" (Demos, 2016), online: <http://www.demos.org/publication/whose-voice-whose-choice-distorting-influence-political-donor-class-our-big-money-electi>.

[62] Sarbanes (2016) at 6.

[63] See, e.g., *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 62.

[64] *Buckley v Valeo,* 424 US 1 at 19 (1976).

[65] Sarbanes (2016) at 3.

[66] Jennifer vanHeerde-Hudson & Justin Fisher, "Public knowledge of and attitudes towards party finance in Britain" (2013) 19:1 Party Politics 41.

[67] Brennan Center for Justice at NYU School of Law, *National Survey: Super PACs, Corruption, and Democracy: Americans' Attitudes about the Influence of Super PAC Spending on Government and the Implications for our Democracy* (2012), online: <https://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy>.

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four American voters think wealthy individuals have a better shot at influencing elections than the rest of the population has.[68]

Arguments in favour of stricter campaign finance regulation often raise the issue of voter confidence. For example, in *Canada (Attorney General) v Somerville,* the government argued that third-party spending limits are necessary to prevent the perception that lawmakers are more accountable to their wealthy supporters than to their electors.[69] In *Harper v Canada (Attorney General)*, the Supreme Court of Canada cited public confidence as a permissible justification for third-party spending limits and their limits on freedom of expression.[70] The US Supreme Court also accepts that the government may limit free speech to prevent the appearance of corruption, but the majority defines corruption narrowly to include only direct *quid pro quo* exchanges.[71]

4.5 Other Rationales

Campaign fundraising is time-consuming for politicians. Limits on campaign spending may reduce the time politicians spend on fundraising, allowing them to focus on policy development and other valuable functions.[72] In addition, some argue that unrestrained campaign spending compromises the quality of public debate. For example, Dworkin argues that, if electoral debate is simply a free-for-all, discourse may "be so cheapened as to altogether lose its democratic character."[73] Similarly, the Neill Committee in the UK justified a ban on paid political advertising on broadcast media by pointing to the undesirability of a "continuous barrage of party political propaganda."[74]

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[68] Sarah Dutton et al, "Americans' view of Congress: Throw 'em out", *CBS News* (21 May 2014), online: <http://www.cbsnews.com/news/americans-view-of-congress-throw-em-out/>.
[69] *Canada (Attorney General) v Somerville,* 1996 ABCA 217 at para 11.
[70] *Harper v Canada (Attorney General)*, 2004 SCC 33.
[71] See, e.g., *McCutcheon v FEC,* 572 US __ (2014) (slip op).
[72] Barendt (2005) at 481.
[73] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2000) at 369.
[74] UK, *Fifth Report of the Committee on Standards in Public Life: The Funding of Political Parties in the United Kingdom* (London The Stationery Office, 1998) at 174.

5. OVERVIEW OF CHALLENGES IN REGULATING CAMPAIGN FINANCE

5.1 Freedom of Expression and Association

Campaign finance regulation often entails limits on freedom of expression. As the US Supreme Court remarked in *Buckley v Valeo*, "virtually every type of communication in a modern mass democracy is dependent on expenditure."[75] Limiting spending and fundraising therefore limits the "quantity of expression."[76] Further, campaign finance regulations impact *political* speech, which enjoys a preferred position under US law and stronger protection under the European Convention on Human Rights.[77] Some regulations also hinder freedom of association by preventing individuals from freely pooling their resources to finance a political message. Governments attempting to restrict spending, fundraising, broadcasting, and other aspects of election campaigns must therefore show that restrictions are a justified infringement of freedom of expression and association.

As Dworkin observes, critics of campaign finance regulation view any restriction of political speech as harmful to democracy, even if that restriction is aimed at enhancing the quality of democracy.[78] These critics focus on the danger posed by government, rather than the wealthy, to democracy and individual freedom. The majority of the US Supreme Court follows this libertarian approach to freedom of speech. In *McCutcheon v Federal Election Commission*, for example, Chief Justice Roberts maintained that the government cannot be trusted to judge the value of certain speech over other speech, "even when the government purports to act through legislation reflecting 'collective speech.'"[79]

Dworkin dismisses this libertarian model as "prophylactic overkill."[80] Under Dworkin's "partnership" model of democracy, citizens participate in elections not only by voting, but by attempting to influence the opinions of others.[81] Dworkin argues that citizens who lose must be "satisfied that they had a chance to convince others .... not merely that they have been outnumbered."[82] However, if the "admission price" to political debate is too high,

[75] *Buckley v Valeo,* 424 US 1 at 19 (1976).
[76] *Ibid.*
[77] Barendt (2005) at 159.
[78] Dworkin (2000) at 353.
[79] *McCutcheon v FEC,* 572 US __ (2014) (slip op at 17).
[80] Dworkin (2000) at 369.
[81] *Ibid* at 358.
[82] *Ibid* at 364–65.

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citizens will be denied the opportunity to make persuasive efforts on the basis of wealth, "a circumstance... remote from the substance of opinion or argument."[83]

Many commentators agree with Dworkin that campaign finance regulation can be a justified limit on freedom of speech. Some proponents of campaign finance reform go further, arguing that restrictions on spending and fundraising, for example, may actually enhance free speech values. Restrictions may prevent the wealthy from drowning out other speakers and thus facilitate the dissemination of a wider range of perspectives. In this vein, Fiss argues that the state can be "a friend of speech," not just its enemy.[84] According to Fiss, free speech should protect not only individual self-expression but also popular sovereignty.[85] To accomplish this, "the state may have to act to further the robustness of public debate in circumstances where powers outside the state are stifling speech."[86]

5.2 Entrenching Incumbents and Differential Impacts on Different Political Parties

Campaign finance regulations tend to have disproportionate impacts on different parties and candidates. These impacts may be unintended. For example, in Canada, the federal Liberal Party introduced campaign finance measures, which ultimately turned out to be most favourable to the Conservative Party.[87] In other instances, partisan finagling may be at work. La Raja argues that the design of campaign finance regulation often "can be tied to partisan strategies for influencing the value of one faction's resources relative to one's rivals."[88]

Most concerning is the potential for campaign finance regulation to favour incumbents.[89] For example, ceilings on candidate spending may give incumbents an advantage because they already have publicity.[90] As a result, critics argue that spending caps "limit competition and

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[83] *Ibid* at 364. Dworkin also makes the argument that, in a society with a defensible distribution of wealth, "no one...could have the impact on political decisions, just in virtue of money spent in politics, that the rich can now have in the United States": *ibid* at 176. In this sense, the campaign finance laws struck down by the US Supreme Court do not victimize anyone, as they do not make anyone's position "worse, with respect to the liberty in question, than it would most likely have been in a defensible distribution": *ibid* at 176.

[84] Owen M Fiss, *The Irony of Free Speech* (Harvard University Press, 1996) at 83.

[85] *Ibid* at 3–4.

[86] *Ibid*.

[87] Colin Feasby, "Canadian political finance regulation and jurisprudence" in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) 206 at 217.

[88] La Raja (2008) at 6.

[89] Richard A Posner, *Law, Pragmatism, and Democracy* (Harvard University Press, 2003) at 240.

[90] Barendt (2005) at 482; Posner, (2003) at 240.

undemocratically serve to preserve the *status quo*."[91] Such arguments are particularly salient in the US, where "elections are candidate-centered and big campaigns are sometimes needed to blast out incumbents."[92]

Campaign finance regulations may also have differential impacts depending on the ideology and fundraising methods of different political parties. For example, in the UK, restrictions on donations from labour unions would clearly disadvantage the Labour Party. In Canada, Feasby argues that "contribution limits have created a persistent funding advantage for the federal Conservative Party," which has had success gathering many small donations from individuals.[93] Because party expenditure is also limited, the Conservative Party often has money left over to spend on attack ads between elections.[94] The federal New Democratic Party, on the other hand, faced a greater disadvantage than the Liberals and Conservatives after the erosion of public funding in Canada in 2014, since the New Democrats derived a larger portion of their income from the public funding regime.[95]

5.3 Loopholes

Loopholes are another challenge in crafting effective campaign finance regimes. The goals of ameliorating corruption, unfairness, and inequality will be subverted if donors simply find new ways to funnel money to politicians. Issacharoff points out that "the perverse 'hydraulic' of money finding its outlet" has caused many attempts at campaign finance reform to "backfire."[96] For example, after Congress tightened regulations governing party fundraising and spending in the US in 2002,[97] spending by third-party campaigners jumped, suggesting that money was simply redirected to a new outlet.[98] Even if campaign finance regulations are skillfully designed to minimize these "hydraulics," prospective donors may direct money to other activities like lobbying to achieve their ends.[99]

5.4 Circumscribing the Scope of Regulated Activities

Another difficulty in designing campaign finance regulations is drawing the line between regulated and unregulated activities. Distinguishing between election activities and general political activities can be difficult, and entities and individuals will always try to fall on the

[91] Gauja & Orr (2015) at 250.
[92] *Ibid*.
[93] Feasby (2012) 206 at 217. See also Young, (2015) at 119.
[94] Feasby (2012) 206 at 217, 219.
[95] Young (2015) at 118.
[96] Issacharoff (November 2010) at 120.
[97] *Bipartisan Campaign Finance Reform Act of 2002,* Pub L No 107-155, 116 Stat 81.
[98] Dwyre (2015) at 54.
[99] OECD (2016) at 16.

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unregulated side of the line.[100] Third parties might attempt to split costs between election-related spending and general expenses in order to avoid hitting the thresholds for regulatory requirements.[101] In addition, it may be unclear whether an advertisement on a contentious political issue during an election aims to improve the chances of a certain political party or is merely part of general political debate. Responding to this difficulty, Barendt has argued that the Supreme Court of Canada's willingness to allow third party spending limits[102] is based on the incorrect assumption that "a sensible line can be drawn between campaign expenditure on the one hand and expenditure on general political and social discussion" on the other.[103]

Lawmakers may also encounter difficulty in drawing the line between regulated and unregulated time periods. Campaign finance regulation often kicks in when an election begins. However, because election campaigning has become more or less permanent, some commentators argue that lawmakers should approach political finance as a whole rather than focusing on campaign finance alone.[104] Further, contemporary digital campaigning techniques have shifted the timing of expenses. Many costly activities, such as forming databases of voters, occur before the election period begins, allowing expenses for these activities to slip through the regulatory net.[105] On the other hand, an overly broad cap on general party expenditures could impact useful activities such as policy development.[106]

5.5 New Campaigning Techniques

The next challenge in campaign finance is the application of old regulatory regimes to new methods of campaigning. Traditionally, campaign finance regulation is designed with media like television and radio in mind. However, campaigns are increasingly reliant on digital techniques like "micro-targeting," which involves using data purchased from data companies to predict how particular voters might feel about certain issues and targeting small groups of voters with tailored advertisements.[107] Existing regulatory frameworks may be ill-suited to these new techniques. For example, spending caps may be undermined by the difficulty of tracking online and social media expenses.[108] Further, as discussed above in

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[100] Keith D Ewing & Jacob Rowbottom, "The Role of Spending Controls" in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) at 85.

[101] *Ibid*.

[102] See, e.g., *Harper v Canada (Attorney General)*, 2004 SCC 33.

[103] Barendt (2005) at 479–80.

[104] Gauja & Orr (2015) at 259.

[105] Damian Tambini et al, *Media Policy Brief 19: The new political campaigning* (London School of Economics, March 2017) at 5.

[106] Ewing & Rowbottom (2012) at 81.

[107] Katelyn Ferral, "One Person, one Algorithm, one vote", *The Capital Times* (4 January 2017) 24.

[108] Tambini et al (March 2017) at 5.

Section 5.4, some activities involved in digital campaigning may take place before the election period begins, allowing expenses for these activities to escape unregulated.[109]

6. THE REGULATION OF THIRD-PARTY CAMPAIGNERS

6.1 The Role of Third-Party Campaigners

The proper role of third-party campaigners in elections is debated. On one hand, third parties may provide helpful perspectives and additional information not offered by parties and candidates. As the Alberta Court of Appeal observed in *Somerville*:

> The citizenry looks to its community, political and religious leaders, and interest groups for input. Voters want the benefit of the independent advice and information on candidates and parties from others with similar ideologies and without the self interest involved in candidate and party advertising.[110]

The Alberta Court of Appeal noted further that, without third-party campaigners, voters would only receive the information politicians and the media choose to disseminate.[111] This is particularly problematic in relation to issues avoided by political parties as "non-winners," since their positions on such issues are "critical to the voter."[112] The dissent in *Harper v Canada (Attorney General)* echoed these points, arguing that deliberative democracy necessitates giving a voice to unpopular views avoided by political parties or candidates.[113] In this conception of elections, "parties and third parties are on an equal footing" and third party "voices are seen to be in the interests of either open deliberation or competitive pluralism."[114]

On the other hand, many commentators argue that political parties and candidates should be the primary players in elections, rather than unaccountable third-party groups with narrow interests.[115] The Canadian Lortie Commission summarized this argument:

> Parties remain the primary political organizations for recruiting and selecting candidates for election to the House of Commons, for organizing

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[109] *Ibid*.
[110] *Canada (Attorney General) v Somerville*, 1996 ABCA 217 at para 75.
[111] *Ibid* at para 48.
[112] *Ibid* at para 76.
[113] *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 14.
[114] Gauja & Orr (2015) at 263.
[115] See, e.g., La Raja (2008) at 7; Issacharoff, (November 2010) at 136, 141; dissenting judgement in *Citizens United v FEC*, 588 US 310 (2009).

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> the processes of responsible parliamentary government, and for formulating policy that accommodates and reconciles competing regional and socio-economic interests. As legitimate as interest groups are in a free and democratic society, by their nature they cannot perform these crucial functions.... It is therefore imperative that electoral reform address the fundamental objective of strengthening political parties as primary political organizations.[116]

In addition, since third-party organizations, such as corporations, do not have the right to vote, some argue they should be barred "from exercising an undue voice within the electoral process."[117]

In the US, the growth of outside spending has deteriorated the centrality of candidates and political parties in campaigns. Dwyre argues that this deterioration is "detrimental to the overall health of American representative democracy."[118] Parties "link voters to lawmakers" and provide an "accountability mechanism."[119] They also give voters an idea of what to expect from candidates.[120] However, these functions are undermined by the shrinking role of parties in electoral debate.[121] In Dwyre's view, the diminishing influence of parties will lead to a "democratic deficit" and a disenchanted electorate.[122]

6.2 Regulating Third-Party Campaigners to Reinforce other Campaign Finance Controls

Third-party campaign regulations may help ensure the effectiveness of regulations governing parties and candidates. If party and candidate spending is limited without corresponding limits on third-party spending, parties and candidates may be forced to use their limited spending capacity to "fend off attacks" by third parties rather than advertising their policy positions.[123] The regulation of third parties also prevents circumvention of regulations governing spending, contributions, and transparency for candidates and political parties. A failure to regulate third parties could produce a "waterbed effect" in which front groups are "used to channel spending for parties and candidates."[124] Gauja and

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[116] Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report* (Ottawa: Minister of Supply and Services, 1991) vol 1 at 13.
[117] Gauja & Orr (2015) at 254.
[118] Dwyre (2015) at 35.
[119] *Ibid* at 53, 57–58.
[120] Robert G Boatright, "U.S. Interest Groups in a Deregulated Campaign Finance System" in Robert G Boatright, ed, *The Deregulatory Moment? A Comparative Perspective on Changing Campaign Finance Laws* (University of Michigan Press, 2015) at 99–100.
[121] Dwyre (2015) at 53, 57–58.
[122] *Ibid*.
[123] Gauja & Orr (2015) at 254. See also Ewing & Rowbottom (2012) at 82.
[124] Gauja & Orr (2015) at 254.

Orr add that third-party regulations must prevent organizations from proliferating to circumvent spending caps.[125]

6.3 The Regulation of Third Parties and Freedom of Speech

Third-party spending caps raise particularly potent freedom of expression concerns. Their constitutional validity is therefore controversial. As noted by the Alberta Court of Appeal in *Canada (Attorney General) v Somerville,* limits on third party spending "purport ... to protect the democratic process, by means of infringing the very rights which are fundamental to a democracy."[126]

Third-party spending limits have survived freedom of expression challenges in Canada and the UK, but in the US, caps on independent third-party expenditures have been struck down as an unjustifiable limit on freedom of speech.[127] Freedom of expression and third-party spending limits are discussed further below in the context of the Canadian cases of *Canada (Attorney General) v Somerville,*[128] *Libman v Quebec (Attorney General),*[129] and *Harper v Canada (Attorney General);*[130] the British case of *Bowman v the United Kingdom;*[131] and the American cases of *Buckley v Valeo,*[132] *Austin v Michigan Chamber of Commerce,*[133] *McConnell v FEC,*[134] *Citizens United v FEC,*[135] and *SpeechNow.org v FEC.*[136]

6.4 Third-Party Spending and Corruption

A lack of consensus persists regarding the extent to which independent third-party campaigning entails a risk of corruption. Many argue that politicians may be inclined to reward third parties who fund advertising to support their campaigns, even if the third parties act independently. However, American courts have concluded that independent third-party campaign expenditures entail no significant risk of corruption or the appearance

[125] *Ibid* at 263.
[126] *Canada (Attorney General) v Somerville,* 1996 ABCA 217 at para 65
[127] See *Buckley v Valeo,* 424 US 1 (1976), *SpeechNow.org v FEC,* 599 F (3d) 686 (DC Cir 2010), *Citizens United v FEC,* 588 US 310 (2009).
[128] *Canada (Attorney General) v Somerville,* 1996 ABCA 217.
[129] *Libman v Quebec (Attorney General),* [1997] 3 SCR 569, 151 DLR (4th) 385.
[130] *Harper v Canada (Attorney General),* 2004 SCC 33.
[131] *Bowman v the United Kingdom* (1998), No 24839/94, [1998] I ECHR 4.
[132] *Buckley v Valeo,* 424 US 1 (1976).
[133] *Austin v Michigan Chamber of Commerce,* 494 US 652 (1989).
[134] *McConnell v Federal Election Commission,* 540 US 93 (2003).
[135] *Citizens United v FEC,* 588 US 310 (2009).
[136] *SpeechNow.org v FEC,* 599 F (3d) 686 (DC Cir 2010).

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of corruption, assisted in this conclusion by a narrow definition of corruption. This debate is summarized in Section 8.3, below.

6.5 The Regulation of Institutional Third Parties

Institutional campaign spending may carry different implications for the quality of democracy depending on the type of institution in question. Rowbottom points out that "some institutions can be an important vehicle for participation ... Other institutions, however, may act as a conduit for wealthy individuals and organisations."[137] In some cases, the difference between an individual donation and an institutional donation may be meaningless, as when an individual controls the institution and lacks accountability to members.[138] For example, Boatright notes that some interest groups in the US have a small membership to whom they are accountable, making them look more like for-profit corporations than vehicles for "representing citizens' views to politicians."[139] In other cases, institutional spending results from the "pooling of resources among lots of people," which reduces both corruption and equality concerns.[140] This type of institutional spending is also a means of enhancing the effectiveness of small donations.[141] Some institutions may also require "internal debate" before making political expenditures, which contributes to the deliberative process.[142]

Blanket prohibitions or caps on institutional political spending may close off healthy "channels for participation."[143] Rowbottom argues that the design of campaigning controls for institutions should not be based on their status as corporations, unions, or unincorporated associations, but rather on the "democratic credentials of the institution" and its ability to provide an effective channel for citizen participation.[144]

a) Corporations

For-profit corporations are an example of an institution in which members have little influence over political spending. Rowbottom points out that, "since a company does not represent its shareholders (or anyone else) and has its own legal identity ... it may be

[137] Jacob Rowbottom, "Institutional donations to political parties" in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) 11 at 11.
[138] Hasen (2012) 225; Rowbottom (2012) 11 at 17.
[139] Boatright (2015) at 100.
[140] Rowbottom (2012) 11 at 16.
[141] *Ibid*.
[142] *Ibid* at 18.
[143] *Ibid* at 16.
[144] *Ibid* at 27.

questioned why companies are legally permissible donors at all."[145] A corporation's money is not the property of the shareholders. If a company makes a political donation or expenditure at odds with the views of a shareholder, the shareholder's only recourse is to sell their shares.[146] As noted by the dissent in the American case of *Citizens United v Federal Election Commission,* corporate communications are "at least one degree removed from the views of individual citizens, and ... may not even reflect the views of those who pay for it."[147] If a corporation is closely held or has a controlling shareholder, donations from the corporation could be viewed by candidates and by the public as donations from the controlling individual, which raises issues in relation to corruption and public confidence.[148] Directors are restrained to some extent when directing money to political purposes by their duty to further the company's interests, but this restraint seems irrelevant to the prevention of corruption, inequality, unfairness, and falling public confidence in the electoral system.[149]

In the UK, companies are required to obtain a member resolution authorising any political donations or expenditures in advance.[150] However, the resolution "must be expressed in general terms ... and must not purport to authorize particular donations or expenditure."[151] Further, the resolution will have effect for four years.[152] As a result, this mechanism does little to promote accountability or attenuate the control of the company's management over political spending.

In contrast to for-profit corporations, incorporated interest groups could be a healthy means of participation for small donors wishing to act collectively. Individuals contribute money to the group because of its political agenda, as opposed to for-profit corporations, in which the company's political activities have nothing to do with investor support.[153] Thus, as Rowbottom points out, corporate status "says little about whether donations should be permissible or capped."[154]

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[145] *Ibid* at 22. Note that corporations are impermissible donors to candidates and parties at the federal level in Canada and are also prohibited from making contributions to candidates at the federal level in the US: see Parts 8.2.1.2(b) and 10.2(b), below. Corporations may, however, engage in third-party campaigning in Canada and the US. For an opposing view on the role of corporations in elections, see the judgement of Kennedy J in *Citizens United v FEC,* 588 US 310 (2009). At page 364, Kennedy J maintained that, "[o]n certain topics, corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts".

[146] Rowbottom (2012) 11 at 22.

[147] *Citizens United v FEC,* 588 US 310 at 419 (2009).

[148] Rowbottom (2012) 11 at 21.

[149] *Ibid*, 11 at 21.

[150] *Companies Act 2006,* c 46, s 366.

[151] *Ibid*, s 367.

[152] *Ibid*, s 368.

[153] Rowbottom (2012) 11 at 23.

[154] *Ibid*.

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Issacharoff maintains that for-profit corporations in the US lack the desire and ability to overwhelm elections.[155] Studies indicate that corporate spending is low compared to other third party spending in the US.[156] Further, after a US Supreme Court decision struck down restrictions on corporate electioneering, there was no explosion in corporate spending.[157] Rather, money has come mostly from wealthy individuals.[158] Issacharoff explains this phenomenon by pointing out that corporations are probably unwilling to risk backlash by supporting candidates with controversial positions.[159] For example, Target faced a boycott in 2010 after contributing to a candidate that opposed same-sex marriage.[160] Issacharoff argues that for-profit corporations are more likely to direct their money towards lobbying, which is more effective and discreet.[161]

b) Labour Unions[162]

Labour unions are often grouped with corporations in debates over and legislation on campaign finance. For example, the dissenting justices of the US Supreme Court in *Citizens United v Federal Election Commission* discussed corporations and unions together, stating that both represent "narrow interests."[163] However, political spending by labour unions arguably differs from political spending by for-profit corporations in regard to its implications for corruption and equality. Ewing, commenting in the UK context, points out that "the trade union model of party funding is one that involves millions of people of modest means making a small annual contribution to sustain the political process."[164] In Ewing's view, "[t]his is precisely what we should be trying to encourage."[165] Rowbottom adds that unions often have some form of "internal democracy," such as requirements for internal debate on proposed political spending and measures to promote the accountability of union leaders.[166] For these reasons, Rowbottom argues that union spending is not problematic from the perspective of equality.[167] Yet unions are the most heavily regulated donors in the UK.[168] In contrast to the thin shareholder resolution requirement for UK corporations, unions in the

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[155] Issacharoff (November 2010) at 130.
[156] *Ibid*.
[157] Boatright (2015) at 71.
[158] *Ibid*.
[159] Issacharoff (November 2010) at 130.
[160] Dwyre (2015) at 55.
[161] Issacharoff (November 2010) at 131.
[162] According to Gauja and Orr, labour unions are the most active third-party campaigners in the UK, Canada, New Zealand, and Australia: Gauja & Orr, (2015) at 268.
[163] *Citizens United v FEC,* 588 US 310 at 412 (2009).
[164] Keith D Ewing, "The Trade Union Question in British Political Funding" in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) at 72.
[165] *Ibid.*
[166] Rowbottom (2012) 11 at 24.
[167] *Ibid* at 25.
[168] *Ibid* at 23.

UK must ballot their members to establish a separate political fund for any political spending.[169] Individual members must then opt in to payments into the fund.[170]

6.6 Incidence of Third-Party Electioneering in Canada and the UK

Gauja and Orr argue that "there is relatively little demand for 'big money' third-party campaigning in parliamentary democracies," especially those, like Canada and the UK, that are "culturally, rather than legally driven," to accept limits on third-party spending.[171] In the UK, third parties rarely approach their spending limits, although this could be partly due to gaps in reporting requirements or cost splitting by third parties.[172] Similarly, third parties in Canada generally do not reach their spending limits.[173] Feasby argues that third parties in Canada have little "appetite ... for big money campaigns," while the "lack of co-ordination between third parties suggests that third parties are not affecting electoral fortunes on a national level."[174] In Canada's 2008 federal general election, while political parties spent over $58 million, third-party spending was relatively negligible at just under $1.5 million.[175] In the 2015 federal general election, 104 third parties collectively spent over $6 million on election advertising, but spending limits were much higher in 2015 because of the unusually long campaign.[176] Lawlor and Crandall add that third parties are probably not being used to circumvent contribution limits to parties and candidates.[177] Based on these observations, they argue that third-party spending restrictions in Canada seem "to be a preventative rather than a responsive approach."[178]

However, Canada's 1988 federal general election suggests that third-party spending limits could play a significant role in issue-based elections, although such elections are rare in Canada.[179] The 1988 election, during which third-party spending was unlimited, was essentially reduced to a referendum on free trade.[180] Most of the $4.7 million spent by third-party campaigners was directed toward the free trade issue and four times more money went

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[169] *Ibid*.
[170] *Ibid*.
[171] Gauja & Orr (2015) at 268.
[172] Ewing & Rowbottom (2012) at 82, 88.
[173] Feasby (2012) 206 at 212.
[174] *Ibid*.
[175] *Ibid*.
[176] The top ten spenders were mainly labour unions: Joan Bryden, "Third Parties spent $6-million to influence 2015 election" *The Globe and Mail* (1 April 2016), online: <http://www.theglobeandmail.com/news/politics/third-parties-spent-6-million-to-influence-2015-vote/article29491009/>.
[177] Andrea Lawlor & Erin Crandall, "Understanding third party advertising: An analysis of the 2004, 2006 and 2008 Canadian elections" (December 2011) 54:4 Cdn Pub Pol'y 509 at 509.
[178] *Ibid* at 527.
[179] *Ibid* at 526.
[180] Desmond Morton, "Should Elections be Fair or Just Free?" in David Schneiderman, ed, *Freedom of Expression and the Charter* (Thomson Professional Publishing Canada, 1991) 460 at 463.

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toward promoting free trade than opposing it.[181] This indirectly supported the ultimately successful Progressive Conservative Party, which campaigned on a platform of supporting free trade. As the Supreme Court of Canada noted in *Libman v Quebec (Attorney General)*, "[t]he 1988 federal election showed clearly how independent spending could influence the outcome of voting."[182]

7. INTERNATIONAL LAW

a) UNCAC

The United Nations Convention against Corruption ("UNCAC") addresses transparency in campaign finance. Article 7(3) of UNCAC states that "[e]ach States Party shall consider taking appropriate legislative and administrative measures ... to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties."[183]

b) OECD Documents

The OECD's *Guidelines for Multinational Enterprises* advise companies to follow local law on political contributions, stating that "enterprises should ... [n]ot make illegal contributions to candidates for public office or to political parties or other political organizations. Political contributions should fully comply with public disclosure requirements and should be reported to senior management."[184] Political financing is also mentioned in the Recommendation for Further Combating Bribery, which recommends that companies develop measures to prevent bribery in a range of areas, including "political contributions."[185]

The OECD is showing increased interest in campaign finance and its consequences for integrity in government. This interest is demonstrated in its 2016 report, *Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture*.[186]

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[181] Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report* (Ottawa: Minister of Supply and Services, 1991) at 337.
[182] *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, 151 DLR (4th) 385 at para 51.
[183] *United Nations Convention against Corruption*, 31 October 2003, 2349 UNTS 41 (entered into force 13 December 2005).
[184] OECD, *Guidelines for Multinational Enterprises* (OECD, 2011) at 48, online: <http://mneguidelines.oecd.org/guidelines/>.
[185] OECD, *Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex II: Good Practice Guidance on Internal Controls, Ethics, and Compliance (OECD, 2010), online: <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44884389.pdf>.
[186] OECD (2016).

The report outlines a recommended policy framework with four "pillars." First, policymakers should encourage transparency and accountability through "[c]omprehensive disclosure of income sources of political parties and candidates" and "user-friendly" organization of disclosed information.[187] Second, policymakers should promote a level playing field through measures such as public funding, spending limits, bans on certain types of private contributions (e.g., contributions from corporations), and rules to limit abuse of state resources.[188] Third, policymakers should foster a culture of integrity by developing rules in areas like conflict of interest and whistleblower protection.[189] Standards of integrity for private donors are also important in creating a culture of integrity.[190] Finally, policymakers should encourage regular review of campaign finance regimes and ensure compliance through dissuasive sanctions, independent oversight, and the provision of support to political parties to assist in compliance.[191]

8. US LAW

In the US, freedom of speech jurisprudence has led to the demise of various campaign finance regulatory measures.[192] Commenting on this deregulatory bent, Boatright observes that the US "begins from a different place" from some other countries when it comes to the regulation of campaign finance.[193] This "different place" involves a long-standing reluctance to regulate campaign finance and the recognition of third-party campaigner organizations as an integral part of the electoral process.[194] In spite of these cultural tendencies and the American courts' fierce protection of freedom of speech, limits and source restrictions on political contributions and transparency requirements for political spending have survived. However, the transparency requirements for some types of third parties are weak, allowing political money to be funnelled through non-transparent organizations.[195]

In this part, I will focus on the interaction between free speech and campaign finance regulation, followed by a brief overview of the federal regulatory scheme in the US.

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[187] *Ibid* at 65.
[188] *Ibid* at 30.
[189] *Ibid*.
[190] *Ibid*.
[191] *Ibid* at 31.
[192] Dwyre notes that recent rulings and regulations made by the Federal Election Commission have contributed further to the relaxation of regulation: Dwyre (2015) at 35.
[193] Boatright (2015) at 71.
[194] *Ibid*.
[195] See Section 8.3, below.

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8.1 Constitutional Rights and Campaign Finance Regulation in the US

8.1.1 Introduction

The First Amendment of the US *Constitution* ("the First Amendment") states:

> Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[196]

Political speech enjoys a "preferred position" in American constitutional law.[197] According to the US Supreme Court, "[l]aws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"[198] In the context of campaign finance regulation, the US Supreme Court has held that the only permissible governmental interest in restricting political speech is the prevention of corruption and the appearance of corruption.[199] Other interests, such as equality and fairness, are considered insufficiently compelling to justify burdens on First Amendment rights. Further, the majority of the US Supreme Court has defined corruption narrowly to include only direct *quid pro quo* exchanges.[200] In the majority's view, influence and access alone do not raise the spectre of corruption.[201] Kang calls this approach to corruption "disappointingly underdeveloped."[202]

By narrowly circumscribing the possible justifications for campaign finance regulation, the majority of the US Supreme Court guards against the risk of governmental influence over voters' thoughts and decisions while overlooking the potential for undue influence by the wealthy over public discourse and elected officials. Thus, the protection of individual freedom is arguably accomplished at the expense of equality between individuals. This libertarian approach to campaign finance accords with the view that the First Amendment is "premised on mistrust of governmental power."[203] In line with this mistrust, Chief Justice

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[196] US Const amend I.

[197] Barendt (2005) at 154. See also *Buckley v Valeo,* 424 US 1 at 14 (1976).

[198] *Citizens United v FEC,* 588 US 310 at 340 (2010), quoting *FEC v Wisconsin Right to Life,* 551 US 449 at 464 (2007). See also Deborah A Roy, "The Narrowing Government Interest in Campaign Finance Regulations: Republic Lost?" (Fall 2015) 46:1 U Mem L Rev 1.

[199] See, e.g., *Buckley v Valeo,* 424 US 1 (1976).

[200] See, e.g., *Citizens United v FEC*, 588 US 310 (2010).

[201] *Ibid.*

[202] Michael S Kang, "The Brave New World of Party Campaign Finance Law" (2016) 101:3 Cornell L Rev 531 at 534.

[203] *Citizens United v FEC,* 588 US 310 at 340 (2009).

Roberts of the US Supreme Court maintains that the public must be left to "determine for itself what speech and speakers are worthy of consideration".[204]

The US Supreme Court's adoption of a libertarian model of campaign finance has led to the extinction of campaign expenditure limits. However, the Court distinguishes between expenditures and contributions, concluding that contribution limits are permissible because they pursue the legitimate governmental interest of anticorruption.[205] The Court has also upheld transparency requirements for both expenditures and contributions.[206]

A contingent of justices on the US Supreme Court has accepted a wider range of justifications for the burdens on political speech associated with campaign finance regulations. At one point, these justices formed the majority of the Court, leading to decisions upholding various campaign finance controls.[207] However, this contingent is now in the minority, and their earlier decisions have been overruled.

8.1.2 Jurisprudence on the Constitutional Validity of Campaign Finance Regulation in the US

a) *Buckley v Valeo*

Buckley v Valeo (*Buckley*) is a foundational case for American campaign finance regulation and represents the beginning of the end for expenditure limits in the US.[208] In *Buckley*, the US Supreme Court found that ceilings on independent, uncoordinated third-party campaign expenditures were an unacceptable restriction on political speech under the First Amendment.[209] In the majority's view, the impugned spending ceiling precluded anyone other than candidates, parties, and the press from making "any significant use of the most effective modes of communication."[210] The Court observed that "virtually every type of communication in a modern mass democracy is dependent on expenditure."[211] Thus, restricting spending "reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[212]

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[204] *Ibid* at 341.
[205] See, e.g., *Buckley v Valeo,* 424 US 1 (1976).
[206] *Ibid*.
[207] See, e.g., *Austin v Michigan Chamber of Commerce,* 494 US 652 (1989); *McConnell v Federal Election Commission,* 540 US 93 (2003). See Section 8.1.2(b), below.
[208] *Buckley v Valeo,* 424 US 1 (1976).
[209] "Uncoordinated" refers to uncoordinated with candidates. In other words, the spending ceiling at issue applied to independent third-party campaigners.
[210] *Buckley v Valeo,* 424 US 1 at 19–20 (1976).
[211] *Ibid* at 19.
[212] *Ibid.*

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In the Court's view, the government's interest in preventing corruption did not justify the third-party expenditure limits.[213] The Court held that independent third-party campaign expenditures do not pose the same risk of corruption as large contributions to candidates.[214] The Court explained that "[t]he absence of prearrangement and coordination of an expenditure with the candidate ... alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[215]

The Court also rejected the argument that independent expenditure caps were justified by a governmental interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections."[216] According to the Court, the idea that "government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[217] Rather, the First Amendment was intended to promote unfettered dissemination of information and ideas.[218] The Court cited similar concerns in striking down a limit on candidate self-funding.[219]

The Court did, however, uphold limits on direct contributions to candidates. First, unlike expenditure ceilings, contribution caps impose only a "marginal," indirect restriction on the contributor's right to free speech.[220] According to the Court, a "contribution serves as a general expression of support for the candidate and his views" and this symbolic expression does not depend on the size of the contribution.[221] Further, the eventual speaker will be someone other than the contributor.[222] Second, the Court found that the contribution limits pursued the permissible objective of preventing corruption and its appearance. According to the Court, contribution limits address the risk that large donations will be "given to secure a political *quid pro quo* from current and potential office holders."[223] Equally important, contribution limits address "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."[224]

In *Buckley*, the US Supreme Court established several principles that continue to influence American jurisprudence on campaign finance regulation. First, the Court rejected the egalitarian rationale for regulation. Only the anticorruption rationale was accepted as a

[213] *Ibid* at 44.
[214] *Ibid* at 46.
[215] *Ibid* at 47.
[216] *Ibid* at 48.
[217] *Ibid* at 49.
[218] *Ibid*.
[219] *Ibid* at 54.
[220] *Ibid* at 20.
[221] *Ibid* at 21.
[222] *Ibid*.
[223] *Ibid* at 26.
[224] *Ibid* at 27.

legitimate justification for limits on political speech during election campaigns. Second, the Court held that independent expenditures by third parties do not raise a significant risk of corruption. This holding set the stage for the growth of independent third-party spending in American elections by groups such as super-PACs (discussed further below). Finally, the Court distinguished between the First Amendment implications of contributions and expenditures. This explains why the concept of coordination is important in American campaign finance law. If spending by a third party or political party is coordinated with a candidate, it is viewed as a contribution to the candidate. As a result, coordinated expenditures, like contributions, are subject to caps and other restrictions. Only truly independent expenditures are unregulated. Various commentators have criticized this distinction between expenditures and contributions as unworkable in practice.[225] In fact, Chief Justice Burger's dissenting opinion in *Buckley* argued that "contributions and expenditures are two sides of the same First Amendment coin."[226]

b) *Austin v Michigan Chamber of Commerce* and *McConnell v FEC*

The cases of *Austin v Michigan Chamber of Commerce* (*Austin*)[227] and *McConnell v FEC* (*McConnell*)[228] are no longer in line with the US Supreme Court's approach to campaign finance regulation. The views expressed in the majority judgements in both cases reflect the views of the dissenting justices in more recent cases on campaign finance regulation.

In *Austin*, the majority of the US Supreme Court upheld a Michigan law that prohibited corporations from using general treasury funds for independent expenditures in support of or opposition to a candidate's election. Corporations could still pay for political advertising, but were required to use a separate fund.[229] Although the majority appeared to accept the idea, originating in *Buckley*, that political speech may only be burdened in the name of preventing corruption, the majority broadened the concept of corruption to include "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[230] Thus, the majority appeared to blend the equality rationale for campaign finance regulation with the anticorruption rationale. The majority's decision also accepted that the speech of corporations and natural persons may be treated differently, since corporate status confers "special benefits ... and present[s] the

[225] See, e.g., Gauja (2010) at 182; *Colorado Republican Federal Campaign Committee v FEC,* 518 US 604 (1996).
[226] *Buckley v Valeo,* 424 US 1 at 241 (1976). Burger CJ would have struck down both the expenditure limits and the contribution limits.
[227] *Austin v Michigan Chamber of Commerce,* 494 US 652 (1989).
[228] *McConnell v Federal Election Commission,* 540 US 93 (2003).
[229] Corporations could only solicit contributions to the segregated political fund from certain persons: *Austin v Michigan Chamber of Commerce,* 494 US 652 at 656 (1989).
[230] *Ibid* at 660.

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potential for distorting the political process."[231] This decision was overturned in *Citizens United v FEC,* discussed further below.

In *McConnell,* the majority of the US Supreme Court upheld the ban on "soft money" in the *Bipartisan Campaign Finance Reform Act* of 2002 (*BCRA*).[232] "Soft money" referred to unregulated donations to political parties for the purpose of party-building activities, such as issue advertising and voter-turnout efforts. Prior to the *BCRA,* political parties could raise unlimited funds for these activities.[233] In *McConnell,* the majority held that contributions may be restricted for anticorruption purposes, as in *Buckley,* but expanded the definition of "corruption" beyond the *quid pro quo* to include the risk of undue influence on lawmakers. In the majority's view, the soft money ban was directed toward the legitimate goal of preventing corruption, as it prevented the circumvention of contribution limits. The soft money ban is still in place.

In accordance with *Austin*, the majority in *McConnell* also upheld a provision prohibiting corporations and trade unions from using general treasury funds for independent expenditures on "electioneering communications." "Electioneering communications" are a category of election advertisements created by the *BCRA* that refer to a candidate in the period before the election. The category is broader than the category of "express advocacy." which involves words like "vote for" or "vote against." The Court noted that corporations were allowed to establish segregated funds to pay for electioneering communications. Further, the same rationale for prohibiting corporations from spending general treasury funds on express advocacy, discussed in *Austin*, also applied to the broader category of electioneering communications. This part of the judgement was overturned in *Citizens United v FEC*, discussed further below.

c) *Davis v FEC*

Davis v FEC (*Davis*) aligns with current US Supreme Court jurisprudence on campaign finance regulation and freedom of speech.[234] In *Davis,* the majority of the US Supreme Court struck down the "millionaire's amendment," a provision of the *BCRA* stipulating that candidates could benefit from a higher donation ceiling if facing a self-funded opponent whose spending reached a certain threshold. The Court found that the impugned provision was an unjustifiable burden on the freedom of speech of self-funded candidates. In *Buckley*, the Court had already struck down an attempt to cap candidates' use of personal funds, since the cap interfered with candidates' right to advocate intensively for their election and

[231] *Ibid* at 661.
[232] *Bipartisan Campaign Finance Reform Act of 2002,* Pub L No 107-155, 116 Stat 81.
[233] Boatright, (2015) at 74. For more on soft money, see Richard Briffault, "Soft Money, Congress and the Supreme Court" in K D Ewing & Samuel Issacharoff, eds, *Party Funding and Campaign Financing in International Perspective* (Hart Publishing, 2006) at 191.
[234] *Davis v Federal Election Commission,* 554 US 724 (2007).

lacked an anticorruption purpose.[235] In *Davis,* the Court emphasized "the fundamental nature of the right to spend personal funds for campaign speech" and observed that the millionaire's amendment imposed "an unprecedented penalty on any candidate who robustly exercises that First Amendment right."[236] This penalty was not justified by an anticorruption interest, as using personal funds actually decreases the risk of corruption by reducing candidates' dependence on donations. Relying on *Buckley,* the Court rejected the idea that egalitarian concerns could justify a burden on First Amendment rights.[237] The Court warned that allowing the state to limit political speech for the purpose of furthering equality "would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office."[238] The majority likened wealth to other "strengths" candidates may have, such as fame or "a well-known family name," and emphasized that "[t]he Constitution ... confers upon voters, not Congress, the power to choose" officeholders.[239]

d) *Citizens United v FEC*

In *Citizens United v FEC* (*Citizens United*),[240] the majority of the US Supreme Court departed from its earlier decisions in *McConnell* and *Austin.* Although the Court upheld a ban on direct contributions to candidates from corporations and unions, along with various transparency requirements, the majority struck down limits on independent expenditures by corporations and unions. Under the *BCRA,* corporations and unions were prohibited from using general treasury funds for independent expenditures on express advocacy and electioneering communications. As mentioned above, express advocacy involves the use of "magic words" like "vote for" or "vote against." "Electioneering communications," a category of communications created by the *BCRA,* refer to a candidate in the period before the election but fall short of express advocacy. The majority of the Court held that the First Amendment precludes the government from prohibiting the use of general treasury funds for either express advocacy or electioneering communications.

Writing for the majority, Justice Kennedy began by asserting that the First Amendment restrains government from treating speakers differently based on their identity. Thus, corporations, including for-profit corporations, cannot be treated differently from natural persons in the context of political speech. Restricting some speakers but not others would "deprive the public of the right and privilege to determine for itself what speech and

[235] *Ibid* at 738.
[236] *Ibid* at 738–39.
[237] *Ibid* at 741.
[238] *Ibid* at 742.
[239] *Ibid.*
[240] *Citizens United v Federal Election Commission,* 588 US 310 (2009).

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speakers are worthy of consideration."[241] In Justice Kennedy view, the "governing rule" should be "more speech, not less."[242]

In response to the majority's decision on this point, Justice Stevens quipped that "American democracy is imperfect, [but] few ... would have thought its flaws included a dearth of corporate money in politics."[243] Justice Stevens disagreed that corporations and natural persons must be treated identically in the electoral context. Rather, in this context, "the distinction between corporate and human speakers is significant."[244] Corporations are not part of "We the People" and carry a special risk of corrupting the electoral process.[245] Unlike human speech, corporate speech is "derivative" and restrictions on corporate speech do not prevent individuals from speaking themselves.[246] Further, the amount of money in a corporation's general treasury does not reflect public or even shareholder support for the corporation's political activities.[247]

The majority went on to find that the impugned provisions amounted to content-based "censorship" and an outright ban on corporate speech.[248] The dissent disagreed, pointing out that, far from banning corporate speech, the *BCRA* continued to allow corporations to fund political speech through the formation of separate segregated funds. However, in Justice Kennedy's view, creating these funds was too administratively "burdensome" to be an adequate alternative.[249] The dissent also argued that an exception to the prohibition could be carved out for non-profit corporations that raise funds almost exclusively from individuals, like Citizens United. However, to Justice Kennedy the alternatives suggested by the dissent were unworkable because they would nonetheless "chill ... political speech."[250] Further, according to Justice Kennedy, the "purpose and effect [of the ban on corporate independent expenditures] are to silence entities whose voices the Government deems to be suspect."[251] Although the impugned prohibition was not overtly content-based, Justice

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[241] *Ibid* at 341.
[242] *Ibid* at 361.
[243] *Ibid* at 479.
[244] *Ibid* at 394.
[245] *Ibid* at 465, 454. Stevens J noted that "[b]usiness corporations must engage the political process in instrumental terms if they are to maximize shareholder value. The unparalleled resources, professional lobbyists, and single-minded focus they bring to this effort...make *quid pro quo* corruption and its appearance inherently more likely when they...spend unrestricted sums on elections:" 454. Stevens J then pointed to past instances in which corporations received something from elected officials in exchange for funding independent, uncoordinated issue advertisements: 455.
[246] *Ibid* at 466.
[247] *Ibid* at 419, 465.
[248] *Ibid* at 337.
[249] *Ibid.*
[250] *Ibid* at 329.
[251] *Ibid* at 339.

Kennedy noted that restrictions "based on the identity of the speaker" can be "a means to control content."[252]

The majority and the dissent also disagreed on the governmental interests capable of justifying limits on electoral speech. Following *Buckley*, Justice Kennedy held that the government may only limit campaign expenditure in the name of preventing corruption or its appearance. In Justice Kennedy's view, independent, uncoordinated expenditures do not give rise to corruption or the appearance of corruption. Justice Kennedy reached this conclusion by defining corruption narrowly to encompass only direct *quid pro quo* exchanges. According to the majority, the provision of "influence or access" is not corruption and "will not cause the electorate to lose faith in our democracy."[253] Justice Kennedy attempted to support this proposition by explaining that "[d]emocracy is premised on responsiveness," and the only reason to vote for or contribute to a candidate is to ensure the candidate "will respond by producing those political outcomes the supporter favors."[254] This seems to suggest that, in Justice Kennedy's view, big donors *should* benefit from greater influence, or "responsiveness," than non-donors.

The dissent disagreed with Justice Kennedy's definition of corruption. First, in the dissent's view, Justice Kennedy defined *quid pro quo* corruption too narrowly. Justice Stevens argued that *quid pro quo* exchanges need not "take the form of outright vote buying or bribes ... Rather, they encompass the myriad ways in which outside parties may induce an officeholder to confer a legislative benefit in direct response to, or anticipation of, some outlay of money the parties have made or will make on behalf of the officeholder."[255]

Second, the dissent would have expanded the definition of corruption beyond the *quid pro quo* exchange:

> Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf. Corruption operates along a spectrum, and the majority's apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics.[256]

[252] *Ibid* at 340.
[253] *Ibid* at 359–60.
[254] *Ibid* at 360.
[255] *Ibid* at 452.
[256] *Ibid* at 447–48.

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Further, the dissent observed that, even if "ingratiation and access" are not corruption, they create the opportunity for and the appearance of *quid pro quo* exchanges.[257]

The dissent and the majority also disagreed on the validity of *Austin*'s "antidistortion" rationale for regulating corporate campaign finance. The majority rejected the idea from *Austin* that the state may limit corporate speech to prevent the distortion of electoral debate by well-resourced corporations. Relying on *Buckley*, Justice Kennedy held that Congress cannot restrict political speech based on the speaker's wealth or with the goal of equalizing the relative ability of people and entities to influence electoral outcomes.[258] In Justice Kennedy's view, attempts by Congress to regulate electoral speech for these equality-related purposes would constitute an impermissible attempt to influence voters' choices.[259]

The dissent argued in favour of the "antidistortion" rationale from *Austin*. In the dissent's view, the impugned law represented an acceptable attempt to balance the First Amendment rights of listeners against those of speakers.[260] Corporations amass funds that natural persons cannot, allowing them to flood broadcast media with their communications. Since citizens do not have unlimited time to consider all speech transmitted during an election, "corporate domination of the airwaves prior to an election may decrease the average listener's exposure to relevant viewpoints."[261] Further, corporate domination of electoral debate could lead individuals to feel cynicism about their own ability to be heard.[262] The dissent concluded that *Austin*'s "antidistortion" rationale was intended to "*facilitate* First Amendment values by preserving some breathing room around the electoral 'marketplace' of ideas."[263]

Although the majority struck down the prohibition on the use of corporate and union general treasury funds, they upheld disclaimer and disclosure requirements for entities funding express advocacy and electioneering communications. According to Justice Kennedy, these transparency requirements were justified burdens on speech because they allow "the electorate to make informed decisions and give proper weight to different speakers and messages."[264]

In October 2014, the Federal Election Commission approved new rules in response to *Citizens United*. The rules expressly permit corporations and unions to make independent expenditures on express advocacy and electioneering communications.[265] The regulations

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[257] *Ibid* at 455.
[258] *Ibid* at 350.
[259] *Ibid*.
[260] *Ibid* at 473. The idea that the First Amendment protects both listeners and speakers is echoed in Fiss' arguments in favour of campaign finance regulation: Fiss, (1996).
[261] *Citizens United v Federal Election Commission*, 588 US 310 at 472 (2009).
[262] *Ibid* at 470.
[263] *Ibid* at 473.
[264] *Ibid* at 371.
[265] 11 CFR § 114.4.

were also revised to allow corporations and unions to finance partisan voter registration and get-out-the-vote initiatives, as long as these activities are uncoordinated with parties or candidates.[266] Funds used for these activities must be disclosed if express advocacy is involved and the reporting threshold of $2,000 is exceeded.[267] The Federal Election Commission further clarified that foreign nationals, national banks, and corporations created by a law of Congress continue to be prohibited from contributing to accounts used to fund electioneering communications.[268]

e) *SpeechNow.org v FEC*

Political action committees, or PACs, are organized under section 527 of the *Internal Revenue Code.*[269] So-called "traditional PACs" coordinate at least some of their spending with candidates. This coordinated spending is treated as a contribution to the candidate. Prior to the US Supreme Court's decision in *SpeechNow.org v FEC* (*SpeechNow*), contributions to all PACs were subject to the same restrictions as contributions to candidates.[270] For example, PACs could not accept donations over $5,000, just like candidates. These restrictions were intended to prevent donors from circumventing caps on donations to candidates, as prospective donors could, in the absence of such restrictions, simply create a PAC, donate large amounts to the PAC, and direct the PAC to engage in coordinated spending with the candidate.

In *SpeechNow,* a PAC organized solely for the purpose of making uncoordinated expenditures challenged the contribution cap.[271] The District of Columbia Circuit Court sided with SpeechNow.org on the basis that restricting independent expenditures does not serve the governmental interest of preventing corruption or its appearance. This decision hatched the "super-PAC," or "independent-expenditure-only PAC," which engages solely in uncoordinated spending and therefore has unlimited fundraising and spending capacity. The Court did, however, uphold registration and disclosure requirements for super-PACs. After this decision, the FEC released an advisory opinion clarifying that the combined effect of *Citizens United* and *SpeechNow* is to allow corporations and unions to contribute unlimited amounts to super-PACs.[272]

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[266] 11 CFR § 114.3(c)(4).
[267] 11 CFR § 114.3(c)(4).
[268] 11 CFR § 104.20(c)(7).
[269] 26 USC § 527.
[270] *SpeechNow.org v FEC*, 599 F (3d) 686 (DC Cir 2010).
[271] *Ibid.*
[272] Dwyre (2015) at 41–42. See 11 CFR § 114.2, note to paragraph (b). Corporations and unions may also contribute to the independent-expenditure-only accounts of hybrid PACs. Corporations and unions may also contribute to the independent-expenditure-only accounts of hybrid PACs.

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f) *McCutcheon v FEC*

In *McCutcheon v FEC* (*McCutcheon*), the US Supreme Court struck down the *BCRA*'s aggregate limits on contributions from a single contributor to different candidates, national party committees, and traditional PACs.[273] However, the Court upheld the base limits on contributions per election to a single candidate and the base limits on contributions per year to national party committees and traditional PACs. The Court also upheld disclosure requirements for contributions. The majority pointed out that disclosure serves a valuable informational role for the electorate and deters corruption. In the majority's view, disclosure requirements are preferable to contribution caps, as limiting contributions could provoke the movement of money into less transparent campaigning vehicles.[274]

Chief Justice Roberts, for the majority, found that the aggregate limits imposed a significant infringement on freedom of speech and association, since a "donor must limit the number of candidates he supports and may have to choose which of several policy concerns he will advance."[275] The government argued that donors could support a large number of candidates and stay within the aggregate limits by simply contributing less to each candidate or committee. However, Chief Justice Roberts found this option to be inadequate because it would impose a "special burden on broader participation" in support of a wide range of candidates or causes.[276] This conclusion flowed from Chief Justice Roberts' conviction that all forms of political expression, regardless of whether that expression involves handing out a few leaflets or spending vast sums on a national advertising campaign, are deserving of equal protection.[277]

Chief Justice Roberts confirmed that the sole governmental interest capable of justifying restrictions on campaign finance is the prevention of *quid pro quo* corruption or its appearance. He also confirmed that corruption does not include "ingratiation and access," but rather is limited to a "direct exchange of an official act for money."[278] The First Amendment therefore bars Congress from imposing contribution limits in order to prevent parties and candidates from rewarding donors with privileged access and influence. In Chief Justice Roberts' view, it is a "central feature of democracy" that "constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns."[279] Thus, like Justice Kennedy in *Citizens United*, Justice Roberts appeared comfortable with the idea that office-holders will be particularly

[273] *McCutcheon v FEC*, 572 US __ (2014) (slip op).
[274] *Ibid* (slip op of Roberts CJ at 36).
[275] *Ibid* (slip op Roberts CJ at 15–16).
[276] *Ibid* (slip op of Roberts CJ at 16).
[277] *Ibid* (slip op of Roberts CJ at 15).
[278] *Ibid* (slip op of Roberts CJ at 2).
[279] *Ibid* (slip op of Roberts CJ at 2).

responsive to wealthy backers. The dissent criticized this approach for failing to differentiate "between influence resting upon public opinion and influence bought by money alone."[280]

As in *Citizens United*, the dissent, written by Justice Breyer, argued for a broader conception of corruption that goes beyond "act[s] akin to bribery" to capture the influence that large contributions may exert over elected officials' judgement.[281] Further, Justice Breyer suggested that corruption encompasses the tendency of money to drown out the "voices of the many" and disrupt the responsiveness of elected officials to the people.[282] This conception of corruption echoes the equality rationale for campaign finance regulation.

Based on his narrower conception of corruption, Chief Justice Roberts held that the aggregate limits did not serve an anticorruption interest. Each contribution is subject to base limits, meaning the aggregate limits do not, in themselves, prevent corruption.[283] The government argued that corruption may nonetheless occur when a donor gives a large cheque to a legislator to split up among various candidates and committees. The dissent agreed, observing that candidates who solicit large cheques for their party "will be deeply grateful to the checkwriter, and surely could reward him with a *quid pro quo* favor."[284] However, in Roberts CJ's view, this argument must fail because it would "dangerously broaden ... the circumscribed definition of *quid pro quo* corruption" to include "general, broad-based support of a political party."[285]

Unlike Justice Breyer, Chief Justice Roberts also rejected the argument that aggregate limits prevent circumvention of base limits, finding fears of circumvention too speculative. Owing to other provisions in the *BCRA*, such as restrictions on earmarking, Chief Justice Roberts argued that it would be difficult for a donor to channel large sums to a candidate and still get credit for the donation. If the donor receives no credit for their donation, there is no risk of a *quid pro quo*.

As in *Citizens United*, the majority also confirmed that the government must not "restrict the political participation of some in order to enhance the relative influence of others."[286] The majority emphasized that the First Amendment is intended to ensure that public debate is left in the hands of the public, not the government.[287] In accordance with the libertarian approach to freedom of speech, Chief Justice Roberts maintained that government cannot be trusted to judge the value of certain speech over other speech, "even when the government

[280] *Ibid* (slip op of Breyer J at 30).
[281] *Ibid* (slip op of Breyer J at 4, 6, 11).
[282] *Ibid* (slip op of Breyer J at 5–6).
[283] *Ibid* (slip op of Roberts CJ at 22).
[284] *Ibid* (slip op of Breyer J at 20).
[285] *Ibid* (slip op of Roberts CJ at 37).
[286] *Ibid* (slip op of Roberts CJ at 1).
[287] *Ibid* (slip op of Roberts CJ at 14).

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purports to act through legislation reflecting 'collective speech.'"[288] In Chief Justice Roberts's view, by attempting to level the playing field through aggregate limits, Congress was meddling impermissibly in electoral debate and trying "to help decide who should govern."[289] Thus, Congress must not intervene even if non-interference means the wealthy decide who governs.

8.2 Regulatory Regime in the US

In this section, I will provide a brief overview of federal campaign finance regulations in the US.[290]

a) Expenditures

Because of the jurisprudence discussed above, campaign expenditures are unlimited in the US for candidates, political parties, and third parties. Third parties, such as corporations, unions, and independent-expenditure-only PACs (or "super-PACs"), may spend unlimited amounts in support of a candidate, party, or issue associated with a candidate or party, as long as that spending is not coordinated with a candidate. Candidates may also spend unlimited personal funds on their own campaigns.

b) Contributions and Coordinated Spending

Contributions to candidates are subject to caps and source restrictions.[291] Candidates must not accept direct contributions from corporations, unions, foreign nationals, national banks,

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[288] *Ibid* (slip op of Roberts CJ at 17).

[289] *Ibid* (slip op of Roberts CJ at 3).

[290] For more detail on the federal regulatory regime, see: 52 USC §§ 30101–30146; 11 CFR; advisory opinions, policy statements, and guidance released by the Federal Election Commission, online: <https://www.fec.gov/legal-resources/>; The Center for Responsive Politics, online: <www.opensecrets.org>; Samuel Issacharoff, *The Law of Democracy: Legal Structure of the Political Process*, 5th ed (Foundation Press, 2016); The Law Library of Congress, "Election Law", online: <https://www.loc.gov/law/help/guide/federal/elections.php>; Campaign Legal Center, online: <www.campaignlegalcenter.org>; The Campaign Finance Institute, online: <http://www.cfinst.org/law.aspx>.

[291] See 52 USC § 30116 and 11 CFR §§ 110.1–110.4 for more information on contribution caps. As discussed above, super-PACs, which engage solely in independent expenditures, are not subject to these caps or source restrictions. Super-PACs therefore have unlimited spending and fundraising capacity. Hybrid-PACs, which engage in both coordinated and independent spending, must maintain a separate fund for independent expenditures, which will not be subject to contribution caps or source restrictions. All expenditures by single-candidate PACs are considered contributions to their candidate, even if some of the PAC's spending is technically uncoordinated.

or federal government contractors.[292] Coordinated spending with a candidate is viewed as a contribution to the candidate. As a result, these restricted sources may not engage in coordinated spending with a candidate.[293] Further, to prevent circumvention of the rules governing contributions to candidates, donations to entities that engage in coordinated spending with candidates, such as political party committees and traditional PACs, are also subject to caps and source restrictions.[294] Before the *BCRA* was enacted, limits on contributions to political party committees could be circumvented by donating "soft money" to the party. Soft money was used for "party-building activities" and was unregulated.[295] However, the *BCRA* closed this loophole, stipulating that political parties may only raise money that is subject to federal regulation.[296]

c) Transparency requirements

Different disclosure requirements apply to different types of political actors and organizations.[297] For example, in reports to the Federal Election Commission (FEC), super-PACs must include the source, amount, and date of contributions to the super-PAC for any purpose, along with the amount, purpose, date, and recipient of disbursements over $200 in a calendar year.[298] Super-PACs must also disclose separately their spending on express advocacy.[299]

Corporations, unions, and groups organized under 26 USC § 501(c), often termed "501(c) organizations,"[300] must disclose disbursements made for the purpose of express advocacy

[292] 52 USC §§ 30118, 30119, 30121; 11 CFR § 110.20. Issacharoff notes this rule may be up for grabs in relation to corporations after *Citizens United v FEC*, in which the majority of the US Supreme Court frowned upon making distinctions between corporations and natural persons: Issacharoff, (November 2010) at 132.

[293] See, e.g., 11 CFR § 114.10(a).

[294] See 52 USC § 30116 for contribution limits to political party committees.

[295] Boatright (2015) at 74. For more on soft money, see Briffault (2006) at 191.

[296] *Bipartisan Campaign Finance Reform Act of 2002*, Pub L No 107-155, § 101, 116 Stat 81.

[297] For more detailed information on federal disclosure requirements, see: 52 USC § 30104; 11 CFR §§ 102.1–102.17, 104.1–104.22, 109.1–109.37. See also The Centre for Responsive Politics, online: <www.opensecrets.org>.

[298] 52 USC §§ 30104(b)(3), 30104(b)(5)(A); 11 CFR § 104.3(a)(4).

[299] 52 USC § 30104(b)(6)(B)(iii); 11 CFR §§ 104.3(b)(3)(vii), 104.4, 109.10(a). As discussed above, express advocacy uses words like "vote for" or "vote against".

[300] 501(c) organizations may engage in political campaigning activity so long as it is not their primary activity; however, Dwyre notes that the Internal Revenue Agency has done little to investigate whether 501(c) organizations are making campaigning activity their primary activity: Dwyre (2015) at 48–50. The most relevant types of 501(c) organizations in the context of election campaigns are labour organizations (organized under 26 USC § 501(c)(5)), trade associations or business leagues like the Chamber of Commerce (organized under 26 USC § 501(c)(6)), and "social welfare organizations" (organized under 26 USC § 501(c)(4)): Dwyre (2015) at 48–50.

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and electioneering communications.[301] However, corporations, unions, and 501(c) organizations are not required to report the source of their donations to the FEC unless the donations were made specifically for the purpose of funding express advocacy or electioneering communications.[302] The same general rules apply to groups organized under 26 USC § 527, or "527 organizations," that are not political committees, meaning their main activities are not political.[303]

Some entities also have disclosure obligations in relation to agencies other than the FEC, such as the Internal Revenue Service.[304]

d) Public Funding

In the US, an opt-in public funding scheme exists for presidential candidates, but the scheme is out-of-date and rarely used by major candidates.[305] Candidates who opt in must also comply with expenditure limits. In the past, the government also provided public grants to political party committees for party conventions,[306] but this scheme has been terminated.[307]

e) Role of the Federal Election Commission

The FEC is responsible for disclosing information on campaign finance, monitoring compliance with legislative requirements, and administering public funding of presidential campaigns.[308] To assist in promoting compliance, the FEC promulgates rules and regulations and issues advisory opinions, of which there are over 1,000.[309] The FEC is only responsible

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[301] 52 USC §§ 30104(c),(f); 11 CFR §§ 104.20, 109.10(b), 114.10(b)(1)–(2). "Electioneering communications" are defined in 11 CFR § 100.29(a). As discussed above, the category of "electioneering communications" was created by the *BCRA* and captures a broader range of advertising than the category of "express advocacy" does.

[302] 52 USC §§ 30104(c),(f); 11 CFR §§ 114.10(b)(1)–(2), 109.10(e)(1)(vi), 104.20(b), 104.20(c)(7)–(9). See also Dwyre, (2015) at 61. Note that labour unions organized under 26 USC 501(c)(5) must disclose the source of all contributions of $5,000 or more to the Department of Labor: see fn 650, below.

[303] 52 USC §§ 30104(c),(f); 11 CFR §§ 109.10(b)–(e), 104.20(b).

[304] For example, labour organizations organized under 26 USC 501(c)(5) must, in reports to the Department of Labor, disclose the identity of any contributor giving $5,000 or more in the twelve-month reporting period, along with the purpose, date, and amount of the contribution: 29 USC § 431; 29 CFR § 403. Labour organizations must also disclose to the Department of Labor any political disbursements intended to influence elections and referendums: 29 USC § 431, 29 CFR § 403.

[305] Dwyre (2015) at 35; Hasen (2012) 225 at 225.

[306] Gauja (2010) at 158.

[307] *The Gabriella Miller Kids First Research Act*, Pub L No 113-94, 128 Stat 1085 (2014) (codified at 26 USC § 9008).

[308] Thomas E Mann, "The FEC: Administering and Enforcing Campaign Finance Law" in Anthony Corrado et al, eds, *The New Campaign Finance Sourcebook* (Brookings Institution Press, 2005) 232 at 234.

[309] *Ibid* at 235–36.

for civil enforcement of campaign finance laws, not criminal enforcement, which falls under the Justice Department's mandate.[310]

8.3 Criticisms of Campaign Finance Regulation in the US

The American regulatory regime is often criticized for encouraging the movement of campaign money away from relatively transparent political parties to unaccountable and less transparent outside spending groups, such as 501(c) organizations.[311] As a result, the role of political parties and candidates is shrinking while the role of third parties grows. The dissent in *Citizens United* deplored this trend, noting that political parties represent "broad coalitions" while corporations and unions, the third parties at issue in that case, represent "narrow interests."[312] Other types of third parties may also represent narrow interests. For example, in the 2012 general election, 93% of the money spent by super-PACs came from 0.0011% of the population of the US, raising significant equality concerns.[313]

The growth of outside spending is driven by the absence of independent expenditure limits for third parties, the *BCRA*'s prohibition on soft money for political parties, the limits on coordinated spending for political parties, and the less stringent transparency requirements for outside spenders like corporations, unions, 501(c) groups, and non-political 527 organizations. Although the lack of mandatory disclosure makes confirmation impossible, Dwyre speculates that many corporations direct their election campaign spending through 501(c) organizations to avoid revealing their support for particular candidates or parties.[314]

According to the majority of the US Supreme Court in cases like *Citizens United*, all this outside spending raises no risk of corruption, or even the risk of the appearance of corruption, as long as the spending is independent and uncoordinated with candidates. Yet this premise is highly debatable. Many question whether "independent expenditures" are truly "independent" in the current environment of pervasive outside spending. Dwyre observes that many super-PACs are run by "former party officials, Congressional staff, and partisan operatives" and candidates and elected officials are allowed to speak at super-PAC fundraisers.[315] Boatright argues that there is "implicit coordination between groups and between groups and candidates and parties."[316] He suggests that some party functions have been *de facto* outsourced to outside groups because of the restrictions on party financing,

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[310] *Ibid* at 236

[311] See, for example, Hasen (2012) 225 at 225.

[312] *Citizens United v Federal Election Commission*, 588 US 310 at 412 (2009).

[313] Blair Bowie & Adam Lioz, *Billion-Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections* (Demos, 2013) at 8, online: <http://www.demos.org/publication/billion-dollar-democracy-unprecedented-role-money-2012-elections>.

[314] Dwyre (2015) at 55.

[315] *Ibid* at 46.

[316] Boatright (2015) at 73.

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creating a "network" of parties and outside groups that is guided by "mechanisms of coordination."[317] Boatright bolsters this argument by pointing out that personnel tend to move between interest groups, candidate campaigns, and political party committees, suggesting there is "informal" coordination.[318] This not only dilutes the responsiveness of parties to voters but also raises the spectre of corruption, since parties and candidates may wish to show gratitude toward the outside groups in their "network."[319]

Even if outside spending is truly independent, many argue that independent expenditures nonetheless give rise to the risk of corruption or its appearance. Based on the record before Congress in the lead-up to the *BCRA*'s enactment, the dissent in *Citizens United* pointed out that "corporate independent expenditures ... had become essentially interchangeable with direct contributions in their capacity to generate *quid pro quo* arrangements."[320] The record indicated that candidates' campaigns are generally aware of who is behind independent advertisements on the candidates' behalf.[321] Further, even if independent outside spending does not produce direct *quid pro quo* corruption, Hasen argues that it may lead to the sale of access to candidates.[322] He makes the common sense observation that "[p]residential candidates are likely to notice and appreciate when an individual spends millions of dollars supporting or opposing the candidate through an independent effort," which may lead to "special access ... after the election."[323] The record cited by the dissent in *Citizens United* supported this argument, since it demonstrated that "the sponsors of...advertisements were routinely granted special access after the campaign was over."[324]

Some commentators argue that political party financing in the US should be deregulated to reduce outside spending and restore the role of the political parties in elections. Boatright has suggested raising contribution caps for political parties, relaxing restrictions on coordinated spending of parties and candidates, providing more public funding to political parties, and tightening disclosure requirements for third parties.[325] However, Sarbanes argues that deregulating contributions to political parties would only exacerbate the disproportionate influence of wealthy donors in American politics.[326] Others agree that deregulating party finance is not the answer, as allowing "parties to engage in the same type of courting and solicitation of the very wealthy as Super PACs" is unlikely to "mitigate the

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[317] *Ibid*.
[318] *Ibid* at 87.
[319] *Ibid* at 73.
[320] *Citizens United v FEC,* 588 US 310 at 455 (2009).
[321] *Ibid*.
[322] Of course, the majority of the US Supreme Court does not recognize this kind of exchange as "corruption": see *Buckley v Valeo,* 424 US 1 (1976); *SpeechNow.org v FEC*, 599 F (3d) 686 (DC Cir 2010); *Citizens United v FEC,* 588 US 310 (2009); *McCutcheon v FEC,* 572 US __ (2014) (slip op).
[323] Hasen (2012) 225 at 237.
[324] *Citizens United v FEC,* 588 US 310 at 455 (2009).
[325] Boatright (2015) at 100.
[326] Sarbanes (2016) at 33.

ongoing distributional shift of the campaign finance system toward the interests of the very wealthy."[327]

Campaign finance legislation in the US is criticized for a variety of other problems. For example, the *BCRA*'s ban on soft money was intended to reduce the risk of corruption by preventing political parties from accepting unregulated, unlimited contributions. However, Hasen argues that the practice of "bundling" has replaced, to some extent, the use of soft money to gain access to politicians.[328] Bundling involves one individual soliciting many donations from their acquaintances. Bundlers who reach certain thresholds are rewarded with access and other perquisites.[329] Others criticize the regulatory regime for falling behind new developments in campaign finance. The public funding regime for presidential candidates provides an example of this "policy drift."[330] Dwyre calls the presidential public funding regime a "quaint remnant of a bygone era when public funding provided a way to level the playing field between presidential contenders."[331] Hasen agrees that the scheme is "no longer viable."[332] For example, in 2008, former President Obama opted out of the public funding regime and raised $745.7 million for his presidential campaign.[333] If he had opted in, he would have received $84.1 million in public funding and his spending would have been limited to that amount.[334]

The FEC is also criticized for its lack of success in imposing "serious sanctions on high-stakes violations."[335] Enforcement problems are exacerbated by a complicated and slow enforcement process.[336] Further, the FEC's endless advisory opinions and other policy documents have led to an unwieldy and overly complex regime.[337] Dwyre also notes that political deadlock among the Commissioners has prevented the FEC from keeping up with changing practices and newly discovered loopholes, thus feeding policy drift.[338]

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[327] Kang (2016) at 536.
[328] Hasen (2012) 225 at 234.
[329] *Ibid* at 229.
[330] Dwyre (2015) at 34.
[331] *Ibid* at 35.
[332] Hasen (2012) 225 at 225.
[333] *Ibid*.
[334] Adam Nagourney & Jeff Zeleny, "Obama Forgoes Public Funds in First for Major Candidate", *The New York Times* (20 June 2008), online: <http://www.nytimes.com/2008/06/20/us/politics/20obamacnd.html>.
[335] Mann (2005) 232 at 237.
[336] *Ibid*.
[337] The problem of complexity was pointed in *Citizens United v FEC*, 588 US 310 at 335–36 (2009).
[338] Dwyre (2015) at 34.

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9. UK LAW

Campaign finance-related scandals in past decades have led to increasing regulation of political financing in the UK.[339] The UK's campaign finance regime imposes spending limits and transparency requirements on parties, candidates, and third-party campaigners. However, unlike in Canada and the US, contributions to parties and candidates are uncapped, although contributions must come from permissible sources. In other words, demand is limited but supply is not. Paid political broadcasting is also prohibited in the UK. The UK's limits on political spending and broadcasting have survived challenges based on freedom of expression, providing a stark contrast to American freedom of speech jurisprudence.[340]

9.1 Freedom of Expression and Campaign Finance Regulation in the UK

In two cases dealing with the UK's campaign finance laws, the European Court of Human Rights (ECtHR) accepted that states may impose some limits on campaign financing without falling afoul of the guarantees of freedom of expression and free elections.[341] Article 10 of the European Convention on Human Rights ("the Convention")[342] provides as follows:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public

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[339] See Justin Fisher, "Britain's 'Stop-Go' Approach to Party Finance Reform" in Robert G Boatright, ed, *The Deregulatory Moment? A Comparative Perspective on Changing Campaign Finance Laws* (University of Michigan Press, 2015).

[340] See Section 8.1.2, below, for a discussion of freedom of speech jurisprudence in the US. Issacharoff points out that the UK has a tradition of treating elections as "an administrative tallying of preferences as they exist", which could play a part in the courts' willingness to allow limits on freedom of expression during elections: Samuel Issacharoff, "The Constitutional Logic of Campaign Finance Regulation" (2009) 26 *Pepperdine L Rev* 373 at 384.

[341] Brexit does not directly affect the weight of the Convention and ECtHR decisions in the UK. The ECtHR is a judicial body of the Council of Europe, which is separate from the European Union, and the Convention is incorporated into UK law through the UK *Human Rights Act*. For more information, see Chloe Smith, "Lawyers fear for UK's future in ECHR after Brexit vote", *The Law Society Gazette* (24 June 2016), online: <https://www.lawgazette.co.uk/law/lawyers-fear-for-uks-future-in-echr-after-brexit-vote/5056112.article>.

[342] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221.

> safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 3 of Protocol 1 to the Convention provides that contracting parties shall "undertake to hold free elections ... under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."[343]

In *Bowman v the United Kingdom* (*Bowman*), the ECtHR considered a provision of the *Representation of the People Act, 1983* (*RPA*) providing that third parties could spend no more than £5 promoting the election of a particular candidate in any one constituency in a general election.[344] The applicant was charged under the *RPA* after distributing some 1.5 million leaflets in various constituencies to inform voters about candidates' views on abortion.[345]

Although the spending limit infringed freedom of expression, the ECtHR accepted that it had the legitimate aim of protecting the rights and freedoms of others, as required by Article 10(2) of the Convention. The ECtHR identified the "others" as other candidates, since the provision aimed to promote "equality between candidates" and the electorate.[346] However, the ECtHR found that the impugned provision was disproportionate to its goal. The spending cap formed a "total barrier" for third parties wishing to inform people in their area about a candidate's views on a particular issue, even though the limit applied only in the four to six weeks before a general election.[347] In response to this decision, Parliament raised the third-party spending cap at the constituency level for general parliamentary elections.[348]

In *Bowman*, the ECtHR discussed the interaction between the right to free elections and the right to free expression. According to the ECtHR, these two guarantees are the "bedrock" of democracy and reinforce one another, but they may also come into conflict.[349] The ECtHR accepted that states may need to limit freedom of expression during elections to ensure "free expression of the opinion of the people", as required by the right to free elections. However, information must nonetheless be permitted to "circulate freely" during an election.[350] Like the Supreme Court of Canada in *Harper*, the ECtHR thus acknowledged the usefulness of

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[343] *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* 1952, ETS No 009.

[344] *Bowman v the United Kingdom* (1998), No 24839/94, [1998] I ECHR 4. Paragraph numbers cited to online version: <http://hudoc.echr.coe.int/eng#{"itemid":["001-58134"]}>.

[345] *Bowman v the United Kingdom* (1998), No 24839/94, [1998] I ECHR 4 at paras 11–12.

[346] *Ibid* at para 38.

[347] *Ibid* at para 45.

[348] See Section 9.2.3.3, below, for current rules on third-party spending limits at the constituency level.

[349] *Bowman v the United Kingdom* (1998), No 24839/94, [1998] I ECHR 4 at para 42.

[350] *Ibid* at para 42.

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third-party spending limits in enhancing electoral debate, but warned against stifling the flow of information through overly high spending caps.

In *Animal Defenders International v the United Kingdom* (*Animal Defenders*), the ECtHR confirmed its willingness to allow limits on expression during elections for the sake of fairness and robust debate.[351] In this case, the applicant challenged a blanket ban on paid political advertising on broadcast media for political parties, candidates, and third parties under the *Communications Act 2003*.[352] The UK House of Lords and the ECtHR upheld the ban.

In its decision, the House of Lords emphasized that a level playing field in public debate enables citizens "to make up their own minds on the important issues of the day."[353] According to the House of Lords, the blanket ban on paid political advertising "avoid[s] the grosser distortions [in electoral debate] which unrestricted access to the broadcast media will bring."[354] In recognizing the need to prevent the wealthy from distorting electoral debate, the House of Lords accepted the egalitarian rationale for campaign regulation and acknowledged that limiting electoral speech can actually enhance the exchange of information and ideas. Speaking bluntly, Baroness Hale bolstered the majority's conclusions by warning against "the dominance of advertising, not only in elections but also in the formation of political opinion, in the United States of America" and the "[e]normous sums" spent on such advertising.[355]

At the ECtHR, the parties agreed that the legislative objective of the ban on paid political advertising was to preserve the "impartiality of broadcasting on public interest matters and, thereby ... protect ... the democratic process."[356] The majority of the ECtHR accepted that this objective fell within the legitimate aim of protecting the rights of others, as required by Article 10(2) of the Convention. The ECtHR also concluded that the ban could reasonably be considered necessary in a democratic society. According to the majority, without the ban, the wealthy could "obtain competitive advantage in the area of paid advertising and thereby curtail a free and pluralist debate, of which the State remains the ultimate guarantor."[357]

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[351] *Animal Defenders International v the United Kingdom* [GC], No 48876/08, [2013] II ECHR 203.
[352] *Communications Act 2003* (UK), c 21, s 321(2),(3). Broadcasters must provide free airtime to political parties for political and campaign broadcasts: *Communications Act 2003* (UK), c 21, ss 319(2)(g), 333.
[353] *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport,* [2008] UKHL 15 (BAILII) at para 48, Hale B.
[354] *Ibid*.
[355] *Ibid* at para 47.
[356] *Animal Defenders International v the United Kingdom* [GC], No 48876/08, [2013] II ECHR 203 at para 78.
[357] *Ibid* at para 112.

Finally, on the issue of proportionality, the majority of the ECtHR found the ban to be properly tailored to the "risk of distortion."[358] The ban applied to media with "particular influence," those media being television and radio, and a narrower ban could lead to abuse and uncertainty.[359] The ECtHR also pointed out the availability of alternatives to paid political advertising for third-party groups, such as participation in radio or television programs or the formation of a charitable arm to fund non-political paid advertising.[360]

By concluding that the state is the "ultimate guarantor" of robust debate, the ECtHR revealed a significant divergence from the US Supreme Court's approach to freedom of speech. In campaign finance cases, the majority of the US Supreme Court has demonstrated an unwavering suspicion of state power and has emphasized the role of constitutional rights in shielding the individual from that power.[361] In *Animal Defenders*, by contrast, the ECtHR's approach recalls Fiss' theory that the state may enhance free speech, not merely threaten it.[362]

9.2 Regulatory Regime in the UK

The UK's campaign finance regime attempts to level the playing field for parties and candidates by limiting demand for, but not supply of, political money. This runs opposite to the American approach of limiting supply but not demand. In the UK, parties, candidates, and third parties are subject to expenditure limits, but contributions to all three are uncapped, although contributions must come from permissible sources. The UK's ban on paid political advertising on broadcast media is intended to further curb political parties' demand for money.

Under the UK's scheme of uncapped contributions, parties and candidates could rely solely on a small number of large donors to finance their campaigns. This raises obvious corruption concerns. Disclosure requirements supposedly address the risk of corruption. Disclosure also discourages large contributions, as big donors may find themselves the subject of unwanted media attention.

In the UK, different legislation applies to campaigning by political parties and candidates. Registered parties are governed by the *Political Parties, Elections and Referendums Act 2000* (*PPERA*),[363] while candidates are governed by the *RPA*.[364] Both Acts also regulate third-party campaigning in general parliamentary elections, with *PPERA* addressing national third-

[358] *Ibid* at paras 117–22.
[359] *Ibid*.
[360] *Ibid* at para 124.
[361] See Section 10.1.2, below.
[362] Fiss (1996). See Section 5.1, above, for more on Fiss' arguments regarding freedom of speech and campaign finance regulation.
[363] *Political Parties, Elections and Referendums Act 2000* (UK), c 41.
[364] *Representation of the People Act 1983* (UK), c 2.

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party campaigns and the *RPA* addressing third-party campaigns at the constituency level. The campaign finance provisions in both Acts were amended by the *Electoral Administration Act 2006*,[365] the *Political Parties and Elections Act 2009*,[366] and the *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (the *Transparency of Non-Party Campaigning Act*).[367] This Section will focus on the rules in *PPERA* and the *RPA* in relation to general parliamentary elections. The UK also regulates campaign financing in referendums and local government elections.

9.2.1 Regulation of Campaign Financing for Political Parties and Candidates in the UK

9.2.1.1 Spending Limits for Registered Parties and Candidates

In the UK, ceilings on candidate spending date back to 1883 and were extended to political parties and third parties in 2000 by *PPERA*.[368] In *Attorney General v Jones*,[369] the Court of Appeal explained that the purpose of spending caps is to promote "a level financial playing field between competing candidates, so as to prevent perversion of the voters' democratic choice between competing candidates within constituencies by significant disparities of local expenditure."[370] By contrast, American courts view the objective of leveling the playing field as an insufficient basis for restricting campaign spending.[371]

a) Expenses Captured by Spending Limits

i. Registered Parties: Definition of "Campaign Expenditure"

Registered parties are subject to ceilings on "campaign expenditure" under *PPERA*. "Campaign expenditure" is defined as an expense incurred by a party for election purposes that falls within Schedule 8 of *PPERA*, which lists such matters as advertising, publishing documents with the party's policies, market research, and rallies or other events.[372] The phrase "for election purposes" is defined as "for the purpose of or in connection with (a) promoting or procuring electoral success for the party ... or (b) otherwise enhancing the standing" of the party or its candidates.[373] This includes attempts to prejudice the chances or standing of other parties or candidates.[374] Further, an activity could be done "for election

[365] *Electoral Administration Act 2006*, c 22.
[366] *Political Parties and Elections Act 2009* (UK), c 12.
[367] *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (UK), c 4.
[368] Ewing & Rowbottom (2012) at 77.
[369] *Attorney General v Jones*, [1999] 2 Cr App R 253.
[370] *Ibid* at 255.
[371] See, e.g., *Buckley v Valeo*, 424 US 1 (1976).
[372] *Political Parties, Elections and Referendums Act 2000* (UK), c 41, s 72(2).
[373] *Ibid*, s 72(4).
[374] *Ibid*, s 72(5)(a).

purposes" even if no express mention is made of any party or candidate.[375] Finally, a registered party's "campaign expenditure" does not include expenditures that are to be included in a candidate's election expenses return, which prevents the same expenses from counting toward the spending limits of both a candidate and its party.[376]

Even if an expense falls within the definition of "campaign expenditure," it will not count towards the party's spending limit under *PPERA* unless it was incurred in the 365 days before a general parliamentary election.[377]

ii. Candidates: Definition of "Election Expenses"

The *RPA* limits the amount candidates may spend on "election expenses". The definition of "election expenses" is similar to the definition of "campaign expenditure" for political parties. "Election expenses" are defined in the *RPA* as:

- "any expenses incurred at any time
- in respect of any matter specified in Part 1 of Schedule 4A
- which is used for the purposes of the candidate's election
- after the date when he becomes a candidate at the election".[378]

The matters in Part 1 of Schedule 4A include advertising, distributing unsolicited material to electors, transport, public meetings, and accommodation and administration costs. The phrase "for the purposes of the candidate's election" is defined as "with a view to, or otherwise in connection with, promoting or procuring the candidates election," which includes "prejudicing the electoral prospects of another candidate."[379] Exclusions are made for certain expenses, such as those related to the publication of non-advertising material in newspapers and periodicals.[380] Further, the value of volunteer services provided on the volunteer's own time is not considered an election expense.[381]

b) Spending Limits

i. Registered Parties

In the 365 days before a general parliamentary election, registered parties' campaign expenditure is limited to £30,000 per constituency contested by the party, or £810,000 in

[375] *Ibid*, s 72(5)(b).
[376] *Ibid*, s 72(6).
[377] *Ibid*, Schedule 9, para 3(7).
[378] *Representation of the People Act 1983* (UK), c 2, s 90ZA(1).
[379] *Ibid*, ss 90ZA(3),(6).
[380] *Ibid*, Schedule 4A, para 8.
[381] *Ibid*, Schedule 4A, para 10.

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England, £120,000 in Scotland, and £60,000 in Wales, whichever is greater.[382] Constituency-level branches of registered parties are not subject to limits on spending in support of candidates in their constituencies.[383] However, if a constituency-level branch spends money promoting the party as a whole, this spending will count toward the national party's spending limit.[384]

No political party spent the full amount permitted in the 2010 general parliamentary election. This could be a result of declining party income.[385]

ii. Candidates

Candidate spending limits are determined by adding together a base amount and a "top up" that depends on the number of registered electors in the candidate's constituency.[386] There are two relevant time periods for candidate spending under the *RPA*. One limit applies to post-candidacy election expenses, while a separate limit applies to pre-candidacy election expenses under certain circumstances. The limit for post-candidacy expenses covers all election expenses incurred for things used after the candidate becomes a candidate, even if the expenses were actually incurred before they became a candidate, as indicated by the definition of "election expenses."[387] In the 2017 general parliamentary election, the post-candidacy spending limit consisted of a base amount of £8,700 with a top up of 9p per elector in county constituencies.[388]

A separate spending cap applies to pre-candidacy election expenses in some circumstances. If Parliament is not dissolved for 55 months, election expenses will be capped between the

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[382] *Political Parties, Elections and Referendums Act 2000* (UK), c 41, Schedule 9, paras 3(2)–(3),(7).
[383] Ron Johnston & Charles Pattie, "Local Parties, Local Money, and Local Campaigns: Regulatory Issues" in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) at 92.
[384] *Ibid*.
[385] Ewing & Rowbottom (2012) at 80.
[386] UK Electoral Commission, "UK Parliamentary general election 2015: Guidance for candidates and agents, Part 3 of 6 – Spending and donations" at 6, online: <http://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/173074/UKPGE-Part-3-Spending-and-donations.pdf>.
[387] *Representation of the People Act 1983* (UK), c 2, s 90ZA.
[388] *Ibid*, s 76; *Representation of the People (Variation of Limits of Candidates' Election Expenses) Order 2014*, SI 2014/1870, art 4. See also United Kingdom Electoral Commission, "UK Parliamentary general election 2015: Guidance for candidates and agents, Part 3 of 6 – Spending and donations" at 7, online: <http://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/173074/UKPGE-Part-3-Spending-and-donations.pdf>; United Kingdom Electoral Commission, "UK Parliamentary general election 2017: Guidance for candidates and agents, Part 3 of 6 – Spending and donations" at 7, online: <https://www.electoralcommission.org.uk/__data/assets/pdf_file/0019/214516/UKPGE-Part-3-Spending-and-donations.pdf>. In the 2017 parliamentary general election, there was no pre-candidacy spending limit, since Parliament was dissolved before the 55-month period expired.

end of the 55-month period and the day a person becomes a candidate.[389] In other words, if an expense is incurred for something used during this pre-candidacy window, it will count toward the pre-candidacy spending limit. This window could last up to four months. In the 2015 general parliamentary election, spending during this period was limited to a base amount of £30,700 with a top up of 6p per elector.[390] The addition of this pre-candidacy limit in 2009 was presumably directed toward preventing the circumvention of pre-existing post-candidacy spending limits.

9.2.1.2 Regulation of Contributions to Registered Parties and Candidates

As mentioned above, contributions to candidates and political parties in the UK are subject to source restrictions and disclosure requirements, but the amount of each contribution is unlimited. The source restrictions and disclosure requirements apply to all donations to political parties, regardless of whether donations are specifically intended for the purpose of election campaigning, although disclosure is required more frequently during election periods.

a) Definition of "Donation"

i. Definition of "donation" for parties: *PPERA*

"Donation" is defined in section 50(2) of *PPERA* to include gifts of money or property; membership fees; payments of the party's expenses by a third person; and the provision of property, services, or facilities "otherwise than on commercial terms." "Sponsorship" is also included in the definition of "donation" and is defined in section 51 of *PPERA* as the transfer of money or property to the party to help the party meet expenses for events, research, or publications. Sponsorship does not, however, include the price of admission to events and payments to access party publications.[391] The definition of "donation" also excludes various things, such as the provision of volunteer services on one's own time free of charge.[392] In

[389] *Representation of the People Act 1983* (UK), c 2, s 76ZA. Note that, for the purposes of section 76ZA, the definition of "election expenses" in section 90ZA(1) is changed to omit the words "after the date when he becomes a candidate at the election": s 76ZA(1).
[390] *Ibid*, s 76ZA(2); *Representation of the People (Variation of Limits of Candidates' Election Expenses) Order 2014*, SI 2014/1870, art 4. See also United Kingdom Electoral Commission, "UK Parliamentary general election 2015: Guidance for candidates and agents, Part 3 of 6 – Spending and donations" at 7, online: <http://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/173074/UKPGE-Part-3-Spending-and-donations.pdf>.
[391] *Political Parties, Elections and Referendums Act 2000* (UK), c 41, s 51(3).
[392] *Ibid*, s 52(1).

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addition, donations of £500 or less are excluded from the definition of "donation" and are therefore exempt from source restrictions and disclosure requirements.[393]

Loans with a value over £500 are included within the regulatory scheme.[394] After the self-explanatory "loans for peerages" scandal of 2006, the *Election Administration Act 2006* amended *PPERA* to ensure loans could not be used to circumvent source restrictions and disclosure requirements for donations.[395]

ii. Definition of "donation" for candidates: the *RPA*

The definition of "donation" under the *RPA* is similar to the definition under *PPERA*. "Donation" is defined to include gifts; sponsorship; money lent on non-commercial terms; and the provision of property, services, or facilities on non-commercial terms.[396] Donations of £50 or less are excluded.[397] Volunteer services provided free of charge on the volunteer's own time are also excluded.[398]

b) Source Restrictions

Source restrictions are similar for candidates and registered parties.[399] As indicated by the definitions of "donation," these restrictions are triggered by donations and loans over £500 for parties and by donations over £50 for candidates. Donations and loans over these thresholds must not come from anonymous or impermissible donors.[400] Permissible donors include individuals registered in the electoral register in the UK, companies and limited liability partnerships that carry on business in the UK, unincorporated associations that carry on their activities primarily in the UK and have their main office in the UK, and trade unions listed under UK legislation.[401] Charities are not allowed to make political donations.[402] An additional restriction applies to donations and loans to political parties.

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[393] *Ibid*, s 52(2).
[394] *Ibid*, ss 71F(3),(12)(b).
[395] Fisher (2015) at 155; Gauja, (2010) at 179. *Parties and Elections: Legislating for Representative Democracy* (Ashgate Publishing, 2010) at 179.
[396] *Representation of the People Act 1983* (UK), c 2, Schedule 2A, para 2(1). "Sponsorship" is defined in para 3 of Schedule 2A.
[397] *Ibid*, Schedule 2A, para 4(2).
[398] *Ibid*, Schedule 2A, para 4(1)(b).
[399] Third-party campaigners are subject to these same source restrictions under *PPERA*, as discussed in Section 9.2.3.2, below.
[400] *Political Parties, Elections and Referendums Act 2000* (UK), c 41, s 54(1)(a); *Representation of the People Act 1983* (UK), c 2, Schedule 2A, para 6(1)(b).
[401] *Ibid*, Schedule 2A, para 6(1)(a). By contrast, under the federal regime in Canada, only individuals may contribute to political parties and candidates: see Section 8.2.1.2, above.
[402] United Kingdom Election Commission, "Permissibility checks for political parties" at 4, online: <https://www.electoralcommission.org.uk/i-am-a/party-or-campaigner/guidance-for-political-parties/reporting-donations-and-loans>; Rowbottom, (2012) 11 at 26.

Individuals contributing or lending more than £7,500 to a registered party must be resident, ordinarily resident, and domiciled in the UK for tax purposes.[403]

When accepting a donation from an unincorporated association, the Electoral Commission advises party officers to ascertain whether the association has an identifiable membership, a set of rules or a constitution, and a separate existence from its members.[404] If these criteria are met, the party officer may accept the donation without inquiring further into the identity of the individuals funding the association, even if those individuals might be impermissible donors. The party officer must simply record the association's name and the address of its main office, in accordance with *PPERA*'s transparency requirements.[405] If the above criteria are not met, party officers are directed to "consider whether the donation is actually from individuals" within the association "or if someone within the association is acting as an agent for others."[406] If so, the officer must ensure the individuals in question are permissible donors.[407]

c) Disclosure Requirements

Donations and loans to registered parties, along with donations to candidates, are subject to disclosure requirements. These requirements will be discussed in Section 9.2.1.3, below, on transparency requirements.

9.2.1.3 Transparency Requirements for Registered Parties and Candidates

a) Registered Parties

The treasurer of a registered party must submit a campaign expenditure return to the Electoral Commission within six months after a general election.[408] The report must contain all campaign expenditures in the 365 days before the election, along with supporting

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[403] *Political Parties, Elections and Referendums Act 2000* (UK), c 41, ss 54(2)(a),(2ZA), 71HZA(1)–(2).
[404] United Kingdom Election Commission, "Permissibility checks for political parties" at 9, online: <https://www.electoralcommission.org.uk/i-am-a/party-or-campaigner/guidance-for-political-parties/reporting-donations-and-loans>.
[405] *Ibid*. However, some additional transparency is provided by the reporting requirements for unincorporated associations. If an unincorporated association donates or lends over £25,000 in a year to a registered party, the association must report to the Electoral Commission any gifts over £7,500 received by the association before and after the association makes the donation or loan: *Political Parties, Elections and Referendums Act 2000* (UK), c 41, Schedule 19A, para 2.
[406] United Kingdom Election Commission, "Permissibility checks for political parties" at 9, online: <https://www.electoralcommission.org.uk/i-am-a/party-or-campaigner/guidance-for-political-parties/reporting-donations-and-loans>.
[407] *Ibid*.
[408] *Political Parties, Elections and Referendums Act 2000* (UK), c 41, ss 80, 82(1). The treasurer commits an offence if they fail to submit the report on time without reasonable excuse: s 84(1).

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invoices and receipts.[409] The treasurer must also submit a declaration that the return is complete and correct and, if the party's campaign expenditure exceeds £250,000, an auditor's report.[410] The Electoral Commission must make the campaign expenditure returns available for public inspection "as soon as reasonably practicable," but may destroy returns two years after receiving them.[411]

Party treasurers must also submit quarterly donation reports.[412] As mentioned above, only contributions over £500 meet the definition of "donation" and only loans of a value of over £500 count as regulated transactions under *PPERA*. Donation reports must include donations or loans over £7,500, donations or loans from the same source that add up to £7,500 in a calendar year, and donations or loans over £1,500 that come from a source already reported in that year.[413] Further, the treasurer must include donations or loans over £1,500 to the party's accounting units, or constituency-level branches.[414] If one person makes several donations to different branches of the party, the donations will be treated as a donation to the central party and must be reported if over £7,500 in the aggregate.[415] Reports must include information about the donor or lender, such as name and address.[416] During a general election, these reports must be submitted weekly.[417] If there is nothing to report, the treasurer must submit a nil return.[418] The Electoral Commission maintains a register of donations and loans reported under *PPERA,* which must include the amount and source of each donation or loan.[419] Donations are to be entered into the register "as soon as reasonably practicable."[420]

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[409] *Ibid*, ss 80(3),(4).
[410] *Ibid*, ss 83(2), 81.
[411] *Ibid*, s 84.
[412] *Ibid*, ss 62(1), 71M(1).
[413] *Ibid*, ss 62, 71M; UK Electoral Commission, "Overview of donations to political parties" at 6, online: <http://www.electoralcommission.org.uk/__data/assets/pdf_file/0014/102263/to-donations-rp.pdf>; UK Electoral Commission, "Overview of loans to political parties" at 6, online: <http://www.electoralcommission.org.uk/__data/assets/pdf_file/0015/102264/to-loans-rp.pdf>.
[414] UK Electoral Commission, "Reporting donations and loans: Parties with accounting units" at 4, online: <http://www.electoralcommission.org.uk/__data/assets/pdf_file/0016/102283/sp-reporting-with-au-rp.pdf>.
[415] *Ibid*.
[416] *Political Parties, Elections and Referendums Act 2000* (UK), c 41, ss 62(13), 71M(13); Schedule 6, para 2; Schedule 6A, para 2.
[417] *Ibid*, ss 63, 71Q.
[418] *Ibid*, ss 62(10), 71M(10).
[419] *Ibid*, ss 69, 71V.
[420] *Ibid*, ss 69(5), 71V.

b) Candidates

Candidates must submit a spending return within 35 days after the election result is declared.[421] The return must include all election expenses incurred and payments made, along with a statement of the amount of money provided from the candidate's own resources to cover election expenses.[422] Even if the candidate has incurred no election expenses, they must submit a nil return.[423] The return must also list donations received and information about the donations, such as the date of acceptance, the amount of the donation, and the name and address of the donor.[424] As noted above, these requirements only apply to donations over £50, as donations under this threshold do not meet the definition of "donation" in the *RPA*.[425] If a candidate fails to deliver their return on time and is a Member of Parliament, the candidate is prohibited from sitting or voting in the House of Commons until delivery is complete.[426] The *RPA* also requires a candidate's donation returns to be published in at least two newspapers in their constituency.[427]

9.2.2 Public Funding of Election Campaigns in the UK

The UK's campaign finance regime provides little in the way of public funding for parties or candidates. There are no tax credits for political donations and no reimbursements or allowances. Fisher notes that a tradition of "voluntarism as the basis for party finance" may explain the absence of robust public funding for election campaigns in the UK.[428]

a) Policy Development Grants

Policy development grants for political parties are intended to help fund long-term research, thus encouraging parties to become a source of ideas in politics, not just electoral campaigning machines.[429] The Electoral Commission is not authorized to make more than £2 million in policy grants per year.[430]

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[421] *Representation of the People Act 1983* (UK), c 2, s 81(1).
[422] *Ibid*, ss 81(1),(3).
[423] UK Electoral Commission, "UK Parliamentary general election 2015: Guidance for candidates and agents, Part 3 of 6 – Spending and donations" at 16, online: <http://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/173074/UKPGE-Part-3-Spending-and-donations.pdf>.
[424] *Representation of the People Act 1983* (UK), c 2, Schedule 2A, para 11; *Political Parties, Elections and Referendums Act 2000* (UK), c 41, Schedule 6, para 2.
[425] *Representation of the People Act 1983* (UK), c 2, Schedule 2A, para 4(2).
[426] *Ibid*, s 85(1). If a Member of Parliament contravenes this prohibition, they will be fined £100 for every day they sit or vote without submitting the return.
[427] *Ibid*, s 88.
[428] Fisher (2015) at 169.
[429] Ghaleigh (2006) at 53.
[430] *Political Parties, Elections and Referendums Act 2000* (UK), c 41, s 12(8).

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b) Broadcasting Regulations

The *Communications Act 2003* prohibits paid political advertising on television and radio and requires broadcasters to provide free airtime to registered political parties for political and campaign broadcasts.[431] Licensed broadcasters must allocate political broadcasting time in accordance with the minimum requirements set out by Ofcom, the UK's communications regulator.[432] As long as these minimum requirements are met, broadcasters have discretion to set their own rules on the length, frequency, allocation, and scheduling of political broadcasts.[433]

Under section 321(2) of the *Communications Act 2003*, an advertisement will contravene the prohibition on paid political advertising if it is inserted by a body whose objects are wholly or mainly of a political nature or if it is directed towards a political end. Objects of a political nature and political ends include attempts to influence the outcome of elections or referendums, among other non-election-related purposes.[434]

The regulation of political broadcasting is motivated by the "fear of the societal consequences of unbridled private control of an especially potent form of communication," although the

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[431] *Communications Act 2003* (UK), c 21, ss 319(2)(g), 333. For more information on the ban on paid political broadcasting, see Jacob Rowbottom, "Access to the Airwaves and Equality: The Case against Political Advertising on the Broadcast Media" in K D Ewing & Samuel Issacharoff, eds, *Party Funding and Campaign Financing in International Perspective* (Hart Publishing, 2006) at 77. Rowbottom argues in favour of broadcasting restrictions by pointing out that access to broadcast media is always limited, but should not be limited on the basis of wealth: 96. See also Andrew Geddis, "The press: The media and the 'Rupert Murdoch problem'" in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) at 136. For criticism of the ban on paid political advertising, see Section 9.3, below.

[432] Ofcom, "Ofcom rules on Party Political and Referendum Broadcasts" (22 March 2017), online: <https://www.ofcom.org.uk/__data/assets/pdf_file/0035/99188/pprb-rules-march-2017.pdf>. Ofcom advises that, before general elections, licensed broadcasters and the BBC should allocate one or more election broadcasts to each registered party "having regard to the circumstances of a particular election, the nation in which it is held, and the individual party's past electoral support and/or current support in that nation": *ibid,* Rule 14. Ofcom clarifies that registered parties should qualify for an election broadcast if contesting one sixth or more of the seats in a general election: *ibid,* Rule 15. Further, licensed broadcasters and the BBC "should consider making additional allocations of... [election broadcasts] to registered parties...if evidence of their past electoral support and/or current support at a particular election or in a relevant nation/electoral area means it would be appropriate to do so": Rule 16. Registered parties may choose a television broadcast length of 2'40", 3'40", or 4'40" and a length of up to 2'30'' for radio: *ibid*, Rule 24. Political broadcasts must be aired between 5:30pm and 11:30pm on television and between 6:00am and 10:00pm on radio: *ibid*, Rules 25–26. In the context of general elections, the relevant licensed broadcasters are "licensed public service television channel[s]" and "national (i.e. UK-wide, commercial) analogue radio service[s]": *ibid,* Rules 1, 8.

[433] *Ibid,* Rules 3–4.

[434] *Communications Act 2003,* c 21, s 321(3).

potency of television and radio is arguably being diluted by other media.[435] The prohibition on paid political broadcasting is also aimed at reducing demand for campaign funds among political parties and candidates, which theoretically helps to address corruption, equality, and fairness concerns.

As discussed above, the European Court of Human Rights upheld the ban on paid political advertising in *Animal Defenders International v the United Kingdom*.[436] A "strong cultural antipathy to political advertising" in the UK also supports the continuing existence of the ban.[437]

9.2.3 Regulation of Third-Party Campaign Financing in the UK

The *RPA* governs third-party campaigns in relation to candidates in a particular constituency. Broader campaigns for or against a political party or category of candidates, or on policies or issues associated with a party or category of candidates, are governed by *PPERA*.[438]

The regulation of third-party campaigners in the UK mirrors the regulation of political parties and candidates. Third-party campaigners are subject to spending limits and, if they spend above a certain amount, they must comply with reporting requirements and source restrictions for donations.

9.2.3.1 Activities Captured by Third-Party Campaign Regulations

a) *PPERA*

i. Meaning of "Recognised" Third Party

"Third party" is defined in *PPERA* as "any person or body other than a registered party," or a registered party if it campaigns to promote the electoral success of other parties or candidates from other parties.[439]

PPERA creates a scheme of unregistered and registered, or "recognised," third parties. Unregistered third-party campaigners can only spend up to a certain amount. Third-party

[435] Geddis (2012) at 146.
[436] *Animal Defenders International v the United Kingdom* [GC], No 48876/08, [2013] II ECHR 203.
[437] Stephanie Palmer, "The Courts: Legal challenges to political finance and election laws" in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) at 184.
[438] UK Electoral Commission, "Northern Ireland Assembly election March 2017: Non-party campaigners" (guidance document) at 5, online: <http://www.electoralcommission.org.uk/__data/assets/pdf_file/0007/219148/Northern-Ireland-Assembly-NPC-2017.pdf>.
[439] *Political Parties, Elections and Referendums Act 2000* (UK), c 41, ss 85(8)–(9).

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campaigners must register if their spending on "controlled expenditures" exceeds this threshold during the regulated period. Once registered, they will be a "recognised third party" with a much higher spending limit, but will be subject to various other requirements such as reporting requirements. Currently, there are ten recognised third parties in the UK, including three trade unions and two animal welfare organizations.[440]

ii. Definition of "Controlled Expenditure"

As mentioned above, once a third party reaches a certain threshold of "controlled expenditure," they must register and meet various requirements. The definition of "controlled expenditure" in section 85 of *PPERA* has two components. First, a "controlled expenditure" is an expense incurred by or on behalf of the third party that falls under Part 1 of Schedule 8A, which includes expenses incurred for the "production or publication of material ... made available to the public in whatever form and by whatever means," canvassing or market research, press conferences, and public rallies other than annual conferences of the third party, among other things.[441] Various expenses are excluded from the definition, such as expenses incurred by an individual to provide volunteer services on their own time.[442] Second, a "controlled expenditure" must be capable of being reasonably "regarded as intended to promote or procure the electoral success" of a party and its candidates or of a particular category of parties or candidates.[443] A category of parties or candidates may be characterized by, for example, a policy position.[444] A third party promotes the electoral success of parties or candidates if it engages in "prejudicing the electoral prospects ... of other parties or candidates.[445] Promoting electoral success also does not require express mention of any party or candidate,[446] nor does the expenditure need to be solely for the purpose of promoting a party or candidate's electoral success in order to fit within the definition of "controlled expenditure."[447]

In its guidance for non-party campaigners, the Electoral Commission has superimposed an alternative or additional two-step test for determining whether spending on an activity is a "controlled expenditure" under *PPERA*. The first step is the "purpose test," which involves asking whether the activity can reasonably be regarded as intended to influence voters to

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[440] The Register is found online at: <http://search.electoralcommission.org.uk/Search/Registrations?currentPage=1&rows=20&sort=RegulatedEntityName&order=asc&open=filter&et=tp&register=none&regStatus=registered&optCols=EntityStatusName>.

[441] *Political Parties, Elections and Referendums Act 2000* (UK), c 41, Schedule 8A, para 1.

[442] *Ibid*, Schedule 8A, para 2(1)(a)(i).

[443] *Ibid*, s 85(2).

[444] *Ibid*, s 85(2)(b).

[445] *Ibid*, s 85(4)(b).

[446] *Ibid*, s 85(4)(c).

[447] *Ibid*, s 85(4A).

vote for or against a party or category of candidates.[448] The purpose test will be met if the activity promotes or opposes policies so closely associated with the party or category of candidates that it can reasonably be regarded as intended to influence voters.[449] The second step is the "public test," which involves asking whether the activity is aimed at, seen by, or heard by the public or involves the public.[450] The "public" does not include members of the non-party campaigner organization or its "committed supporters".[451]

b) The *RPA*

Under the *RPA*, persons other than the candidate, the candidate's election agent, and those authorized by the election agent are subject to regulations if they incur expenses for matters such as public meetings or advertising with a view to promoting or procuring the election of a candidate.[452]

9.2.3.2 Regulation of Contributions to Recognised Third Parties under *PPERA*

Under *PPERA*, donations to recognised third parties are not capped, but are subject to other requirements if their value exceeds £500, such as reporting requirements.[453] The reporting requirements are discussed in Section 9.2.3.4, below. Donations of over £500 to recognised third parties for the purpose of controlled expenditures must also come from permissible donors, just like donations to political parties.[454] In relation to a recognised third party, donations are defined as gifts; sponsorship; membership fees; and the provision of goods, services, and facilities, among other things, but volunteer services do not count as a donation.[455]

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[448] UK Electoral Commission, "Northern Ireland Assembly election March 2017: Non-party campaigners" (guidance document) at 8.
[449] UK Electoral Commission, "Overview of regulated non-party campaigning" (guidance document) at 6, online: <http://www.electoralcommission.org.uk/__data/assets/pdf_file/0006/193065/Overview-of-regulated-non-party-campaigning-May-2016.pdf>.
[450] UK Electoral Commission, "Northern Ireland Assembly election March 2017: Non-party campaigners" (guidance document) at 8.
[451] UK Electoral Commission, "Overview of regulated non-party campaigning" (guidance document) at 7.
[452] *Representation of the People Act 1983* (UK), c 2, s 75.
[453] *Political Parties, Elections and Referendums Act 2000* (UK), c 41, Schedule 11, para 4(2).
[454] *Ibid*, Schedule 11, para 6. See section 54(2) of *PPERA* for the list of permissible donors.
[455] *Ibid*, Schedule 11, paras 2(1), 4(1). "Sponsorship" is defined in para 3.

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9.2.3.3 Regulation of Spending by Third Parties

a) *PPERA*

The spending limits for recognised third parties apply to the 365 days before a parliamentary general election,[456] but expenses incurred before the regulated period will count toward the limit if they are incurred for property, services, or facilities that are used during this regulated period.[457] Recognised third parties have a higher spending limit than unregistered third parties. In England, the controlled expenditure of recognised third parties may amount to up to 2% of the maximum campaign expenditure limit for England.[458] The "maximum campaign expenditure limit" refers to the maximum amount political parties may spend in a particular part of the UK.[459] A recognised third party may not spend more than 0.05% of the maximum campaign expenditure limit in any one constituency.[460] If a recognised third party exceeds the spending limit, they will commit an offence under *PPERA* if they reasonably ought to have known that their expenditures would exceed the limit.[461]

Unregistered third parties can spend up to £20,000 in England and up to £10,000 in each of Scotland, Wales, and Northern Ireland on controlled expenditures in the 365 days before a parliamentary general election.[462] Like recognised third parties, unregistered third parties must not spend more than 0.05% of the maximum campaign expenditure in a particular constituency.[463] If a third party exceeds these limits without registering, they will commit an offence under *PPERA*.[464]

b) The *RPA*

Under the *RPA*, third parties can spend up to £700 campaigning for the election of a candidate after the date the candidate becomes a candidate.[465] Expenses incurred before the candidate becomes a candidate will count toward this limit if incurred for something to be used after the candidacy begins.[466] A person becomes a candidate the day Parliament is dissolved, unless their intention to become a candidate is not expressed until after

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[456] *Ibid*, Schedule 10, para 3(3).
[457] *Ibid*, s 94(8).
[458] *Ibid*, Schedule 10, para 3.
[459] *Ibid*, s 94(10)(e).
[460] *Ibid*, Schedule 10, para 3(2A).
[461] *Ibid*, s 94(2).
[462] *Ibid*, ss 94(3)–(5).
[463] *Ibid*, s 94(5ZA).
[464] *Ibid*, s 94.
[465] *Representation of the People Act 1983* (UK), c 2, ss 75(1),(1ZZB),(1ZA).
[466] *Ibid*, s 75(8).

dissolution, in which case they will become a candidate on the date this intention is declared or the date of the person's nomination, whichever is earlier.[467]

9.2.3.4 Transparency Requirements for Third-Party Campaigners

a) Attribution

Under *PPERA*, published election material must contain the names and addresses of the printer, promoter, and person on whose behalf it is published.[468] The "promoter" is defined as "the person causing the material to be published."[469] "Election material" is defined as "material which can reasonably be regarded as intended to promote or procure electoral success" for a registered party, for a category of registered parties, or for a category of candidates.[470] For example, if a company causes material to be published in support of a registered party, the company's name and address must appear on the material.

b) Reporting Requirements

i. *PPERA*

Unregistered third parties have no disclosure obligations. However, recognised third parties must prepare a return if they incur any controlled expenditures during the 365 days before polling day.[471] The return must include a statement of payments made in respect of controlled expenditures and a statement of donations received for the purpose of controlled expenditures for the relevant election.[472] For donations from permissible donors with a value of more than £7,500, the return must state the amount or nature of the donation, the date it was received, and information about the donor.[473] The total value of all donations that are worth more than £500 and that do not exceed £7,500 must also be reported.[474] If a recognised third party incurs more than £250,000 for controlled expenditures during the 365 days before polling day, they must also submit an auditor's report with their return.[475]

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[467] *Ibid*, s 118A(2); UK Electoral Commission, "UK Parliamentary general election 2015: Guidance for candidates and agents, Part 3 of 6 – Spending and donations" at 6, online: <http://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/173074/UKPGE-Part-3-Spending-and-donations.pdf>.

[468] *Political Parties, Elections and Referendums Act 2000* (UK), c 41, s 143.

[469] *Ibid*, s 143(11).

[470] *Ibid*, s 143A.

[471] *Ibid*, s 96(1).

[472] *Ibid*, s 96(2).

[473] *Ibid*, Schedule 11, para 10(1),(2).

[474] *Ibid*, Schedule 11, para 10(3).

[475] *Ibid*, s 97.

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ii. The *RPA*

If a third-party campaigner incurs expenses that must be authorized by a candidate's election agent, such as expenses totalling over £700, the third party must submit a return stating the amount of the expenses and the candidate for whom they were incurred.[476] The return must be submitted within 21 days after the election results are declared.[477] If the expenses are under £700, meaning the candidate's election agent need not authorize the expenses, the Electoral Commission may nonetheless require the third party to submit a return that either shows the expenses incurred or contains a statement that the expenses were £200 or less.[478]

9.2.3.5 Rules Governing Specific Types of Third Parties

a) Companies

Companies must obtain a resolution from their members authorizing political donations or expenditures in advance.[479] A resolution is not required unless the donation exceeds £5,000 by itself or in combination with other political donations made in the 12-month period leading up to the donation.[480] The resolution "must be expressed in general terms ... and must not purport to authorize particular donations or expenditure."[481] The resolution has effect for four years.[482]

b) Trade Unions

Trade unions must ballot their members to establish a separate political fund for political donations and expenditures.[483] Members must opt in in order to contribute to the union's political fund and may withdraw their opt-in notice at any time.[484] Further, the trade union must take all reasonable steps to notify members of their right to withdraw from contributing to the political fund.[485]

Trade unions must provide detailed information in annual returns regarding payments out of their political fund if those payments exceed £2,000 in a calendar year.[486] For example, if a union contributes to a third-party campaigning organisation, the union's annual return

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[476] *Representation of the People Act 1983* (UK), c 2, s 75(2).
[477] *Ibid*, s 75(2)(a).
[478] *Ibid*, s 75ZA.
[479] *Companies Act 2006* (UK), c 46, s 366.
[480] *Ibid*, s 378(1).
[481] *Ibid*, s 367(5).
[482] *Ibid*, s 368.
[483] *Trade Union and Labour Relations (Consolidation Act) 1992* (UK), c 52, s 71.
[484] *Ibid*, s 84(1).
[485] *Ibid*, s 84A(1).
[486] *Ibid*, s 32ZB.

must include the name of the organisation, the amount paid to that organisation, the names of the political parties or candidates that the union hoped to support through the expenditure, and the amount of the expenditure spent in relation to each political party or candidate.[487]

c) Unincorporated Associations

If an unincorporated association donates or lends over £25,000 in a year to a registered party or recognised third party, the association must report to the Electoral Commission any gifts over £7,500 received by the association before and after the association makes the political contribution.[488] The Electoral Commission must maintain a register of gifts reported to them by unincorporated associations.[489]

9.2.4 Role of the Electoral Commission

The Electoral Commission supervises compliance with *PPERA* and other electoral law statutes, such as the *RPA*.[490] It has the power to demand the production of documents or records of income and expenditure, to copy those documents and records, and to enter the premises of an individual or organization to retrieve those documents and records.[491] Failure to deliver documents to the Electoral Commission can lead to civil penalties.[492] The police, however, are responsible for initiating enforcement actions for criminal offences under *PPERA*.[493]

Since 2009, four out of nine commissioners on the Electoral Commission have been nominated by the political parties.[494] This was introduced in response to criticisms that the commissioners, who formerly could not be members of parties or have held political office in the last ten years, were too apolitical and did not understand the "practical workings of political parties."[495]

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[487] *Ibid*, s 32ZB(6).
[488] *Political Parties, Elections and Referendums Act 2000* (UK), c 41, Schedule 19A, para 2.
[489] *Ibid*, Schedule 19A, para 7.
[490] Ghaleigh (2006) at 42; *Political Parties, Elections and Referendums Act 2000* (UK), c 41, s 145.
[491] *Political Parties, Elections and Referendums Act 2000* (UK), c 41, s 146.
[492] *Ibid*, s 147; Navraj Singh Ghaleigh, "The regulator: The first decade of the Electoral Commission" in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) at 157.
[493] Ghaleigh (2012) at 157.
[494] *Ibid* at 158.
[495] *Ibid*.

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9.3 Criticisms of Campaign Finance Regulation in the UK

A heavily criticized aspect of the UK's campaign finance regime is the absence of donation caps.[496] Even though most campaign finance scandals in the UK involve donations, only spending is capped.[497] Uncapped donations allow reliance on a small number of large donors, which raises concerns regarding corruption, equality, fairness, and public confidence.[498] Admittedly, the UK's spending limits might relieve the need for big donations to some extent by reducing demand for money. In addition, transparency requirements supposedly deter large donations through negative press attention. For example, after the disclosure requirements in *PPERA* came into force in 2000, the media seized on instances in which large donors to the Labour Party obtained some benefit from government around the same time they made donations.[499] The resulting scandal may have deterred future large donors.[500] However, Fisher notes this deterrence did not appear to be at work in the 2008 and 2010 elections.[501] Fisher argues further that, in spite of *PPERA*'s spending limits, the demand for money among parties has continued unabated, especially after the devolution of power to Scotland, Wales, and Northern Ireland and associated extra elections.[502] The major parties' reliance on large donations could also be exacerbated by "the decline of other forms of party income."[503]

Others criticize *PPERA*'s spending limits for leaving out local, constituency-level party branches.[504] As noted by Johnston and Pattie, candidates are subject to stricter regulation than parties at the constituency level.[505] They argue in favour of stricter regulation for local party units, particularly in light of the importance of local party branches in campaigning for marginal seats and the apparent effectiveness of local campaigning.[506] Fisher adds that

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[496] According to Fisher, one reason for the UK's failure to impose a donation ceiling is the Labour Party's structure of affiliated trade unions: see Fisher, (2015) at 161.
[497] Ewing & Rowbottom (2012) at 77.
[498] For example, in the Brexit referendum, which was subject to similar rules as general elections, ten donors were responsible for over half of donations to the campaigns and 100 donors were responsible for 95% of all reported donations: Transparency International UK, *Take Back Control: How Big Money Undermines Trust in Politics,* Steve Goodrich & Duncan Hames, eds (October 2016) at 1.
[499] Ewing (2006) at 63.
[500] The scandals also led the Labour Party to set up extra "safeguards"; for example, the party instituted a requirement that donors sign a statement declaring that they are not seeking personal or commercial benefits: *ibid* at 67.
[501] Fisher (2015) at 167.
[502] *Ibid* at 153.
[503] *Ibid*.
[504] However, expenses incurred by local party branches to promote the party as a whole count toward the national party's spending limits. See Section 9.2.1.1, above.
[505] Johnston & Pattie (2012) at 92.
[506] *Ibid*.

spending at the constituency level will only become more important as volunteer campaigning drops with falling party membership.[507]

The timing of spending limits under *PPERA* is also problematic. The spending limits apply in the 365 days before a general election, yet elections are usually announced four to six weeks before polling day.[508] As a result, parties cannot know whether the regulated period has begun and will struggle to "time their run."[509] Further, since the ruling party basically sets the date of the election, incumbents have a "tactical advantage."[510]

Criticism has also been directed toward the source restrictions and transparency requirements for political donations. Rowbottom argues that the permissible donor scheme can be circumvented through the use of corporate vehicles.[511] For example, a foreign national could effectively make a political donation through a company carrying on business in the UK, as long as the company did not act as an agent for the foreign national.[512] Lesser transparency requirements in Northern Ireland, where donors need not be disclosed, may also allow circumvention of *PPERA*'s transparency rules. For example, the Democratic Unionist Party of Northern Ireland caused controversy after accepting a £425,000 donation for the purpose of pro-Brexit advertising in England and Scotland.[513] The party was not

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[507] Justin Fisher, "Legal Regulation and Political Activity at the Local Level in Britain" in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) at 121.

[508] Ghaleigh (2006) at 47.

[509] *Ibid*.

[510] *Ibid*.

[511] Rowbottom (2012) 11 at 18.

[512] *Ibid*.

[513] Peter Geoghegan & Adam Ramsay, "The strange link between the DUP Brexit donation and a notorious Indian gun running trial", *openDemocracyUK*, online: <https://www.opendemocracy.net/uk/peter-geoghegan-adam-ramsay/mysterious-dup-brexit-donation-plot-thickens>; "DUP confirms £435,000 Brexit donation", *BBC News* (24 February 2017), online: <http://www.bbc.com/news/uk-northern-ireland-39075502>; Fintan O'Toole, "What connects Brexit, the DUP, dark money and a Saudi prince?", *The Irish Times* (16 May 2017), online: <https://www.irishtimes.com/opinion/what-connects-brexit-the-dup-dark-money-and-a-saudi-prince-1.3083586>; "The strange tale of the DUP, Brexit, a mysterious £425,000 donation and a Saudi prince", *The Independent* (9 June 2017), online: <http://www.independent.co.uk/news/uk/politics/election-dup-brexit-donations-saudi-arabia-tale-tories-theresa-may-a7782681.html>. Facing political pressure, the DUP eventually revealed the source of the donation to be an organization called the Constitutional Research Council. However, the ultimate source of the donation remains unclear. Even under *PPERA*'s disclosure requirements, the ultimate source of this type of donation could remain murky. As discussed above in Section 9.2.1.2(b), under *PPERA*, parties may, under certain circumstances, accept donations from an unincorporated association without inquiring into the identities of the individuals funding the unincorporated association.

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required by the law of Northern Ireland to disclose the source of the donation, even though the advertising took place outside of Northern Ireland.

Complexity is another problem plaguing the UK's campaign finance regime. Ghaleigh observes that *PPERA*'s labyrinthine intricacy "impose[s] a regulatory burden that risks unintended consequences."[514] Volunteers at the local party level are unlikely to fully understand the requirements of *PPERA*'s "heavily amended" provisions, which could lead to fears of liability and a chilling effect.[515] Gauja and Orr also note that the introduction of stricter third-party campaigning regulations in 2014 could hinder the ability of voluntary organizations to "speak on issues of concern," creating a "chilling effect on democracy."[516] Some organizations may be unable to pay for independent legal advice to sort out the complex third-party rules, although the Electoral Commission releases guidance for third-party campaigners under section 3 of the *Transparency of Non-Party Campaigning Act*.[517] Small political parties may also lack the resources to meet reporting requirements, although the Electoral Commission may provide some assistance.[518]

The UK's ban on paid political advertising on broadcast media has drawn criticism for its impact on freedom of expression, particularly in relation to public interest organizations.[519] Critics argue the ban is overbroad, since it captures "not just political parties but social advocacy groups seeking to take part in debate about matters of controversy."[520] Using Amnesty International as an example, Barendt explains that the ban may preclude charities from running short advertisements on radio or television.[521] To Barendt, this constitutes "a monstrous and unjustifiable infringement of freedom of expression."[522] The case of *Animal Defenders*, which involved advertisements funded by an animal welfare organization, arguably provided an example of overbreadth. As noted by three of the dissenting justices in that case, nobody was suggesting that Animal Defenders International "was a financially powerful body with the aim or possibility of ... unduly distorting the public debate."[523] Five

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[514] Ghaleigh (2012) at 167.
[515] *Ibid*.
[516] Gauja & Orr (2015) at 250.
[517] *Ibid* at 259; *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (UK), c 4, s 3.
[518] Gauja (2010) at 179.
[519] The ban's impact on political parties is less extreme, since broadcasters must provide parties with airtime for party political broadcasts. See *Animal Defenders International v the United Kingdom* [GC], No 48876/08, [2013] II ECHR 203, dissenting judgement of Tulkens J at para 14.
[520] Tom Lewis, "*Animal Defenders International v United Kingdom:* Sensible Dialogue or a Bad Case of Strasbourg Jitters?" (2014) 77:3 Mod L Rev 460 at 462.
[521] Professor Eric Barendt, Minutes of Evidence presented to Joint Committee on the Draft Communications Bill [Minutes of Evidence], 17 June 2002, online: <https://publications.parliament.uk/pa/jt200102/jtselect/jtcom/169/2061701.htm>.
[522] Ibid.
[523] *Animal Defenders International v the United Kingdom* [GC], No 48876/08, [2013] II ECHR 203, dissenting judgement of Tulkens J at para 19.

other dissenting justices in *Animal Defenders* argued further that "the prohibition applied to the most protected form of expression (public interest speech), by one of the most important actors in the democratic process (an NGO) and on one of the most influential media (broadcasting)."[524]

Critics also observe that the ban on paid political advertising prevents public interest groups from responding to commercial advertising on broadcast media. As Lewis points out, "under the current state of affairs a car manufacturer may advertise its SUVs on television without limit (finances permitting), but an NGO wishing to publicize the impact of such vehicles on the environment is prohibited, by law, from doing so."[525] Similarly, in Barendt's view:

> It can make no sense to allow commercial ads for automobiles and gas and other products associated with driving, or to allow the government to insert public service adverts ... but not to allow groups to pay for political adverts to make the opposite case.[526]

Critics of the ban on paid political advertising maintain that less restrictive options exist to level the playing field of public debate.[527] Barendt argues that lawmakers can prevent "the domination of politics by ultra rich ... groups" through spending limits on advertising and restrictions on "the number of spots which could be purchased."[528] Both supporters and critics of the ban also question why it applies only to broadcast media.[529] Television and radio are declining in importance while digital advertising, particularly on social media websites, is growing in importance. As a result, the goal of promoting a level playing field is undermined by the lack of regulation governing digital political advertisements, leading some commentators to argue that regulation should be extended to non-broadcast media.[530]

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[524] *Ibid*, dissenting judgement of Ziemele J et al at para 2. Ziemele J also argued that the majority's decision was inconsistent with *VgT Verein gegen Tierfabriken v Switzerland* [GC], No 24699/94, [2001] VI ECHR 243, in which the ECtHR held that a similar prohibition on political advertising in Switzerland contravened the European Convention on Human Rights because it violated freedom of expression and was not necessary in a democratic society.

[525] Lewis (2014) at 473.

[526] Minutes of Evidence (17 June 2002).

[527] Andrew Scott, "'A Monstrous and Unjustifiable Infringement'?: Political Expression and the Broadcasting Ban on Advocacy Advertising" (March 2003) 66 Mod L Rev 224; Sarah Sackman, "Debating 'Democracy' and the Ban on Political Advertising" (May 2009) 72:3 Mod L Rev 475; Minutes of Evidence, (17 June 2002).

[528] Minutes of Evidence (17 June 2002). See also Sackman, (May 2009) at 482. Barendt also suggests that radio and television can be distinguished from each other in designing a regulatory regime, as the price of advertising on radio "would not be extortionate." Thus, the potential for distortion by the wealthy is smaller in the context of radio advertising: Minutes of Evidence, (17 June 2002).

[529] See, e.g., Sackman (May 2009) at 484.

[530] Tambini et al (March 2017) at 4, 8, 21.

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Other criticisms of UK campaign finance law include the parsimoniousness of the public funding regime, which derives partly from public hostility toward the public funding of election campaigns.[531] Ewing and Rowbottom also point to holes in the reporting requirements for third parties. Regulations do not cover internal communications between organizations and their members, while some third parties, like newspaper companies, are excluded altogether.[532] In addition, Ghaleigh criticizes the lack of sanctioning options for contraventions of *PPERA*. The Electoral Commission may either issue a reprimand, which is essentially "nothing," or refer the matter to the criminal prosecution authorities, which may be overly heavy-handed in some cases.[533] Finally, because of the Electoral Commission's "broad range of duties," some critics warn against the "risk of overburdening."[534]

10. CANADIAN LAW

Canada's federal campaign finance regime is more extensive than the regulatory regime in the US or the UK. In Canada, both contributions and expenditures are capped. A "remarkable degree of consensus" exists regarding the need for campaign expenditure ceilings for parties and candidates, with no constitutional challenges or significant legislative proposals targeting caps.[535] Third-party spending limits have been challenged but upheld by the Supreme Court of Canada.[536] Further, in 2003, Parliament introduced "one of the most generous schemes for public funding of political parties that has been seen in a liberal democracy," although an important element of that scheme was omitted in 2014.[537]

10.1 Constitutional Rights and Campaign Finance Regulation in Canada

10.1.1 Introduction

Freedom of expression is enshrined in section 2(b) of the Canadian *Charter of Rights and Freedoms* ("the *Charter*"). In *R v Keegstra*,[538] the Supreme Court of Canada ("SCC") stated that "[t]he connection between freedom of expression and the political process is perhaps the linchpin of the section 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy." The test for determining whether legislation infringes section 2(b) is found in *Irwin Toy Ltd v Quebec (Attorney General)*.[539] First, a court

[531] Fisher (2015) at 165.
[532] Ewing & Rowbottom (2012) at 82.
[533] Ghaleigh (2012) at 157.
[534] Ghaleigh (2006) at 43.
[535] Young (2015) at 121.
[536] *Harper v Canada (Attorney General)*, 2004 SCC 33.
[537] Young (2015) at 107.
[538] *R v Keegstra*, [1990] 3 SCR 697, [1991] 2 WWR 1.
[539] *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577.

will ask whether the activity in question fits within the sphere of activities protected by freedom of expression. This first step is established easily in regard to election-related communications, as political expression "lies at the core of the guarantee of free expression."[540] Second, a court will ask whether the legislation's purpose or effect is to restrict freedom of expression.

Freedom of association is protected under section 2(d) of the *Charter.* According to the SCC, section 2(d) facilitates the exercise of other freedoms and guarantees the ability to exercise *Charter* rights collectively.[541] The right to vote is protected under section 3 of the *Charter*.

Once an infringement of a *Charter* right is established, courts consider section 1 of the *Charter.* Section 1 allows the impugned law to stand if the limit on the right in question is reasonable and demonstrably justifiable in a free and democratic society. At the section 1 stage of the analysis, courts ask whether the objective of the impugned law is pressing and substantial and whether the means chosen by the legislature are proportionate to its ends. In considering proportionality, the courts ask whether the means are rationally connected to the law's objectives, whether the impairment of *Charter* rights is as little as is reasonably possible and whether the deleterious and salutary effects of the law are proportionate.[542]

10.1.2 Jurisprudence on the Constitutional Validity of Campaign Finance Regulation in Canada

a) *Canada (Attorney General) v Somerville*

Spending limits for third-party campaigners have been challenged several times in Canada. Although limits were eventually upheld by the SCC in *Harper v Canada (Attorney General)*,[543] discussed further below, the Alberta Court of Appeal earlier struck down a $1,000 cap on third-party spending on election advertising in *Canada (Attorney General) v Somerville* ("*Somerville*").[544] According to the Court in *Somerville,* the third-party spending limits "severely limit[ed]" the communicative power of third parties, thus violating their right to freedom of expression.[545] The spending limits also constituted a limit on freedom of association, since they prevented people from combining "resources to pursue common goals, influence others, exchange ideas and effect change."[546] Further, the Court found that the impugned provisions violated the right to vote under section 3 of the *Charter*. In the

[540] *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 66.
[541] *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, 151 DLR (4th) 385 at para 36.
[542] *R v Oakes*, [1986] 1 SCR 103; *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 94.
[543] *Harper v Canada (Attorney General)*, 2004 SCC 33.
[544] *Canada (Attorney General) v Somerville,* 1996 ABCA 217.
[545] *Ibid* at para 48.
[546] *Ibid* at para 26.

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Court's view, the limits had "the effect of obstructing citizens' access to information to such an extent that the right to cast an 'informed vote' is breached."[547]

The Court held that the impugned provisions could not be justified under section 1 of the *Charter*. Without effective third-party advertising, citizens would only be as informed "as the news media, the parties and the candidates themselves want the citizens to be."[548] The Court rejected the government's argument that the law was intended to prevent distortion of the political process. Rather, in the Court's view, the spending limits had the unacceptable objective of preserving the preferential position of political parties by preventing third parties from being "heard in any effective way."[549]

b) *Libman v Quebec (Attorney General)*

In *Libman v Quebec (Attorney General)* ("*Libman*"), the SCC struck down a provision in Quebec that restricted third-party campaigning in referendums.[550] The impugned provision stipulated that only the national committees for each option in a referendum could incur expenses to promote or oppose each option. The law failed at the minimal impairment stage of the section 1 *Charter* analysis, as it constituted an almost total ban on the expression of those who could not join or affiliate themselves with national committees.

However, in *Libman,* the SCC accepted in principle the constitutionality of third-party spending limits in referendums and elections. The SCC found that the three objectives of the legislation were pressing and substantial. The first objective was the egalitarian goal of ensuring the wealthy do not have a "dis-proportionate influence by dominating the referendum debate."[551] Second, the spending limits aimed to facilitate informed voting "by ensuring some positions are not buried by others."[552] The third objective was to encourage public confidence by demonstrating that the political process is not "dominated by the power of money."[553]

Moving to the next stage of the section 1 analysis, the SCC found that the third-party spending limits were rationally connected to their three objectives.[554] Based on the report of the 1991 Lortie Commission,[555] the SCC remarked that third-party spending must be limited to ensure the effectiveness of party and candidate spending limits, which are, in turn, key to

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[547] *Ibid* at para 48.
[548] *Ibid*.
[549] *Ibid* at para 76.
[550] *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, 151 DLR (4th) 385.
[551] *Ibid* at para 41.
[552] *Ibid*.
[553] *Ibid*.
[554] *Ibid* at para 57.
[555] Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report* (Ottawa: Minister of Supply and Services, 1991).

electoral fairness.[556] The SCC also accepted that third-party spending limits must be lower than limits for candidates and parties because private resources are unlikely to be spread equally across candidates and policy positions.[557] If limits are too high, third-party spending could produce "disproportionate" and unfair advantages for certain candidates.[558]

c) *Harper v Canada (Attorney General)*

Libman set the stage for *Harper v Canada (Attorney General)* ("*Harper*"), in which the SCC upheld third-party spending limits and accepted that Parliament may choose an "egalitarian model of elections."[559] The impugned provisions of the *Canada Elections Act* ("the *CEA*") limited third-party spending on "election advertising" to $150,000, of which only $3,000 could be spent in a given electoral district.[560] "Election advertising" includes taking a position on an issue with which a candidate is associated, otherwise known as issue advertising. The SCC also upheld registration and disclosure requirements for third parties.

Although the impugned spending limits infringed freedom of expression, the majority of the SCC found the infringement was justified. The spending limits had the pressing and substantial objectives of reducing the domination of political discourse by the wealthy, preventing circumvention of candidate and party spending limits, and enhancing public confidence in the electoral system.[561] The spending limits also satisfied the proportionality test under section 1 of the *Charter*. At this stage of the analysis, the majority emphasized the need for "deference to the balance Parliament has struck between political expression and meaningful participation."[562]

The challengers argued that the impugned third-party spending limits unjustifiably infringed the right to vote in section 3 of the *Charter* by hindering electoral debate. The majority of the SCC, however, held that the impugned provisions actually enhanced the right to vote. Section 3 imports the "right to play a meaningful role in the electoral process,"[563] but this does not confer the right "to mount a media campaign capable of determining the outcome" of an election.[564] Rather, the right to "play a meaningful role in the electoral process" encompasses the right to an informed vote. Since "unequal dissemination of points

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[556] *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, 151 DLR (4th) 385 at paras 43–54.
[557] *Ibid* at para 50.
[558] *Ibid*.
[559] *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 62.
[560] See Section 8.2.3, below, for the definition of "election advertising" and the current third-party spending limits under the *CEA*.
[561] *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 92.
[562] *Ibid* at para 111. Dawood argues that, in light of the risk of "partisan self-dealing" in the design of campaign finance laws, courts "should not automatically defer to Parliament when reviewing laws that govern the democratic process": Yasmin Dajwood, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review" (Fall 2012) 62:4 UTLJ 499 at 505.
[563] *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 70.
[564] *Ibid* at para 74.

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of view undermines the voter's ability to be informed," measures that promote "equality in the political discourse," such as the impugned spending limits, facilitate informed voting and meaningful participation.[565]

The majority of the SCC framed *Harper* as a clash between the right to meaningful participation under section 3 and the right to freedom of expression under section 2(b).[566] In this case, the right to meaningful participation prevailed. The majority warned, however, that spending limits must not be so low that conveying information becomes impossible, as this could jeopardize the "informational component of the right to vote."[567] Parliament must therefore find a middle road between overly stringent restrictions on the dissemination of information and overly permissive spending ceilings that allow some speakers to drown out others.

The dissent disagreed on the location of this middle road, but did not explicitly reject the constitutionality of all third-party spending limits. In light of the expense involved in mass communication, the dissent viewed the impugned spending ceiling as so low that it "effectively denies the right of an ordinary citizen to give meaningful and effective expression to her political views during a federal election campaign."[568] As a result, "effective communication" during elections was "confined to registered political parties and their candidates."[569] This could lead to inadequate coverage of viewpoints and issues unpopular with parties and candidates.[570] The spending caps therefore undermine "the right to listen" and "curtail the diversity of perspectives heard."[571]

Feasby notes that the *CEA*'s third-party spending limits could be vulnerable to a fresh *Charter* challenge. In *Harper,* the majority held that evidence of a reasoned apprehension of harm is sufficient to justify an infringement of freedom of expression in cases involving "inconclusive or conflicting social science evidence of harm."[572] However, since *Harper*, more evidence on third-party spending has become available owing to the accumulation of data from third-party disclosure requirements.[573] The disclosed information suggests there is little "appetite amongst third parties for big money campaigns."[574]

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[565] *Ibid* at paras 71 and 72.
[566] *Ibid* at para 50.
[567] *Ibid* at para 73.
[568] *Ibid* at para 1.
[569] *Ibid* at para 2.
[570] *Ibid* at para 14.
[571] *Ibid* at para 19. The dissenting justices on the US Supreme Court have also turned to the idea that free speech protects both a right to speak and a right to hear. However, they have used this idea in support of spending limits. See, e.g., *Citizens United v Federal Election Commission,* 588 US 310 at 473 (2009).
[572] *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 77.
[573] Feasby (2012) 206 at 211.
[574] *Ibid* at 211–12.

10.2 Regulatory Regime in Canada

This section describes the campaign financing regime for federal parliamentary elections in Canada. Federal campaign financing is governed by the *Canada Elections Act* ("the *CEA*").[575] Each province has also enacted its own regime in relation to campaign financing for elections to the provincial legislative assemblies.

The primary features of the federal regime are:

a) contribution limits for political parties and candidates;
b) source restrictions on contributions to third-party campaigners, political parties, and candidates;
c) spending limits for third-party campaigners, political parties, and candidates;
d) transparency requirements for third-party campaigners, political parties, and candidates; and
e) a public funding scheme involving reimbursements and tax credits.

Unlike regulatory regimes in the UK and the US, the federal regime in Canada limits both the supply of and demand for money in elections, as politicians are subject to limits on the size of donations they may receive and the amount of money they may spend on election campaigns. By contrast, the federal regime in the US imposes caps only on political contributions, not spending. The UK, on the other hand, imposes spending caps on politicians and third-party campaigners but has no contribution ceilings.

10.2.1 Regulation of Campaign Financing for Political Parties, Candidates, Electoral District Associations, Leadership Contestants, and Nomination Contestants in Canada

10.2.1.1 Spending Limits for Registered Parties, Candidates, etc.

The provisions discussed in this section apply to expenditures by candidates, registered political parties, registered electoral district associations, nomination contestants, and leadership contestants.

a) Expenses Captured by Spending Limits

The spending caps in the *CEA* apply to "election expenses," which are defined in section 376(1). "Election expenses" include any costs incurred or non-monetary contributions received by a registered party or candidate for goods or services used to directly promote or oppose a party, its leader, or a candidate during an election period. The definition also expressly includes some specific types of expenses, such as costs incurred or non-monetary

[575] *Canada Elections Act*, SC 2000, c 9.

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contributions provided for the production of promotional material and for the publication or broadcast of that material.[576] "Expenses" are defined in section 349 to include the commercial value of property or services that are donated or provided, other than volunteer labour. The "election period" begins when the writ is issued and ends on polling day.[577] Expenses outside of this period are not included in the definition of "election expenses."

b) Spending Limits

i. Registered Parties

A registered party's election expenses limit is calculated based on the number of electors in the electoral districts in which the party has endorsed candidates.[578] If the election period lasts longer than 37 days, the limit is increased by a certain amount for each day beyond the 37-day period.[579] The 2015 general election lasted 78 days. The Liberal, Conservative, and New Democratic Parties each had a spending limit of $54,936,320.15.[580] Transfers of funds from a registered party to its candidates do not count toward the spending ceiling under the *CEA*.[581] The *CEA* also expressly prohibits a registered party and a third party from colluding to circumvent the spending limit.[582]

ii. Candidates

Candidates' election expense limits are determined by the number of electors in their electoral district.[583] The limit is increased if the election period lasts longer than 37 days.[584] For example, in the 2015 general election, which lasted 78 days, candidates running in the district of Victoria could incur up to $234,268.29 in election expenses.[585] Like registered parties, candidates are prohibited from colluding with others to circumvent the spending limit.[586]

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[576] *Ibid*, s 376(3).
[577] *Ibid*, s 2(1).
[578] *Ibid*, s 430(1).
[579] *Ibid*, s 430(2).
[580] Elections Canada, "Final Election Expenses Limits for Registered Political Parties", online: <http://www.elections.ca/content.aspx?section=ele&document=index&dir=pas/42ge/pollim&lang=e>.
[581] *Canada Elections Act*, SC 2000, c 9, s 430(3).
[582] *Ibid*, s 431(2).
[583] *Ibid*, s 477.49(1).
[584] *Ibid*, s 477.49(2).
[585] Elections Canada, "Final Candidates Election Expenses Limits", online: <http://www.elections.ca/content.aspx?section=ele&document=index&dir=pas/42ge/canlim&lang=e#bc>.
[586] *Canada Elections Act*, SC 2000, c 9, s 477.52.

The Chief Electoral Officer may also establish categories of personal expenses and fix maximum amounts that may be incurred by candidates in each category.[587] However, at the time of writing, no personal expense limits appear to exist.

iii. Electoral District Associations

During the election period, electoral district associations of registered parties are prohibited from transmitting election advertising or incurring any expenses for election advertising.[588] Electoral district associations are therefore not subject to spending limits.

10.2.1.2 Regulation of Contributions to Registered Parties, Candidates, etc.

The provisions discussed in this section apply to contributions to candidates, registered political parties, registered electoral district associations, nomination contestants, and leadership contestants.

a) Definition of "contribution"

Under the *CEA*, a "contribution" can be monetary or non-monetary and includes money from a candidate's own funds.[589] Loans are also subject to source restrictions and count towards contribution limits. The outstanding amount of a loan cannot exceed an individual's contribution limit when combined with any other contributions made by that individual.[590] Transfers and loans between the party, its electoral district associations, and its candidates are not included under the definition of "contribution".[591] Thus, the *CEA* targets "money being transferred from the private to the political domain", not transfers within the political domain.[592] Other exclusions from the definition of "contribution" include annual party membership fees of $25 or less.[593] However, the *CEA* expressly includes fees for party and leadership conventions within the definition of "contribution."[594] The *CEA* also clarifies that, if a candidate or party sells tickets to a campaign fundraising event, the amount of the contribution will be the difference between the price of the ticket and its fair market value.[595]

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[587] *Ibid*, s 378(2). "Personal expenses" are defined in section 378 of the *CEA*.
[588] *Ibid*, s 450(1). "Election advertising" is defined in section 319 of the *CEA*. The definition of "election advertising" is discussed in Section 8.2.3.1, below, in the context of third-party campaigners.
[589] *Canada Elections Act*, SC 2000, c 9, ss 2(1) and 364(1).
[590] *Ibid*, s 373.
[591] *Ibid*, ss 364(2)–(4), 373(5).
[592] Feasby (2012) 206 at 208.
[593] *Canada Elections Act*, SC 2000, c 9, s 364(7).
[594] *Ibid*, s 364(8).
[595] *Ibid*, s 377.

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b) Source Restrictions

Contributions must come from individuals who are Canadian citizens or permanent residents.[596] Similarly, loans are permitted only from certain financial institutions or from individuals who are Canadian citizens or permanent residents.[597] This means corporations, unions, and other non-natural legal persons cannot donate or make loans to a political party or candidate. However, these entities can make contributions to third-party campaigners for the purpose of election advertising, as discussed further below, or engage in third-party campaigning themselves.

Attempts to conceal the identity of the source of a contribution are prohibited by section 368 of the *CEA.* Indirect contributions and loans are also prohibited, as source restrictions and contribution limits could otherwise be circumvented.[598] This means an individual cannot make a contribution using money from another person or entity that was provided for the purpose of making a contribution.[599]

c) Contribution Limits

Individuals may contribute no more than $1,550 per calendar year to a particular registered party and no more than $1,550 per calendar year to the registered associations, candidates, and nomination contestants of a registered party.[600] The same limit applies to contributions to leadership contestants.[601] As mentioned above, the outstanding amount of any loans made by an individual will count toward their contribution limit.[602] Candidates are also prohibited from contributing more than $5,000 to their own campaign, while leadership contestants may contribute no more than $25,000 to their own campaign.[603] Section 368(1) of the *CEA* prohibits attempts to circumvent contribution limits.

10.2.1.3 Transparency Requirements for Registered Parties, Candidates, etc.

a) Registered Parties

Registered parties must submit an election expenses return to the Chief Electoral Officer after a general election, along with an auditor's report and a declaration by the party's chief

[596] *Ibid*, s 363(1).
[597] *Ibid*, ss 373(3)–(4).
[598] *Ibid*, ss 370, 373.
[599] *Ibid*, s 370(1).
[600] *Ibid*, ss 367(1)–(1.1).
[601] *Ibid*, s 367(1)(d).
[602] *Ibid*, s 373.
[603] *Ibid*, ss 367(6),(7).

agent that the return is complete and accurate.[604] The return must set out all election expenses incurred and non-monetary-contributions used as election expenses.[605] Aside from this election expense reporting requirement, registered parties are also subject to ongoing reporting requirements. Each fiscal period, the party's chief agent must provide the Chief Electoral Officer with a financial transactions return, along with an auditor's report and a declaration by the chief agent that the return is complete and accurate.[606] The financial transactions return must set out contributions received by the party during the fiscal period; the number of contributors; the name and address of contributors who gave more than $200; the value of goods, services, or funds transferred by the registered party to a candidate or electoral district association (and vice versa); and a statement of election expenses incurred in by-elections during the fiscal period, among other things.[607]

b) Candidates

A candidate's official agent must provide the Chief Electoral Officer with an electoral campaign finance return, along with an auditor's report and declaration by both the official agent and the candidate that the return is complete and accurate.[608] The return must set out the candidate's election expenses, loans, contributions, and the identity of contributors who gave more than $200, among other things.[609] The return must also state any "electoral campaign expenses" not already reported as election expenses.[610] "Electoral campaign expenses" are defined as any "expense reasonably incurred as an incidence of the election," including personal expenses.[611] Further, the candidate must send their official agent a written statement setting out personal expenses paid by the candidate.[612]

c) Electoral District Associations

Electoral district associations are subject to ongoing reporting requirements, not election-specific reporting requirements. Like registered parties, associations must submit a financial transactions return to the Chief Electoral Officer each fiscal period. The return must state contributions, the identity of donors who give more than $200, expenses, loans, and other

[604] *Ibid*, s 437(1).
[605] *Ibid*, s 437(2).
[606] *Ibid*, s 432(1).
[607] *Ibid*, s 432(2).
[608] *Ibid*, s 477.59(1).
[609] *Ibid*, s 477.59(2).
[610] *Ibid*, s 477.59(2)(b).
[611] *Ibid*, s 375.
[612] *Ibid*, s 477.64(1).

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items.[613] The report must be accompanied by an auditor's report and a declaration by the association's financial agent that the return is complete and accurate.[614]

10.2.2 Public Funding of Election Campaigns in Canada

a) Quarterly Allowances

Quarterly allowances for registered parties were phased out by the Conservative government beginning in 2014. The phasing-out process ended in 2016.[615]

b) Reimbursement of Election Expenses

In the 2015 general election, reimbursements totalled approximately $104 million.[616] Registered parties are reimbursed for 50% of their election expenses if the candidates endorsed by the party receive at least 2% of the votes cast in the election or 5% of the votes cast in electoral districts in which the party ran candidates.[617] If a candidate gets at least 10% of the vote, but only spends 30% or less of their total spending limit, they will be reimbursed for 15% of the total amount they were permitted to spend under section 477.49 of the *CEA*.[618] If a candidate receives at least 10% of the vote and incurred more than 30% of the total amount they were allowed to spend, they will be reimbursed for 60% of their paid election expenses or 60% of the total amount they were allowed to spend, whichever is less.[619] Electoral district associations may also be reimbursed for up to $1,500 for auditing expenses incurred to meet the requirements of the *CEA*.[620]

c) Tax Deductions

Monetary contributions to registered parties, registered electoral district associations, and candidates entitle the donor to a tax credit under the *Income Tax Act*.[621] The amount of the credit is based on the size of the donation. Donations up to $400 entitle the donor to a 75% tax credit. Donations over $400 entitle the donor to a $300 tax credit plus 50% of the amount

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[613] *Ibid*, s 475.2(1).
[614] *Ibid*, s 475.4(1).
[615] *Ibid*, s 445(2). A private member's bill has been put forward to reintroduce quarterly allowances, but private members' bills often do not become law. See Bill C-340, *An Act to amend the Canada Elections Act and to make a consequential amendment to another Act (political financing),* 1st Sess, 42nd Parl, 2017, cl 2 (first reading 7 March 2017).
[616] "Remarks of the Chief Electoral Officer of Canada before the Committee on General Government", 26 July 2016, online: <http://www.elections.ca/content.aspx?section=med&dir=spe&document=jul2616&lang=e>.
[617] *Canada Elections Act,* SC 2000, c 9, s 444.
[618] *Ibid*, s 477.73(1).
[619] *Ibid*, s 477.74.
[620] *Ibid*, s 475.8.
[621] *Income Tax Act,* RSC 1985, c 1 (5th Supp).

by which the donation exceeds $400. The tax credit is decreased further for donations over $750.[622] This scheme is intended to encourage small contributions from a broad range of donors.[623]

d) Broadcasting Time

Free broadcasting time is reserved and allocated to political parties for political broadcasts during elections.[624] The allocation is based on performance in the latest election, but the Broadcasting Arbitrator can modify the allocation if necessary for fairness or the public interest.[625] The allocation scheme was challenged in *Reform Party of Canada v Canada (Attorney General)* on the basis that it entrenched incumbents and therefore breached the rights of smaller parties to freedom of expression and equality.[626] However, the allocation system was upheld, although the Broadcast Arbitrator subsequently adopted a practice of allocating one-third of the available time equally among all registered parties.[627] The Court also held that a prohibition on the purchase of additional broadcast time by political parties was an unjustifiable limit on freedom of expression. This can be contrasted with the UK, in which the House of Lords and the European Court of Human Rights have upheld a blanket ban on paid political advertising.[628]

10.2.3 Regulation of Third-Party Campaign Financing in Canada

The federal campaign finance regime in Canada subscribes to the idea that political parties are the "principal vehicles for communal political organization and expression," which is reflected in spending limits for third-party campaigners under the *CEA*.[629] The Supreme Court of Canada has echoed this idea, stating in *Libman* that, although third parties have an important contribution to make, "it is the candidates and political parties that are running for election."[630]

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[622] Elections Canada, "The Electoral System of Canada: Political Financing", online: <http://www.elections.ca/content.aspx?section=res&dir=ces&document=part6&lang=e>.
[623] Gauja (2010) at 157.
[624] *Canada Elections Act*, SC 2000, c 9, s 345.
[625] *Ibid*, ss 345, 338(1),(5); Feasby (2012) 206 at 200.
[626] *Reform Party of Canada v Canada (Attorney General)* (1995), 123 DLR (4th) 366 (Alta CA).
[627] Feasby (2012) 206 at 213–14.
[628] *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*, [2008] UKHL 15 (BAILII); *Animal Defenders International v the United Kingdom* [GC], No 48876/08, [2013] II ECHR 203.
[629] Feasby (2012) 206 at 207.
[630] *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, 151 DLR (4th) 385 at para 50.

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10.2.3.1 Activities Captured by Third-Party Campaign Regulations

a) Definition of "third party"

"Third party" is defined in section 349 of the *CEA* as "a person or a group, other than a candidate, registered party or electoral district association of a registered party." Thus, a third-party campaigner could be any individual, corporation, or other organization that wishes to promote the success of a candidate or political party in an election.

b) Definition of "election advertising"

If a third party engages in "election advertising" as defined in the *CEA,* they will be subject to the *CEA*'s requirements in regard to spending, contributions received by the third party, and transparency. "Election advertising" is defined in section 319.[631] The components of the definition are as follows:

- transmission to the public by any means
- during an election period
- of an advertising message that promotes or opposes a registered party or the election of a candidate.

The definition includes an advertising message "that takes a position on an issue with which a registered party or candidate is associated," also known as issue advertising.[632] The election period begins when the writ is issued and ends on polling day.[633]

Various communications are excluded. For example, "election advertising" does *not* include things like editorials, debates, interviews, and columns.[634] It also does not include the transmission of documents by an organization to its members, employees, or shareholders.[635] Further exclusions are made for the transmission of an individual's personal political views on a non-commercial basis on the Internet and the making of phone calls to encourage people to vote.[636]

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[631] Although the definition of "election advertising" relates mainly to the regulation of third-party campaigners under the *CEA*, the definition is also relevant to some rules for political parties and candidates, such as requirements for attribution on advertising and the ban on election advertising on Election Day. However, the definition of "election advertising" is irrelevant to spending limits for political parties and candidates. As discussed above, the relevant concept for spending limits for political parties and candidates is "election expenses." "Election advertising expenses" constitute a narrower category than "election expenses."

[632] *Canada Elections Act,* SC 2000, c 9, s 319.

[633] *Ibid*, s 2(1).

[634] *Ibid*, s 319(a).

[635] *Ibid*, s 319(c).

[636] *Ibid*, ss 319(d)–(e).

Elections Canada has further clarified that communications on the Internet will only be considered "election advertising" if they have or normally would have a placement cost.[637] Elections Canada explains this requirement by pointing out that such communications give the well-resourced an unfair advantage, while communications without a placement cost do not. However, this means that the cost of producing Internet material will not be considered an election advertising expense unless there is a placement cost for the material, even if production is costly and the communication meets all other criteria of "election advertising."

c) Definition of "election advertising expense"

An "election advertising expense" is incurred to produce an election advertising message or to acquire the means of transmitting that message.[638] "Expenses" are defined in section 349 of the *CEA* to include the commercial value of property or services that are donated or provided, other than volunteer labour.

10.2.3.2 Regulation of Contributions to Third-Party Campaigners

Contributions to third parties are subject to source restrictions. Third parties cannot accept contributions for the purpose of election advertising from foreign nationals, corporations that do not carry on business in Canada, foreign political parties, or foreign governments, among other entities.[639] Further, third parties cannot use a contribution from an anonymous donor for the purpose of election advertising.[640] However, there is no limit on the amount that eligible donors may contribute to a third party for the purpose of election advertising.

10.2.3.3 Regulation of Spending by Third Parties on Election Advertising

Third parties are subject to spending limits on election advertising. Individuals who are not citizens or permanent residents and corporations that do not carry on business in Canada may spend less than $500 on election advertising in relation to a general election.[641] Other third parties are limited to $150,000, multiplied by an inflation adjustment factor, for election advertising expenses in relation to a general election.[642] Of this amount, no more than $3,000 may be incurred to promote or oppose the election of candidates in a single electoral district, including by "(a) naming them; (b) showing their likenesses; (c) identifying them by their ...

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[637] Elections Canada, "Election advertising on the Internet" (July 2015), online: <http://www.elections.ca/content.aspx?section=res&dir=gui/app/2015-04&document=index&lang=e>.
[638] *Canada Elections Act*, SC 2000, c 9, s 349.
[639] *Ibid*, s 358. Note that, although these foreign third parties cannot make contributions to other third parties for the purpose of election advertising, they are permitted to spend amounts totalling less than $500 on election advertising in Canada. See Section 10.2.3.3.
[640] *Canada Elections Act*, SC 2000, c 9, s 357(3).
[641] *Ibid*, s 351.1.
[642] *Ibid*, s 350(1).

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political affiliations; or (d) taking a position on an issue with which they are particularly associated."[643] The spending limits for these non-foreign third parties will be increased if the election period lasts longer than 37 days.[644] This resulted in much higher expenditure ceilings for the 2015 general election, which lasted 78 days. Third parties were allowed to spend up to $439,410.81 on election advertising expenses and up to $8,788.22 in a given electoral district.[645]

Third parties are prohibited from attempting to circumvent spending limits by splitting themselves into multiple third parties or by acting in collusion with other third parties.[646]

10.2.3.4 Transparency Requirements for Third-Party Campaigners

a) Registration

Third parties must register as soon as they incur election advertising expenses of $500 or more.[647] If required to register, the third party must also appoint a financial agent to accept contributions for election advertising purposes and to authorize election advertising expenses.[648]

b) Attribution

Third parties must identify themselves in any election advertising they produce and indicate they have authorized the advertisement.[649]

c) Reporting

If a third party is required to register, they must file a detailed election advertising report with the Chief Electoral Officer within four months of polling day.[650] For general elections, the report must include a list of all election advertising expenses at the district and national level, as well as "the time and place of broadcast or publication of the advertisements" to which those expenses relate.[651] The report must also disclose the amount of contributions

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[643] *Ibid*, s 350(2). Unlike the overall limit, the limit for each electoral district does not use the term "election advertising expenses".
[644] *Ibid*, s 350(6).
[645] Elections Canada, "Limits on Election Advertising Expenses Incurred by Third Parties – 42nd General Election", online: <http://www.elections.ca/content.aspx?section=ele&document=index&dir=pas/42ge/thilim&lang=e>.
[646] *Canada Elections Act*, SC 2000, c 9, s 350.
[647] *Ibid*, s 353(1).
[648] *Ibid*, ss 354(1), 357(1). The financial agent must be named in the third party's application for registration, which is submitted to the Chief Electoral Officer: *ibid*, s 353(2).
[649] *Ibid*, s 352.
[650] *Ibid*, s 359(1).
[651] *Ibid*, s 359(2).

received for election advertising purposes from six months before the issue of the writ to polling day.[652] For contributions of more than $200 during this time period, the report must state the name and address of the contributor and the amount and date of the contribution.[653] If the contributor is a numbered company, the third party must include the name of its CEO or president.[654] The report must also include the amount used out of the third party's own funds to pay for election advertising expenses.[655] Third parties who incur election advertising expenses of $5,000 or more must appoint an auditor, who must confirm that the election advertising report is a fair reflection of accounting records.[656]

The Chief Electoral Officer is required to publish registered third parties' names and addresses and, within one year of the issue of the writ, the third parties' election advertising reports.[657] If the information is not released until a year after the writ drops, the delay could undercut the anticorruption goals of disclosure, as the potential for undue influence may not be discovered until irrevocable decisions have been made by lawmakers. The public and the media could therefore be temporarily deprived of potentially relevant information in evaluating lawmakers' proposals and decisions.

10.2.4 Role of the Chief Electoral Officer and the Commissioner of Canada Elections

Sections 16.1 and 16.2 require the Chief Electoral Officer to issue guidelines, interpretation notes, and advisory opinions on the application and interpretation of the *CEA*. The Chief Electoral Officer also publishes disclosed information on political financing.[658] The Commissioner of Canada Elections is responsible for compliance with the requirements of the *CEA*. The Commissioner's responsibilities in this regard include investigation of non-compliance and referral of potential offences to the Director of Public Prosecutions, who may initiate prosecution.[659]

10.3 Criticisms of Campaign Finance Regulation in Canada

The Canadian campaign finance regime has apparently had some success in reducing reliance on large donors. Before the regulations governing contributions were introduced in

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[652] *Ibid*, s 359(4)(a).
[653] *Ibid*, s 359(4)(b).
[654] *Ibid*, s 359(4)(b.1).
[655] *Ibid*, s 359(4)(c).
[656] *Ibid*, ss 355(1), 360.
[657] *Ibid*, s 362.
[658] For disclosed information, see: <http://www.elections.ca/content.aspx?section=fin&&document=index&lang=e>.
[659] For more information, see Government of Canada, "Enforcing the *Canada Elections Act*", online: <https://www.cef-cce.gc.ca/content.asp?section=abo&dir=bck&document=index&lang=e>.

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2004, 2% of donors were responsible for 54% of funds raised by politicians.[660] From 2004 to 2008, the 1% of donors who gave over $1,200 per year accounted for only 17% of the total amount contributed, and since 2008, this same 1% of donors has accounted for about 1% of the total amount contributed.[661]

However, other problems persist under the current regime. The *CEA* has become more complex over the years and volunteers are often responsible for compliance.[662] Yet the *CEA*'s only sanctions are criminal.[663] The Chief Electoral Officer has criticized these sanctions as heavy-handed for many infractions and recommends the addition of an administrative monetary penalty regime.[664] The Chief Electoral Officer has also argued that the Commissioner, who investigates offences under the *CEA*, needs more investigatory tools, such as the power to compel testimony.[665]

The *CEA*'s increased spending limits for long elections have also drawn criticism.[666] During the 2015 general election, spending limits were more than double their usual amount because of the unusual length of the election period.[667] This raises concerns about the efficacy of the spending limits in achieving their objectives in relation to corruption, fairness, equality, and public confidence. The scheme also allows the governing party to effectively determine the spending limits for an election.[668] The Chief Electoral Officer has recommended imposing a maximum election length to address these issues.[669]

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[660] "Remarks of the Chief Electoral Officer of Canada before the Committee on General Government", 26 July 2016, online: <http://www.elections.ca/content.aspx?section=med&dir=spe&document=jul2616&lang=e>.
[661] *Ibid*.
[662] "Remarks of the Chief Electoral Officer on the Recommendations Report Following the 42nd General Election", 4 October 2016, online: <http://www.elections.ca/content.aspx?section=med&dir=spe&document=oct0416&lang=e>.
[663] *Ibid*.
[664] *Ibid*.
[665] *Ibid*.
[666] As mentioned above in Parts 8.2.1.1 and 8.2.3.3, spending limits for political parties, candidates, and third parties are raised if the election lasts longer than 37 weeks.
[667] "Remarks of the Chief Electoral Officer of Canada before the Committee on General Government", 26 July 2016, online: <http://www.elections.ca/content.aspx?section=med&dir=spe&document=jul2616&lang=e>.
[668] "Remarks of the Chief Electoral Officer on the Recommendations Report Following the 42nd General Election", 4 October 2016, online: <http://www.elections.ca/content.aspx?section=med&dir=spe&document=oct0416&lang=e>.
[669] *Ibid*. A private member's bill has been introduced in the House of Commons to impose a maximum length for elections, but the bill has only passed through the first reading stage and private members' bills often do not become law: Bill C-279, *An Act to amend the Canada Elections Act (length of election period)*, 1st Sess, 42nd Parl, 2016 (first reading 31 May 2016).

Others criticize the phasing out of quarterly allowances for registered political parties.[670] Before the quarterly allowances were eliminated, the public funding regime adequately offset losses to party income caused by contribution caps.[671] Without the quarterly allowance scheme, the Chief Electoral Officer has warned that contribution caps may lead parties to resort to "illicit and undisclosed funding strategies."[672] The Chief Electoral Officer has also argued that combining contribution caps with inadequate public funding may produce a state of perpetual campaigning as parties attempt to inspire more contributions from more donors.[673] Permanent campaigning could negatively impact "the overall tone of political discourse and the level of public cynicism."[674] On the other hand, some point out that less public funding might have the "merciful consequence" of reducing attack ads and restricting campaign advertising to the actual election period.[675]

Others argue that spending limits should be extended to pre-election advertising expenses, especially in light of the prevalence of attack ads and campaigning between elections.[676] However, pre-election limits may not survive a constitutional challenge if applied to third-party spending. In British Columbia, a pre-writ third-party spending cap was struck down as an overbroad restriction on freedom of expression in *British Columbia Teachers' Federation v British Columbia (Attorney General).*[677] The impugned limit was intended to prevent circumvention of spending limits during the election period. The British Columbia Court of Appeal emphasized that limits on spending during the election period are fundamentally different from pre-writ limits, as the legislature is not in session during an election. Therefore, unlike pre-writ limits, third-party spending limits during the election period will not compromise debate on issues before the legislature.[678]

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[670] See Section 8.2.2, above.

[671] "Remarks of the Chief Electoral Officer of Canada before the Committee on General Government", 26 July 2016, online: <http://www.elections.ca/content.aspx?section=med&dir=spe&document=jul2616&lang=e>.

[672] *Ibid*.

[673] *Ibid*.

[674] *Ibid*.

[675] Lisa Young, "Shaping the Battlefield: Partisan Self-Interest and Election Finance Reform in Canada" in Robert G Boatright, ed, *The Deregulatory Moment? A Comparative Perspective on Changing Campaign Finance Laws* (University of Michigan Press, 2015) at 123.

[676] A bill was introduced in the Senate to extend party spending limits to the period before the election: Bill S-215, *An Act to amend the Canada Elections Act (election expenses)*, 2nd Sess, 41st Parl, 2014 (second reading 10 June 2014).

[677] *British Columbia Teachers' Federation v British Columbia (Attorney General)*, 2011 BCCA 408.

[678] Feasby (2012) 206 at 219.

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11. CONCLUSION

Campaign finance is a high profile issue, and scandals break out regularly.[679] Frustration and cynicism arise when wealthy individuals or corporations support a candidate's election campaign and benefit from favourable policies after the candidate is elected. Even when it is impossible to determine whether policies and decisions result from a politician's own principles or from the need to maintain future financial support by rewarding past support, the relationship between politicians and their financial backers can be toxic for public confidence.[680] Further, aside from the risk of corruption of elected officials, many argue that unregulated campaign finance may corrupt the electoral process itself by allowing the wealthy to set the electoral debate agenda and exert disproportionate influence over the

[679] For some examples, see Tony Paterson, "Bought by BMW? German Chancellor Angela Merkel forced on to defensive over €700,000 donation from carmaker to her Christian Democratic Party", *The Independent* (16 October 2013), online: <http://www.independent.co.uk/news/world/europe/bought-by-bmw-german-chancellor-angela-merkel-forced-on-to-defensive-over-700000-donation-from-8884777.html> (Angela Merkel's party accepted a large donation from BMW shortly before European environment ministers caved "to German demands to scrap an agreement to cap car emissions after Berlin argued that the measure would adversely affect its car industry and create job losses"); Lindsey Renick Mayer, "Big Oil, Big Influence", *PBS Now* (2008), online: <http://www.pbs.org/now/shows/347/oil-politics.html> (Mayer notes that oil and gas companies donated large amounts to Republican election campaign efforts and subsequently benefited from a highly favourable energy policy under former president George W. Bush); Alice Walton & David Zahniser, "Politicians and activists demand answers on mystery donations tied to 'Sea Breeze' developer", *Los Angeles Times* (31 October 2016), online: <http://www.latimes.com/local/lanow/la-me-ln-seabreeze-reaction-20161030-story.html> (the authors discuss the corrosive effects of campaign finance at the municipal level in Los Angeles, noting that "[c]ritics have long accused city leaders of being too willing to change local planning rules for well-connected developers, particularly those who make campaign donations"); Dom Phillips, "Brazil president Michel Temer accused of soliciting millions in illegal donations", *The Guardian* (12 December 2016), online: <https://www.theguardian.com/world/2016/dec/12/brazil-president-michel-temer-illegal-campaign-donations> (in a plea bargain, a former executive at construction company Odebrecht "alleged in colourful detail how leading lawmakers from Temer's and other parties across the political spectrum were paid millions in bribes and both legal and illegal campaign donations to defend the company's interest in Congress"); Dan Levin, "British Columbia: The 'Wild West' of Canadian Political Cash", *The New York Times* (13 January 2017), online: <https://www.nytimes.com/2017/01/13/world/canada/british-columbia-christy-clark.html> (Levin discusses allegations that British Columbia's provincial government headed by former premier Christy Clark rewarded generous campaign donors, turning government "into a lucrative business, dominated by special interests that trade donations for political favors"; as an example, the author notes that, in the interim between the provincial government's public opposition to the Trans Mountain pipeline project in 2016 and its subsequent approval of the pipeline in 2017, Ms. Clark's party received $718,000 in donations from the company proposing the pipeline).

[680] See, e.g., *McCormick v United States*, 500 US 257 (1991).

outcome of elections.[681] This influence arguably undermines the foundational principle of "one person, one vote."[682]

Tension exists between the goal of alleviating the potentially poisonous effects of wealth in politics and the goal of facilitating free and open debate. This tension is often framed as a clash between equality and freedom. The UK's ban on paid political advertising provides an example.[683] Although the ban prevents the wealthy from flooding broadcast media with political advertisements, it also arguably chills debate by preventing public interest groups from advertising their views on broadcast media.[684]

The tension between equality and freedom makes campaign finance regulation a controversial and partisan issue, particularly in the US. The jurisprudence discussed in this chapter demonstrates that Canada, the UK, and the US each have a different approach to resolving this tension. Courts in Canada and the UK, along with the European Court of Human Rights, appear to navigate a middle path between the twin goals of freedom and equality, accepting campaign finance regulations with equality-related objectives if open debate is not overly restricted in the eyes of the court. American courts, on the other hand, have been unwilling to allow incursions on freedom of speech unless those incursions clearly prevent *quid pro quo* corruption or its appearance. Different cultural and judicial approaches to campaign finance regulation have led to divergent regulatory regimes in the three countries. Criticisms of each regime abound, demonstrating that lawmakers in all three countries face ongoing challenges in developing regulation that effectively addresses the problems of campaign finance without shutting down debate.

[681] See, e.g., Hiebert (2006) at 269; La Raja, (2008) at 1.
[682] La Raja (2008) at 3.
[683] See Section 9.2.2 & 9.3, above, for further discussion of the ban on paid political advertising.
[684] Minutes of Evidence (17 June 2002).

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ISBN 978-1-55058-575-9